EMPLOYMENT TRIBUNALS

Claimant: Mrs C Anderson

Respondent: Lancashire County Council

HELD AT: Manchester (by CVP) **ON:** 15 December 2020, 22 & 23 February & 11 June 2021

BEFORE: Employment Judge Peck (sitting alone)

REPRESENTATION:
Claimant: In person
Respondent: Mr Mensah (Counsel)

JUDGMENT having been sent to the parties on 24th June 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the following reasons are provided:

REASONS

Claim and issues

1. This was a final hearing taking place via CVP. Evidence and submissions were heard on 15th December 2020 and 22nd & 23rd February 2021. Oral judgment was delivered to the parties at a further CVP hearing on 11th June 2021.

2. By a claim form presented on 19th December 2019 the claimant, Mrs Carole Anderson, brings a claim of unfair dismissal against the respondent, Lancashire County Council in relation to the summary termination of her employment from her role working in the school office at Higham St John's Primary School.

3. She also brings a claim for unpaid wages, alleging that she was owed 86 hours' pay on termination of her employment, and a claim in respect of a long-service award that, at the Tribunal hearing on 15th December 2020, she claimed remained outstanding.

4. At the outset of the hearing, I confirmed with the claimant the reasons for which she considers her dismissal to have been unfair. She explained that she submitted a claim to be paid for 86 additional hours, which she says was a legitimate claim for hours worked. The claimant does not believe that the allegations against her were well-founded or that her actions amounted to gross misconduct. She also complains about the procedure adopted, specifically that the decision to suspend was taken in haste, that there was a "witch-hunt" against her and that the process was unreasonable due to the length of time it took to conclude.

5. The respondent admits dismissal and its position is that the claimant's dismissal was fair. It contends that the reason was misconduct. The claimant submitted a claim to be paid for 86 additional hours allegedly worked, which the respondent believed to have been fraudulent and for personal gain. The respondent's view was that the hours had either (a) not been worked at all; or (b) had been worked without prior approval and in contravention of an instruction against the accrual of TOIL / additional hours without prior authorisation. The respondent's position is that the claimant was also dismissed for historical pay claims, for which she had been paid but to which she was not entitled, as well as her having booked a holiday before securing authorisation for the time off. The respondent says that a full and fair investigation and process was conducted and that any delays did not affect the overall fairness of the claimant's dismissal. The respondent says that the decision to dismiss fell within the band of reasonable responses open to an employer.

6. Further, the respondent's position is that no monies are owing to the claimant, on the basis that her claim for 86 hours' pay was fraudulent and that the amount properly payable to the claimant cannot have included these hours.

7. Early on in proceedings, the respondent accepted that the claimant was entitled to payment for the long-service award and save as to the payment of the applicable VAT, this was resolved at the hearing.

8. If the claimant's unfair dismissal claim succeeds, she is seeking compensation only. By a schedule of loss dated 28th February 2020, the claimant set out the compensation sought, being a basic award and a compensatory award for loss of earnings (including pension benefits). The claimant set out losses up to the date of her intended retirement, being December 2024, 60 months after termination of her employment.

9. The respondent asserts that any compensation awarded should be reduced to reflect the prospect of the claimant being dismissed in any event (a Polkey deduction). The respondent says that any awards of compensation should also be reduced to reflect the claimant's contributory conduct.

10. At the outset of the hearing, the legal issues to be determined were set out in a list of issues helpfully provided by Mr Mensah.

Unfair Dismissal

11. What was the reason or principal reason for dismissal and was this a potentially fair reason under section 98 Employment Rights Act 1996 (**ERA**)?

12. Applying the test of fairness in section 98(4) ERA, did the respondent act reasonably in treating that as a sufficient reason to dismiss the claimant?

    a. Did the respondent genuinely believe the claimant had committed misconduct?
    b. Were there reasonable grounds for that belief?
    c. At the time the belief was formed had the respondent carried out a reasonable investigation?
    d. Had the respondent followed a reasonably fair procedure?
    e. Did the respondent and claimant comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures (the **ACAS Code**)?
    f. Was dismissal within the band of reasonable responses available to a reasonable employer?

13. If the claimant's claim succeeds, what remedy should he be awarded?

    a. What basic award is payable to the claimant, if any?
    b. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?
    c. If there is a compensatory award, how much should it be?
    d. Should any compensation awarded be reduced in terms of Polkey v AE Dayton Services Limited [1987] ICR 142 to reflect that the claimant would have been dismissed in any event had a fair procedure been following and if so what reduction is appropriate?
    e. Would it be just and equitable to reduce the compensatory award because of any conduct of the claimant before the dismissal? If so, to what extent?

Unpaid wages

14. What amount was properly payable to the claimant on termination of her employment?

15. Was the claimant entitled to 86 hours' pay?

16. If so, did the respondent pay this?

17. If so, when should it have been paid?

18. Was there an unauthorised deduction from wages / breach of contract by the respondent in not making such a payment to the claimant?

Procedure, documents and evidence heard

19. The claimant represented herself and the respondent was represented by Mr Mensah (Counsel).

20. In terms of oral evidence, I heard from the claimant for herself. She also submitted witness statements for Ms K Shone, Mr G Hollinghurst and Mrs A Robinson, none of whom attended the hearing to give evidence. For the respondent, I heard evidence from Helen Shaw (Headteacher), Samantha Green (Parent Governor) and Kirsty Collinge (Governor). Both parties had prepared and exchanged witness statements in advance of the final hearing. I attached very limited weight to the witness statements provided for witnesses who were not in attendance at the final hearing and who were not, therefore, cross examined on their evidence.

21. I was also provided with an agreed bundle of documents, which ran to 534 pages.

Findings of fact

22. In making my findings of fact, I have taken account of the witness statements, the oral evidence of the witnesses, and the contemporaneous documents I have been provided with. Where there was a conflict of evidence, I determined it on the balance of probabilities.

The school

23. Higham St Jones Primary School (**the School**) is a small village school, with approximately 140 pupils.

24. From September 2018, Mrs Shaw undertook the role as Headteacher of the School. Prior to her appointment, Mr Hollingshurst held the post of Headteacher (from 2010 until August 2017), with Mr O'Neill being the Acting Headteacher during the period between Mr Hollinghurst's departure and Mrs Shaw's appointment (2017 – 2018).

The claimant

25. The claimant commenced employment at the School in 2007, working in an administrative role. Prior to this, she had been employed in other posts within the respondent organisation and had over 20 years' continuity of service, running from November 1991.

26. At the time her employment terminated (in September 2019), the claimant was employed as a School Business Support Officer 4 and she was generally known as the School Office Manager. The claimant was responsible for co-ordinating, monitoring and organising administrative / clerical or financial systems and procedures for the School. As the claimant readily accepted during cross examination, she was responsible for implementing financial procedures, for overseeing financial activity and was in a position of

significant trust. The claimant knew that in this role, she needed to maintain the highest standard of honesty and integrity as was put to her during this hearing.

27. The claimant was contracted to work 23 hours per week, on a term-time contract and her usual days of work were Tuesdays, Thursdays and Fridays. The claimant's gross weekly pay was £256.15.

28. The claimant worked alongside Mrs Robinson on a job-share basis. She describes having a verbal "*flexible working arrangement*" in place, both during Mr Hollinghurst and Mr O'Neill's tenures. I find that this was the case. She and Mrs Robinson "*would work beyond [their] contractual hours where necessary*" and would take TOIL in return, as well as covering for one another and sometimes swapping their working days. This included working from home and during the school holidays.

29. For several years this worked well for the claimant, Mrs Robinson and the School. Mrs Robinson and the claimant had become used to working in this way. That said, I find that this was not a contractual flexible working arrangement, but an informal arrangement agreed between colleagues. There was nothing recording this arrangement in writing, the arrangement did not apply with any regularity or structure and Mrs Robinson and the claimant had no entitlement to work in this way. Indeed, had the situation arisen whereby either Mrs Robinson or the claimant was replaced, the arrangement would not necessarily continue with the new (replacement) employee. The claimant was contractually required to work 23 hours' per week during term-time. The ad hoc, informal arrangement between the claimant and Mrs Robinson did not vary this contractual position.

30. As part of this flexible arrangement, the claimant recorded her working hours on a personal spreadsheet. This spreadsheet was set up and populated by her for the purpose of recording hours worked and banked and to monitor the arrangement. On her own evidence "*this [the spreadsheet] was not for claiming extra hours.*"

<u>TOIL / overtime / additional hours</u>

31. In addition to there being flexibility between Mrs Robinson and the claimant, for several years, the claimant would use her "banked" hours to take time off during term-time to attend an Elvis impersonator tour (the **Elvis tour**). This time off was authorised by Mr Hollinghurst and equated to approximately 70 hours of TOIL per school year. There was not a formal process in place for recording the banked hours or for the approval of TOIL. Mr Hollinghurst and the claimant dealt with this verbally.

32. The claimant and her husband attended the Elvis tour as a means of respite from caring for their adult disabled son. When attending, their son would be looked after by his siblings. They chose to attend the Elvis tour for this respite because it was cost effective (they did not have to pay for accommodation, food and travelling expenses) and taking a respite holiday during the school holidays would be more costly for them.

33. The claimant had taken time off to attend the Elvis tour for several years. She had come to assume that this time off would always be authorised. However, I find that she did not have a contractual entitlement to time off to attend the Elvis tour. As per the investigation statement of Mr Hollinghurst, the needs of the School would always come first, which he reiterated at the disciplinary hearing (when asked by the claimant "*Were you aware that [the Elvis Tours] would benefit me in relation to my work-life balance and in respect of caring for my disabled son*", Mr Hollinghurst stated that "*I also still took into consideration the needs of the school at those times of the year*"). The claimant therefore knew that the needs of the School were a consideration.

34. The claimant was afforded more flexibility in terms of the accrual of additional hours than other staff (teaching and non-teaching), who would occasionally work extra hours and during Mr Hollinghurst's tenure, who were able to submit claims for overtime. This was initially through paper forms and then via the School's payroll software system, "Oracle". Mr Hollinghurst also permitted staff to "bank" hours to use for occasional time off during term time. However, unlike the claimant, these hours would be taken or paid for at more regular intervals.

35. The claimant, in her role, was responsible for processing the claims submitted by other staff for payment of overtime and did so once these claims had been authorised by the Headteacher.

36. During Mr Hollinghurst's tenure, the claimant rarely (if ever) received pay in lieu of additional hours worked. Her "banked" hours were always taken as TOIL for the Elvis tour.

37. The first time that the claimant submitted a significant claim for (and was paid for) additional hours was in October 2017, when she submitted a claim for Mr O'Neill's approval for 50 additional hours. She received a payment for these additional hours in November 2017. The claimant also made claims for 30 "extra hours" in December 2017 and for 50 "extra hours" in August 2018. These claims were submitted via Oracle and were authorised by Mr O'Neill. During Mr O'Neill's year as Acting Headteacher, the claimant therefore received payment for 130 additional hours work. During that school year, the claimant also accrued TOIL to attend the Elvis tour.

<u>Mr O'Neill</u>

38. During Mr O'Neill's time as Acting Headteacher additional tasks fell within the claimant's responsibility and Mr O'Neill told her to book down these hours and claim for them. The fact that he authorised the payments in 2017 and 2018 supports this finding.

39. During this time, Mr O'Neill was provided with support one day a week from Ms Colbeck. Mr O'Neill was regarded as being inexperienced, including in matters of the School's financial procedures. On the claimant's evidence, he would turn to her for guidance and support in this regard.

40. Mr O'Neill had unsuccessfully applied for the Headteacher role secured by Mrs Shaw and it is to be noted that Mr O'Neill was less engaged in his Acting Headteacher role as he neared the date of leaving the School, which the claimant did not dispute.

41. The claimant and Mr O'Neill were close friends and he described the claimant as being an "*amazing friend and surrogate mum"*. This friendship continued after Mr O'Neill left the School, although he relocated overseas.

42. Mr O'Neill worked with Mrs Shaw prior to him leaving the School, for a period of approximately 2 months (him leaving the School at some time in October 2018).

Instruction re TOIL

43. Concerns amongst the Governing body of the School regarding the taking of TOIL during term-time arose during Mr O'Neill's tenure. These appear to have been prompted by a parent complaint about Mr O'Neill having taken time off during term-time for personal leisure. It is fair to say that the School's approach to TOIL was inconsistent with other schools within the respondent's organisation, where the taking of time off during term-time was exceptional for both teaching and non-teaching staff.

44. After several discussions, an instruction was issued by Mr O'Neill to all staff at the School in February 2018, informing them that they could no longer accrue TOIL and that if they worked authorised overtime, they would receive payment for this instead. TOIL was to cease immediately for teaching staff and non-teaching staff were informed that any TOIL outstanding needed to be taken or claimed as payment prior to August 2018.

45. This caused upset amongst staff at the School and the removal of what was no doubt a valuable benefit was not well received. It was clearly a "hot topic". Mr O'Neill's instruction was being talked about amongst staff, prompting a further meeting in March 2018.

46. The claimant was not in attendance at the meeting with Mr O'Neill in February 2018. However, the claimant was aware of the instruction that had been issued to staff and knew that TOIL was to cease, which is a finding relevant to both the fairness of dismissal and the issue of contributory fault.

47. I also find that the claimant knew that she needed to claim pay or take TOIL for any additional hours "banked" by 31st August 2018. The fact that she made a claim for 50 hours in August 2018 supports this finding, as does her evidence at the investigation, when she accepted that she should have claimed for additional hours worked in July 2018 prior to the end of August 2018 but did not do so. At the appeal meeting in December 2018, the claimant suggested that she had only been informed by Mr O'Neill about monitoring TOIL accrued by Teaching Assistants. However, this was inconsistent with what she had stated at the earlier investigation meeting, in which she said that although she was not at the staff meeting in February 2018, she was aware of the new TOIL arrangements. This finding is further

supported by Mrs Robinson's evidence, who when asked at the appeal hearing "*Did you know that any additional hours accrued should have been taken by 31st August 2018?*", she replied "*I knew that all hours were to be approved by Mr O'Neill by 31st August*". Again, this is a finding relevant to both the fairness of dismissal and the issue of contributory fault.

Claimant's request for leave in October 2018

48. On 1st October 2018, the claimant submitted an "*application for leave of absence – support staff*" form requesting time off work on 9th, 11th, 12th and 19th October 2018 for "*time owed for extra hours previously worked*". The claimant accompanied this form with a letter, setting out details of the "flexible working arrangement" with Mrs Robinson. Mrs Shaw was now in post and the claimant explained that the arrangement "*occasionally means working during holiday periods*". This letter did not mention an expectation that she be paid for additional hours worked and the claimant made no reference to having any outstanding "banked" hours.

49. In response, by letter dated 17th October 2018, Mrs Shaw informed the claimant that the leave was being authorised but went on to state that: "*Due to the operational management requirements of this post, you are required to work during term time and not during the holiday period*". She informed the claimant that she would be unable to authorise any more time off to attend the Elvis tour.

50. During this Tribunal hearing, the claimant asked Mrs Shaw why Mrs Robinson had not been issued with a letter regarding future time off, given that she too had some leave booked during term time. I accept Mrs Shaw's evidence in this regard and find that this was because the claimant's form was accompanied by a letter requesting confirmation that the Elvis tour arrangement could continue.

The claimant's claim for payment for additional hours

51. The claimant was unhappy with Mrs Shaw's response and was upset to receive this letter. Prior to any meeting taking place between the claimant and Mrs Shaw to discuss her working arrangements, as had been suggested by Mrs Shaw, the claimant therefore updated her personal spreadsheet recording hours worked and calculated that she had "banked" 86 hours.

52. The claimant then submitted a claim via Oracle for 86 hours additional pay. I shall refer to this in the remainder of this Judgment as the "**86 Hours Claim**". The Oracle entry included the following information:

> Date Worked: 19 Oct 2018
> Reason for Work: Extra Hours
> Hours / Units: 86

In the "Action History" the claimant stated that "*these are the extra hours I have already worked up to October half term*".

53. The claimant did not submit this claim immediately, but did so on 13th November 2018, by which time Mr O'Neill no longer worked at the School. In her evidence to this Tribunal, the claimant stated that she should have claimed for the additional hours before Mr O'Neill left. She did not do so.

54. I find that the claimant submitted the 86 Hours Claim in direct response to Mrs Shaw informing her that TOIL could no longer accrue and be used for the Elvis tour. Had Mrs Shaw not issued this instruction, the claimant would not have submitted a claim for additional hours' pay. I make this finding considering that the claimant made no mention of "banked" hours owing in the letter accompanying her leave request form and given her acceptance that she knew she should have claimed for hours owed by the end of August 2018. This is a further finding relevant to both the fairness of dismissal and the issue of contributory fault.

55. On 15th November 2018, the claimant informed Mrs Shaw that she had submitted this claim. She requested that Mrs Shaw approve payment on a couple of occasions. Mrs Shaw did not do so but asked that the claimant provide some supporting evidence. By email dated 15th November 2018, the claimant provided Mrs Shaw with two excel spreadsheets. One for the 2017/18 academic year and one for the 2018/19 academic year.

56. Mrs Shaw was "*stunned*" by this. I accept her evidence in this regard and that she was "*so surprised*" to receive a claim for 86 additional hours work from an administrative member of staff contracted to work 23 hours per week. I also find that Mrs Shaw did not consider that it was reasonable or possible for the claimant to have worked 86 hours since the start of the academic year, given that she understood no hours to be owing to employees after 31st August 2018.

57. On receipt of the 86 Hours Claim, Mrs Shaw was prompted to undertake further enquiries. This included Mrs Shaw speaking to the claimant and asking her to explain the spreadsheets to her. This initial informal discussion did not, however, clarify or resolve the issue.

58. Mrs Shaw therefore analysed the information and reviewed previous claims submitted via Oracle. At this point, Mrs Shaw became suspicious, noting that the records on Oracle suggested that the claimant was making a claim for hours for which she had already been paid. Mrs Shaw therefore also took a statement from Mr O'Neill on 30th November 2018 and he confirmed that he had approved the claims for 130 additional hours, as recorded on Oracle. Mr O'Neill also confirmed that he had informed all staff that all TOIL and additional hours payments for 2017/18 should have been claimed by 31st August 2018. Mr O'Neill stated that he was not aware of any additional hours having been brought forward by the claimant from 2016/17 or at the end of

2017/18. It appears that Mr O'Neill understood that all hours owed to the claimant had been claimed, ready for Mrs Shaw taking over as Headteacher.

59. Having undertaken these enquiries and analysis, Mrs Shaw identified how she understood the 86 Hours Claim to have been calculated by the claimant. Mrs Shaw formulated 6 allegations against the claimant, under the overall allegation of the 86 Hours Claim having been falsified for personal gain.

60. On 4th December 2018, the claimant was suspended on full pay in order that further investigations could be undertaken.

61. The allegations at this stage were as follows:-

    a. that 26.5 hours had already been paid to her in October 2017 (13.5 hours) and December 2017 (13 hours);

    b. that 43 hours had been carried forward from 2016/17, without any supporting evidence and despite Mr O'Neill stating that he was not aware of any hours having been brought forward by the claimant;

    c. that she had claimed 3.5 hours for a day when the claimant was absent from school (a Christmas shopping day);

    d. that she had claimed 12.5 hours to cover Mrs Robinson, without the required prior Headteacher approval;

    e. that she had claimed for 11 hours for a training course, having recorded only 9 hours on her spreadsheet; and

    f. that she had claimed 5.5 hours for a meeting on 7th March 2018 with Mrs Shaw, being a meeting that had not taken place.

<u>Formal investigation</u>

62. The first investigation meeting with the claimant took place on Friday 14th December 2018.

63. Prior to this, Mrs Shaw obtained statements from Mr Ingham (Acting Deputy Headteacher) on 8th December 2018, Ms Colbeck (Associate Headteacher) on 6th December 2018, Mrs Robinson on 10th December 2018 and a further short statement from Mr O'Neill on 12th December 2018:-

    a. Mr Ingham stated that, at a meeting attended by all staff in February 2018, teaching staff were informed that TOIL would cease immediately and non-teaching staff were informed that TOIL would continue until the end of the school year, with all TOIL to be taken in hours or as overtime payments by 31st August 2018. Any extra hours worked thereafter needed to be agreed beforehand, could only be claimed for as overtime (not TOIL) and needed to be approved by the Acting Headteacher and recorded on Oracle.

b. Ms Colbeck's statement detailed discussions that had taken place with Mr O'Neill about the lack of formal procedures in place at the School to deal with TOIL and overtime, prior to the meeting described by Mr Ingham. She also explained that a further meeting had taken place on 19th February 2018, at which staff (teaching and non-teaching) had raised concerns about the change in approach.

c. Mrs Robinson's statement set out her understanding of how TOIL and extra hours worked. She stated that she recorded extra hours in her personal diary and that she understood that she could keep hours and have time off when needed "*provided the head knew well in advance*". She described her understanding of the changes to TOIL and overtime, although commented that "*things were not communicated to me clearly regarding overtime and I continued to work when it was needed although I did, mostly, seek approval for the hours*".

d. Mr O'Neill's statement simply stated that "*It is my understanding that all staff were told about the change to TOIL in the spring or summer term. This was either in a meeting or on a 1:1 basis during the spring / summer term*".

64. The investigation meeting was attended by Mrs Shaw, Miss Duckworth (HR Officer), the claimant and Mrs Gregory (a work colleague of the claimant). Mr Halshaw clerked the meeting. The unsigned notes of the investigation meeting were included in the bundle. There is no evidence of the claimant having challenged the contents of the notes at any stage and although during cross examination the claimant questioned their accuracy, she did not do so at the time and confirmed the notes as accurate at a future investigation meeting. I therefore find, on balance, that the notes are a fair and accurate record of the meeting.

65. The additional statements were provided to the claimant and the allegations were put to her. Mrs Shaw's analysis of the claimant's spreadsheets and hours' calculations was also provided.

66. It quickly became apparent that the claimant did not agree with the way in which Mrs Shaw had interpreted her spreadsheets. The claimant was therefore asked "*how were the 86 hours of additional payments made up?*" to which she replied: "*they were all on the spreadsheet*". The claimant was asked "*could a breakdown be provided of how the 86 hours had been arrived at?*" to which she replied: "*43 hours were carried forward from the previous year*". Further, when asked "*It had been agreed that all additional hours were paid monthly and this is what other staff did, is this correct?*" she replied: "*yes*". When asked why she claimed in the way that she did, the claimant's explanation was: "*because it was better for me and for Mr Hollinghurst*".

67. During this meeting, the claimant explained that authorisation for working additional hours had been verbal and when asked whether all staff had to fill in monthly timesheets for overtime, the claimant stated: "*everyone else had to fill in monthly timesheets but Mr Hollinghurst said it was ok for me to use this*

system". When asked why she did not think to follow the same system as everyone else, the claimant stated that: "*I did have a system, however, I needed to bank up hours so I could go on tour*".

68. Enquiries were made of the claimant as to what extra work had resulted in her working the additional hours and whether this was authorised. The claimant did not provide a detailed response and stated that: "*these were in my diary*".

69. At this meeting, the claimant accepted that Mr O'Neill had made her aware of the new system for taking TOIL and claiming overtime but stated "*he did tell me separately even so, I wanted to bank some hours so I could have time off*". In response to being asked "*You knew the rules about when you should claim hours, so why did you not do it?*", the claimant stated: "*I should have done*".

70. When asked about the expense claim, the claimant's explanation for her approach was "*Mr Hollinghurst said it was cheaper to do it this way so that's why I did it this way*". When asked "*is this wrong*", the claimant replied: "*yes*".

71. At the conclusion of the meeting, it was confirmed to the claimant that Mrs Shaw would be undertaking further investigations and that her paid suspension would continue.

Second investigation meeting

72. A second investigation meeting with the claimant took place 6 weeks later, on 25th January 2019 in advance of which Mrs Shaw obtained statements from Mr Hollinghurst (on 18th January 2019) and Mr Stott (Chairman of the Governing Body) (on 23rd January 2019):

    a. Mr Hollinghurst's statement explained how there was a system in place to allow staff to "bank" overtime in order to take time off during term-time and that "*with the exception of Carole Anderson, most staff never really banked more than 5-10 hours*". He stated that the claimant "*did bank a greater number of hours than most by agreement with myself, these were used for the Elvis tour. She did not routinely bank large numbers of hours for payment through payroll – although she did claim some additional hours as overtime*". Mr Hollinghurst also stated that at the end of 2016/17 he did not believe that there were any hours to be carried forward (other than the claimant having days booked for the Elvis tour). In relation to claiming overtime hours for expenses, Mr Hollinghurst stated that there was a problem with the Oracle expense system and that he informed staff to "*put it in as overtime*".

    b. Mr Stott's statement provided details of the governing body's involvement in the decision to suspend the use of TOIL and he also stated that he had never informed the claimant that she could carry forward hours beyond 31st August 2018.

73. This investigation meeting was attended by Mrs Shaw, Miss Duckworth (HR Officer), the claimant and Mrs Gregory (a work colleague of the claimant). Mr

Halshaw clerked the meeting. The unsigned notes of this meeting were included in the bundle. Again, I find that these accurately record what was discussed.

74. The claimant was taken through the allegations again and it was identified that some of the hours thought to have formed part of the 86 Hours Claim fell outside of its scope. Additional questions were therefore put to the claimant.

75. In broad terms, during this second investigation meeting, the claimant stated that there was an agreement that she would be paid additional hours if she was in school above and beyond her normal working hours, but also indicated that the Headteacher (being Mr O'Neill) did not know and had not approved the additional hours that she was working ("*the extra hours were just recorded on my spreadsheet*"). These additional hours included time spent giving Mr O'Neill a lift to school. The claimant was asked was there "*a formal recording system when you came into school for the hours that you worked*?", to which she replied: "*No, I just came into school when I could manage to do so*". When asked "*why are you still filling in your spreadsheets when you know that any additional hours need to go on Oracle*", the claimant stated that this was: "*to check I was doing 23 hours per week*".

76. The claimant did not always answer questions directly during this investigation meeting. For example, when asked "*Did the Chairman's instruction regarding TOIL apply to you?*", the claimant did not confirm or deny this, but instead replied: "*I was just trying to get my work done*" and when asked "*Did your spreadsheet not follow the…instructions regarding TOIL?*", the claimant's response was: "*I was not at the staff meeting when staff were advised about the new TOIL arrangements*".

77. The claimant took a similar approach during the tribunal hearing. Mr Mensah asked her several times to identify where the details were of the additional work she had undertaken. When asked "*where is the detail of what hours you had done?*", the claimant responded: "*on my spreadsheet*" and when it was put to her that there was "*no detail whatsoever*", in terms of a breakdown of tasks, the claimant repeated her statement: "*there was detail on the spreadsheet and verbal communications about it*".

78. At the end of the second investigation meeting, the claimant was informed that further issues had come to light following an audit of the School fund account and these may also need to be investigated.

79. What became apparent from the first and second investigation meetings (and I make a finding of fact to this effect), was that the claimant was not able to provide a clear and detailed breakdown of how the hours forming part of the 86 Hours Claim had accrued. There was no record of this in the formal sense. The spreadsheet referred to tasks in general terms, with no breakdown of specific tasks or of what time had been spent undertaking what activities. She could not provide a breakdown of the days on which she worked, how each occasion had been authorised and what specific work had been undertaken for which she was claiming payment. In response to questions asking for evidence and information, the claimant could point to nothing

recorded in writing and the only documents to which she referred were her personal diary and the spreadsheets. These spreadsheets, on her own witness evidence, were only used to track her hours and had not been compiled or populated to support claims for overtime.

Third investigation meeting

80. A third and final investigation with the claimant took place a further 6 weeks later, on 8th March 2019, to which the claimant was invited by letter dated 7th February 2019. Again, this meeting was attended by Mrs Shaw, Miss Duckworth (HR Officer), the claimant and Mrs Gregory (a work colleague of the claimant). Mr Halshaw clerked the meeting.

81. At this stage, the 6 original allegations were re-scoped by Mrs Shaw and set out as 15 allegations. In addition, 10 new allegations, unrelated to the 86 Hours Claim were set out to the claimant.

82. In broad terms the allegations can be categorised as follows: -

    c. Allegations 1 – 5 related to the 86 Hours Claim, which the respondent alleged was a falsified claim submitted for personal gain.

    d. Allegation 6 related to the claimant having claimed (and been paid for) 3.5 hours, for a Christmas shopping day that the respondent alleged was not payable.

    e. Allegations 7- 9, 11, 12 and 15 related to the claimant having claimed (and been paid for) 17.16 hours' work, which the respondent alleged was not payable because the time was spent on voluntary activities and was not authorised in advance.

    f. Allegation 10 related to a claim for 6 hours' pay submitted for expenses.

    g. Allegation 13 related to a claim for "Extended Services" work (of 39.5 additional hours), forming part of the 86 Hours Claim, despite the claimant having already received payment for 42.25 additional hours for Extended Services work in April 2018.

    h. Allegation 14 related to the claimant having booked a holiday in October 2018 without obtaining the prior approval of Mrs Shaw.

    i. Allegations 16 – 25 related to the claimant's alleged operation and use of the School fund account and her financial practices at school.

83. In advance of this investigation meeting, additional statements were obtained from Miss Jackson (Supply School Business Manager), Mr Hollinghurst and Ms Jefferson. These statements primarily related to allegations that were subsequently found not to have been substantiated against the claimant.

84. At this investigation meeting, further queries were put to the claimant. She stated that she did not get the time spent undertaking Extended Services work agreed in advance, but that she "*did not believe the extra work I was carrying out was connected to the TOIL instruction which had been issued to all staff*". She did not explain why she thought this. At this meeting, the claimant stated that she believed that her requests for TOIL were different to others, because the Elvis tour was respite for her in respect of her son.

85. Again, during this meeting, the claimant's responses to the questions being put to her were not always direct and were at times evasive and/or confusing. She stated that entries on her spreadsheet did not amount to her booking time and that "*it was not a claim*", yet she also stated that "*I was still logging hours and Mr O'Neill knew this*" and "*I was logging the hours not claiming them*".

Decision to proceed to disciplinary

86. By letter dated 22nd March 2019, the claimant was informed that the matter would proceed to the disciplinary stage, over 15 weeks since her suspension on 4th December 2018.

Claimant's sickness absence

87. No further contact was made by the School with the claimant following the letter dated 22nd March 2019 until it received a sick note from her dated 13th May 2019. This detailed that the claimant was suffering from a "*stress related problem both at work and also caring for her son*" and she was signed off for a 2-month period. In response, the respondent requested that the claimant make contact so that an occupational health referral could be made, to which the claimant responded on 22nd May 2019 to say that she would only correspond by email.

88. During this period, the claimant attended an Elvis tour from 21st May 2019. She had not informed the School of this in advance.

89. An occupational health appointment took place, with a report dated 3rd June 2019 stating that the claimant was unfit for work. The report stated that "*it is important to recognise that the investigation or disciplinary process itself may be a significant contributing stressor to Mrs Anderson and that the removal of this stressor will significantly improve her ill health. However, I consider her unfit to attend this at present*".

90. The next correspondence issued in respect of the pending disciplinary was a letter dated 13th June 2019, inviting the claimant to attend a disciplinary hearing on 4th July 2019. At this time, however, the respondent did not know whether the claimant was medically fit to attend a hearing, since the appointment to assess this was not scheduled until 1st July 2019.

91. In any event, this letter set out details of 25 allegations against the claimant, which included the allegation that "*Mrs Anderson has falsified her claim for 86 additional hours with the value of £1,063.82…for personal gain*" and allegations regarding her operation and use of the School fund account and

financial practices which "*if proven, may constitute serious negligence*". A copy of the investigation report was provided. The claimant was informed that a possible outcome of the disciplinary hearing was her summary dismissal and was informed of her right to be accompanied.

92. A period of 12 weeks passed between the claimant being informed that she was facing formal disciplinary proceedings and her being invited to a disciplinary hearing.

93. The claimant did not attend the occupational health meeting scheduled for 1st July 2019, because of a knee operation, following which she had a further period off sick (from 4th July for 2-weeks and from 18th July 2019 to 16th September 2019). An occupational health report dated 14th August 2019 stated that "*She is unfit for role but fit to attend workplace meetings*".

Disciplinary hearing

94. The disciplinary hearing took place on 13th September 2019, over 40 weeks after the claimant's suspension from work in December 2018. Mrs Shaw stated at the disciplinary hearing that there were "multiple reasons" for this delay including school holidays, recruitment and induction of new staff in school, a teaching commitment and Governor availability. I will set out later in this judgment my conclusions about this timeframe, but in terms of findings of fact, it is clear that Mrs Shaw was managing multiple responsibilities and that a detailed investigation required a significant input of time and effort. On her own evidence at the Tribunal hearing, she was "*employed to run a school*" as well as investigating this matter.

95. I find, however, that no specific explanation could be provided by the respondent for the delay between Mrs Shaw completing her investigations and determining that there was a case to answer (on 22nd March 2019) and 13th May 2019, when the claimant submitted her sick note.

96. The disciplinary was chaired by Ms Green, with fellow governors Mr Bob Waring and Mrs Foden forming the committee. Ms Whitham (Head of Schools HR Team) attended to provide advice to the committee and Mr Thompson attended as notetaker. The claimant was accompanied by Ms Gregory and Mrs Shaw was accompanied by Ms Duckworth (Schools HR Manager).

97. Representations were first made by Mrs Shaw. She referred the committee to her investigation report, before they heard from the witnesses, who were questioned by the committee and the claimant.

98. Mr Hollinghurst gave evidence first, which included him stating that the hours claimed by the claimant for August 2018 were commensurate with what he would expect at that time of year. He also confirmed that, during his time as Headteacher, he would look at the claimant's spreadsheet, stating that "*all hours were agreed by me, there were no alarm bells ringing at all*".

99. Mr Stott, Mr Ingham and Miss Jackson also gave evidence.

100. Mrs Shaw went on to summarise her findings and referred to her recommendation that there was a disciplinary case to answer and that "*the alleged misconduct is not acceptable and is potentially fraudulent*" before the claimant was given an opportunity to ask her questions. This included the claimant asking why it had taken 26 weeks to come to this disciplinary hearing.

101. In advance of the disciplinary hearing, the claimant submitted a statement / report, which she referred to the committee, as well as being provided with an opportunity to make additional representations. The claimant was also questioned by the committee.

102. A new issue that was discussed at the disciplinary hearing, was the fact that the claimant had attended the Elvis tour in May 2019, without seeking prior approval of Mrs Shaw. It was put to her that this was an act in contradiction with Mrs Shaw's instruction in October 2018. In relation this, the claimant put forward her explanation, which was that: "*my GP advised me that it would be beneficial for me to have some time away. I obtained a sick note and went on tour as respite from my son, which was at the same time that I was waiting for this meeting to be convened.*"

103. When asked "*Was it still your intention to go on the Elvis tour in May before your suspension and even though you were not able to accrue hours (or get paid for them)?*" the claimant stated: "*I had a discussion with my husband and we decided that I would do my contracted 23 hours per week; attendance on future Elvis tours had not been considered at this time*". At the disciplinary hearing, although the claimant did not state that she would not attend Elvis tours again, she also did not indicate that she would take time off during term-time to attend Elvis tours in the future.

104. In closing comments, Mrs Shaw stated that: "*I have no trust / confidence if CA returns to work"* and *"I have had no information from CA that she would comply with school rules and regulations in the future*". The claimant stated that: "*I feel that this has been a witch-hunt against me. I have not defrauded or attempted to defraud Higham Primary School*".

105. The committee adjourned to reach its decision, meeting on 23rd September for this purpose.

106. It then informed the claimant of its decision, finding that her "*conduct has fallen well below that which they would expect from an employee of the schoo*l", that "*she has abused school processed and systems for her own personal gain*" and that her actions "*were of such concern that they brought about a fundamental breach of the trust and confidence that the Governing Body is entitled to place in her*". This decision was confirmed by letter from Mrs Green dated 27th September 2019 and its findings in relation to the specific allegations were as follows:-

    a. Allegations 1 – 5 were upheld, with the respondent finding that "*you were aware of the TOIL/overtime instruction and knew that it applied to*

you, yet you completely ignored the instruction for personal gain in order that you could accrue an excessive number of hours in order to take your leave in October, rather than having specific tasks to undertake or to meet the needs of the school".

b. Allegation 6 was not upheld.

c. Allegations 7- 9, 11, 12 and 15 were upheld, with the respondent finding: "*these activities / events should be voluntary…you have abused the systems in place for having additional hours agreed by submitting these claims*".

d. Allegation 10 was upheld, with the respondent finding: "*you have taken advantage of the school financial systems by falsely claiming for your own personal gain and therefore the allegation was proven*".

e. Allegation 13 was upheld.

f. Allegation 14 was upheld.

g. Allegations 16 – 25 were not upheld, with the respondent finding that there had been "*a cavalier approach to managing the school's finances, but they did not feel that these were deliberate acts by you for personal gain*".

107. During the Tribunal hearing, Mrs Green gave evidence consistent with the findings of this committee and the contemporaneous documents. I find that Mrs Green was very clear in her mind as to (a) the claimant's wilful conduct; and (b) the seriousness of this. Mrs Green was clear in her evidence – she did not believe that the claimant had worked the hours for which she had claimed and did not believe that the claimant had any additional hours, that may have been worked, approved.

108. I find that alternatives to dismissal were considered by the committee and accept Mrs Green's evidence in this regard. These were not lengthy considerations and Mrs Green did not explain what those alternatives might have been and why they were discounted. Her evidence was that the claimant had falsified a claim, that this amounted to gross misconduct and there could not, therefore, be other sanctions that would be appropriate.

109. The claimant's employment terminated on 27th September 2019.

110. The claimant was dismissed without notice.

Appeal

111. On 5th October 2018, the claimant lodged an appeal against this decision, highlighting that she had worked for the respondent for over 25 years and had never had her integrity called into question, a point also raised in her disciplinary hearing statement.

112. In terms of new points, she stated that it was unfair that she had not been given an opportunity to ask Mrs Robinson questions at the disciplinary hearing, having expected her to attend. She stated that she felt that there had been insufficient consideration of her explanation and that there was no evidence obtained in support of the finding that she did not have approval from Mr O'Neill to work the additional hours. She highlighted her concerns about the length of time the process had taken and the impact it had had on her health and well-being.

113. The appeal hearing took place on 11th December 2019 and took the form of a re-hearing.

114. The appeal hearing was chaired by Mrs Collinge, with Mr Loads and Mrs Buchanen forming the committee. Mrs Sutton (HR Officer) attended to provide advice to the committee and Mr Thompson attended as notetaker. The claimant was unaccompanied. Mrs Shaw was accompanied by Ms Duckworth (Schools HR Manager).

115. The appeal hearing took the same format as the disciplinary hearing, with Mrs Shaw making representations about all 25 allegations, before witnesses were questioned. The claimant had an opportunity to make representations, before also being questioned. At the appeal hearing, Mr Stott, Mrs Colbeck and Mrs Robinson attended as witnesses.

116. The claimant submitted to the appeal panel 4 character references, from Ms Griffiths, Mrs Jones, Ms Booth and Mrs Spark, all former work colleagues of the claimant. These included statements that "*She has always been a very honest, trustworthy, helpful, organised and tidy person…*" and "*she is an honest, loyal person*".

117. At the appeal hearing, the claimant referred to additional evidence from Mr O'Neill, in the form of a signed statement dated 3rd October 2019 in which he stated that the claimant "*was given authority to set up the extended services at Higham. This was authorised by myself and the chair of governors…this included evening work and extra work over holiday periods…I also asked Mrs Anderson to attend school…to work overtime…including Wednesday 7th March 2018*". The committee questioned why the signature did not match that on Mr O'Neill's initial investigation statements and requested the covering email. The claimant was unable to provide this during the meeting, so agreed she would find it and forward it on to the committee.

118. Questions were again asked of the claimant in relation to the Elvis tour attended in May 2019. When asked "*How far in advance are the Shawn Klush tours booked*?", the claimant stated: "*Well in advance*". She was asked "*would you have known about the May tour after the one in October, the previous year*?" to which she replied: "*Yes, I knew about the tour but I did not know if I would go on it at that time, especially because of my situation*". The committee asked the claimant: "*Would you have ordinarily have gone on the tour if all was well?*" and the claimant replied: "*But it was not all well therefore I do not know"*. The claimant did not, therefore, assure the committee that she would have complied with Mrs Shaw's instruction and not attended future

Elvis tours. However, the claimant did not expressly state that she would do so.

119. On 17th December 2019, the appeal committee reconvened to reach its decision and the outcome was provided to the claimant on 18th December 2019. The original findings against the claimant were upheld by the appeal committee on a unanimous basis.

120. As per the evidence of Mrs Collinge, she did not believe that the claimant had worked all the hours claimed and there was no proof that she had. As Mrs Collinge stated "*I think he [Mr O'Neill] just authorised them [the claims] without looking into detail. Mrs Anderson knew he would authorise without asking questions. This felt untrustworthy. A pattern started then continued*".

121. In relation to the statement from Mr O'Neill, the committee concluded "*as the authenticity of this statement was not provided, they determined they cannot rely on it….Notwithstanding this…it sheds no light on your decision to carry on "as usual" in September 2018 in breach of the TOIL instruction*". This was supported by Mrs Collinge's witness evidence at the Tribunal in which she stated that the content of Mr O'Neill's statement would not have swayed the decision, even if it had been considered.

122. The appeal committee concluded that "*your misconduct is of such a serious nature that this brought about a fundamental breach of trust and confidence….do not consider action short of dismissal to be appropriate owing to the risk of repetition of the misconduct which has been found to be substantiated*".

Remedy

123. In terms of findings of fact relevant to remedy, as noted above, the claimant's gross weekly salary was £256.15.

124. She was 60 years' old at the date of her dismissal, with 27 years' service with the respondent.

125. Following termination of her employment, the claimant did not apply for other employment or take steps to actively look for alternative employment. She was informed about a potential role at another school, which she was advised of by a former colleague, but did not make further enquiries. The claimant felt unable to consider working in a school environment again, given her experience at the School and the circumstances leading up to the termination of her employment.

126. Following termination of her employment, the claimant had undertaken some work on a website selling merchandise and personalised items linked to the Elvis tour, but after costs this was yet to provide her with any income.

The Law

Unfair Dismissal

127. Section 98 ERA reads as follows:

> *"(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 sub-section (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 sub-section if it … relates to the conduct of the employee …*
>
> *(3) …*
>
> *(4) Where the employer has fulfilled the requirements of sub-section (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".*

128. Conduct dismissals can be determined by reference to the test which originated in British Home Stores v Burchell [1980] ICR 303, a decision of the Employment Appeal Tribunal which was subsequently approved in several decisions of the Court of Appeal.

129. The "Burchell test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?

130. Since Burchell was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

131. The circumstances relevant to assessing whether an employer acted reasonably in its investigations include the gravity of the allegations, and the potential effect on the employee (A v B [2003] IRLR 405).

132. A fair investigation requires the employer to follow a reasonably fair procedure. Tribunals must take into account any relevant parts of the ACAS Code. That includes taking account of those elements that the ACAS Code identifies as being important to fairness, including the requirement that "*employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions, or confirmation of those decisions*". The appeal is to be treated as part and parcel of the dismissal process (Taylor v OCS Group Ltd [2006] IRLR 613)**.**

133. If the three parts of the Burchell test are met, the Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

134. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate (Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23). The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

135. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer had reasonable grounds for characterising the misconduct as gross misconduct. The position was explained by HHJ Eady in paragraphs 29 and 30 of Burdett v Aviva Employment Services Ltd [UKEAT/0439/13]**.** Generally gross misconduct will require either deliberate wrongdoing or gross negligence.

Decision and Reasons

Unfair Dismissal

Was the reason (or principal reason) for dismissal a potentially fair reason (section 98 ERA)?

136. I am satisfied that the respondent has shown that the reason or principal reason for the claimant's dismissal was a potentially fair one under section 98 ERA, namely conduct. I acknowledge that the claimant felt that there was a witch-hunt against her, but this is not supported by my findings of fact. I am satisfied that conduct was in the mind of Mrs Green and Mrs Collinge when they made their respective decisions.

Test of Fairness

137. The test of fairness set out at section 98(4) must therefore be applied. Did the respondent act reasonably in all the circumstances, in treating conduct as a sufficient reason to dismiss the claimant? I am guided

by the principles in BHS v Burchell. I must also consider the size and administrative resources of the respondent.

Did the respondent genuinely believe that the claimant had committed misconduct? Were there reasonable grounds for that belief?

138. Dealing with the first and second limbs of *Burchell*, I must consider did the respondent genuinely believe that the claimant was guilty of misconduct and was this belief was based on reasonable grounds, considering the information available at the time of the dismissal and evaluating whether the view that there was misconduct was a view within the band of reasonable responses?

86 Hours Claim

139. In relation to the 86 Hours Claim, I am satisfied that both Mrs Green and Mrs Collinge had a genuine belief that the claimant had submitted a falsified claim for personal gain and that this amounted to misconduct. They each formed the view that the claimant had either not worked the hours for which she was claiming or had worked these hours without seeking prior approval and without an appropriate audit trail, knowing that this was required. I conclude that holding such a view would give rise to a genuine belief of misconduct.

140. I am also satisfied that this belief was based on reasonable grounds considering the following findings of fact.

141. The claimant knew about Mr O'Neill's TOIL instruction and that TOIL was to cease for all staff after 31st August 2018. She also knew that all claims of payment for additional hours had to be submitted by 31st August 2018. Despite this, the claimant continued to "bank" hours" in order that she could take time off during term time to attend the Elvis tour.

142. On being informed that Mrs Shaw would not authorise further TOIL / holidays during term-time, the claimant submitted a claim for payment of hours that she had been logging on her personal spreadsheet for several years. The 86 Hours Claim included claims for time undertaking work in previous academic years, contrary to Mr O'Neill's statement that no time had been carried forward.

143. The claimant was unable to provide any clear evidence to the respondent (or, indeed, to this Tribunal) to substantiate the 86 Hours Claim. She could not provide details of what specific work had been undertaken, what that work had entailed and when it had been undertaken.

144. In the absence of detail, Mrs Green and Mrs Collinge considered other information available, identifying what work might be required (in particular, in respect of the Extended Services work). Their findings did not enable them to justify the extent of hours being claimed.

145. In this context and given the claimant's sometimes evasive answers during the disciplinary process, it was reasonable for the respondent to form the view that it was simply not feasible for the claimant to have undertaken the amount

of hours work claimed for the tasks in question and to conclude that the 86 Hours claim was fraudulent.

Voluntary activities

146. In relation to the allegation regarding hours claimed (and paid) for voluntary activities, I am also satisfied that both Mrs Green and Mrs Collinge had a genuine belief that this amounted to misconduct, even though such claims had been authorised by Mr O'Neill. I also conclude that this belief was based on reasonable grounds.

147. These were claims submitted to an inexperienced and disengaged Acting Headteacher. The claimant was unable to provide any evidence of how the hours had specifically accrued and been authorised. She had not claimed for activities of this nature under the headship of the more experienced Headteacher, Mr Hollinghurst. There was a significant change in the pattern of behaviour – from the claimant making no claims for additional pay, to the claimant submitting claims for 130 hours in an academic year – and in these circumstances the respondent's belief that there was an abuse of systems was not unreasonably held.

Expense claim

148. In relation to the claim for 6 additional hours pay as an alternative to submitting an expense claim, I am satisfied that the respondent held a genuine belief that the claimant was guilty of misconduct and that it formed the view that she had knowingly submitted a claim for hours instead of expenses. This view was formed on reasonable grounds, considering the respondent's conclusion that the claimant knew how to submit claims correctly via Oracle. It was reasonable for the respondent to disregard Mr Hollinghurst's evidence that he had told the claimant to submit expense claims in this way, since that applied several years prior to the expense claim in question.

Holiday booking

149. In relation to the booking of a holiday for October 2018, the claimant had booked this holiday, knowing that there had been an instruction regarding TOIL no longer being permitted. However, although she knew that TOIL was not allowed after August 2018, the claimant had booked her October 2018 holiday on the assumption that it would be approved by the new Headteacher, which it was.

150. In relation to this allegation, therefore, I cannot conclude that the respondent had a genuine belief of misconduct based on reasonable grounds. The claimant had been permitted to attend the Elvis tours for several years and there had been no instruction from Mr O'Neill specifically about the Elvis tour. More importantly, Mrs Shaw approved her attendance on this tour.

Had the respondent carried out a reasonable investigation?

151. Being satisfied, overall, that the respondent had a genuine and reasonably held belief of misconduct, I must next consider, did the respondent carry out as much investigation into the matter as was reasonable? Relevant are the nature and gravity of the allegations, the position of the claimant and the size and administrative resources of the respondent. The expectation is not that the investigation be as meticulous as the kind that would be done in a criminal enquiry.

152. Overall, I conclude the investigation was within the band of reasonable responses, including the decision to suspend and the timing of this suspension.

153. As per my findings of fact, the investigation (and decision to suspend) was prompted because of the significant number of hours for which payment was being claimed and the fact that this claim could not be substantiated through initial informal investigations. Mrs Shaw was an experienced senior teacher, who identified that the 86 Hours Claim might be a duplication and as she put it "*to say that a claim for 86 hours additional pay was unusual is an understatement*". Mrs Shaw was entitled to ask for further information from the claimant and as she explained, it would have been remiss of her had she not done so.

154. The investigation was thorough and detailed, as accepted by the claimant during cross examination. Numerous witness statements were taken, three investigation meetings with the claimant took place and documents were collated and analysed.

155. The claimant raises concerns that this was a witch-hunt. I do not reach this conclusion. At every stage of the process the claimant was given an opportunity to put forward her version of events and present relevant evidence. I recognise that the claimant may have felt that, when she provided an explanation to some allegations, others were added but on balance, there were valid reasons for the changing scope of the allegations. In part, this was due to Mrs Shaw incorrectly analysing the claimant's spreadsheet, and in part, this was due to additional information coming to light that warranted further investigations as it arose.

156. I am also satisfied, taking into account the evidence of Mrs Green and Mrs Collinge, that they had no reason to "get" the claimant and she accepted that they had no vendetta against her. Had there been a witch-hunt by Mrs Shaw, I believe that this would have been identified at some stage during the process.

Had the respondent followed a reasonable fair procedure and had the parties complied with the ACAS Code?

157. In addition to considering Burchell, I must also consider the whole dismissal process (including any appeal) and have regards to the ACAS Code. Procedural fairness is integral to the reasonable test and I must ask

did the respondent follow a reasonably fair procedure? Did the respondent give the claimant sufficient details of the allegations and the evidence in enough time before the disciplinary hearing to enable the claimant to have a fair chance to respond? Was there the right of appeal to another person if the claimant was dissatisfied with the decision?

158. In this case, the claimant knew the case against her. She knew that she was at risk of dismissal, and she was allowed to make representations at each stage of the process. She was allowed a right of appeal. The claimant readily accepted during cross-examination that she was aware of the allegations that she faced at every stage and that she had the chance to put forward her version of events.

159. In regards suspension, I conclude that the decision to suspend taken when it was fell within the band of reasonableness for the following reasons.

160. The 86 Hours Claim came to the attention of Mrs Shaw in mid-November 2018. She did not suspend the claimant immediately but took steps to obtain further information and informally requested an explanation from the claimant.

161. Mrs Shaw was understandably alarmed at the extent of the claim. The claimant was contracted to work 23 hours a week during term time only. The unparticularised 86 Hours Claim was a claim for hours in addition to 30.67 hours of TOIL used for the claimant's October 2018 holiday and further to claims in the previous academic year for 130 hours. In these circumstances, I believe that it was reasonable for Mrs Shaw to have serious concerns about the validity of the claims and to suspend the claimant in order that an investigation could be undertaken.

162. However, despite these conclusions, the process was not overall within the band of reasonableness and there was a failure by the respondent to comply with the ACAS Code. The delay in concluding matters was not reasonable at all. It took 40 weeks from the claimant being suspended to the disciplinary hearing taking place. It was over a year before the appeal was concluded. There were weeks where there was no contact with the claimant and no progress was made. Mrs Green and Mrs Collinge did not fully address their minds to this issue when it was raised by the claimant – there was simply nothing put forward to explain why nothing happened between 22nd March 2019 and 12th May 2019, for example, and I do not believe any other reasonable employer would have allowed such a period of inactivity.

163. Nor was the level of support provided to the claimant during the disciplinary process reasonable or what I would expect of a school within an organisation the size of the respondent.

164. The investigation needed to be detailed and thorough and I acknowledge that Mrs Shaw was doing her best. But from very early on in the process, it was apparent that the investigation would be time-consuming and I believe that any reasonable employer, of the respondent's size and with its administrative resources, would have better resourced the investigation, appointing someone with the time and expertise to undertake it more swiftly. Not only

would this have the clear benefit of saving the respondent the cost of such a lengthy period of suspension. It would have saved the claimant the stress and anxiety inevitably caused by such a lengthy disciplinary process.

165. In conclusion, I find that this unwarranted and unreasonable delay did impact on the overall fairness of the process. On this basis, the claimant's dismissal was procedurally unfair.

Was dismissal within the band of reasonable responses available to a reasonable employer?

166. Were it not for the procedural failing, I would next be determining whether or not dismissal was within the band of reasonable responses to dismiss the claimant? Was the respondent acting reasonably both in characterising her conduct as gross misconduct and then deciding that dismissal was the appropriate punishment?

167. In relation to the finding that booking a holiday in advance of obtaining Mrs Shaw's approval was gross misconduct, I am not satisfied that it was reasonable for the respondent to categorise this as gross misconduct, given my conclusion that the belief of misconduct on this basis was not held on reasonable grounds.

168. However, in relation to the remaining allegations and considering the claimant's conduct overall, I believe that the respondent was reasonable to categorise this as gross misconduct.

169. The claimant was in a position that required her to demonstrate honesty and integrity and the respondent had formed a belief, based on reasonable grounds, that she had not done so. The claimant knew the process required for claiming overtime by other staff, she knew of the need for audit trails and yet she relied upon a spreadsheet created to track hours worked to claim 86 hours' pay. A finding of fraud – of submitting a claim for pay that was not legitimate – can quite reasonably be categorised as gross misconduct.

170. In terms of sanction, I conclude that dismissal was within the band of reasonable responses, notwithstanding the claimant's significant length of service and clean disciplinary record. I am satisfied that these factors were given due consideration by Mrs Green and Mrs Collinge, even if they were quite quickly outweighed by the seriousness of the findings. Whilst another reasonable employer may have more willingly given the claimant the benefit of the doubt, another reasonable employer may also have taken the decision of the respondent, in circumstances where it believed it could not trust the claimant again in any capacity.

171. I note that the respondent stated in both the disciplinary outcome letter and the appeal outcome letter that it had to dismiss because of the risk of the claimant repeating her actions. However, in evidence, Mrs Green and Mrs Collinge stated that this was not the only reason for the sanction imposed and I accept their evidence in this regard.

172. My decision is therefore that the claimant's dismissal was substantively fair, but procedurally unfair.

Should there be a reduction to any compensation awarded in terms of Polkey v AE Dayton Services Limited [1987] ICR 142 to reflect that the claimant would have been dismissed in any event had a fair procedure been followed?

173. On the matter of Polkey, it is my conclusion that the claimant would have been dismissed if a fair procedure had been followed and at the time that she was, if not sooner. The procedural failing, in the main, concerned the issue of delay. There is nothing in my findings that leads me to conclude that this delay impacted on the eventual outcome of the process. I acknowledge that it is wholly unsatisfactory that the process took the time that it did to complete and have concluded that the support provided to the claimant was inadequate. But I cannot conclude that, without these issues, an alternative outcome for the claimant may have resulted.

Would it be just and equitable to reduce any basic and/or compensatory award because under section 122(2) and/or 123(6) Employment Rights Act 1996?

174. I conclude that the claimant was culpable and blameworthy and that a reduction for contributory conduct should be made on a just and equitable basis, for the following reasons.

175. The claimant knew the authorisation processes that were in place for claiming TOIL and additional hours, since she processed these for other staff. However, she wilfully chose to ignore these, knowing that Mr O'Neill (a friend) would not challenge her claims and would authorise these for her. She had the capability to use the correct processes and to have in place a more robust system for recording her hours, but did not do so.

176. She made the decision to submit the 86 Hours Claim, in response to being informed that she could no longer accrue TOIL and/or take time off during term time. She did not have a discussion with Mrs Shaw about what to do about these accrued hours. She did not seek to provide Mrs Shaw with additional information.

177. Instead, she included as many hours as she could in her claim, carrying these forwards from previous years, despite having accepted that these should have been claimed by August 2018. Even having missed that deadline, she did not seek Mr O'Neill's sign off prior to him leaving the School in October 2018.

178. As per the respondent's submissions, the claimant had left herself in a position where the respondent could reasonably conclude that she was claiming for hours not actually worked, or that work had been done but lacked an accurate record / paper trail to enable it to be substantiated.

179. However, I do not accept the respondent's submission that a reduction of 100% would be appropriate. It is my decision to apply a 75% reduction.

180. I do not accept that this was entirely the claimant's own fault. There was clearly a culture of financial mismanagement and poor practices at the School prior to Mrs Shaw's tenure. The claimant had become accustomed to working in a way that would not be acceptable under the majority of Headteachers. The claimant had claimed payment for additional hours and taken TOIL previously. She had such claims authorised.

Non-payment of banked hours

181. It is my decision that a payment in respect of the hours forming part of the 86 Hours Claim is not properly payable to the claimant. The claimant accepted that of these hours, 50 needed to have been claimed prior to 31st August 2018 and aside from whether these hours were authorised or could be substantiated, they can only have been properly payable if claimed for on or before 31st August 2018. Of the remaining hours, taking into account my finding that the claimant was aware of the instruction that working additional hours required prior authorisation from the Headteacher (which had not been obtained) and also that there was no audit trail enabling these hours to be substantiated, these were also not properly payable.

182. On this basis, there cannot have been any deduction by the respondent and/or any breach of contract and the claimant's claim in respect of payment for 86 hours fails and is dismissed.

Remedy

183. I make an award to the claimant of compensation as follows.

184. The claimant is awarded a basic award in the amount of £1,889.11, calculated in accordance with section 119 ERA:-

(1.5 x 19 years' service x £256.15) + (1 x 1 years' service x £256.15)
= £7556.43

Less contributory conduct adjustment of 75% (£5,667.32)
= £1889.11

185. On account of my decision regarding the application of Polkey, the claimant's compensatory award is nil. I have not, therefore, reached a conclusion as to whether the claimant took reasonable steps in mitigation, nor is there any need to determine a period of loss for which the claimant should be compensated.

186. The recoupment regulations do not apply to this award.

Employment Judge Peck
19 July 2021

JUDGMENT SENT TO THE PARTIES ON
3 August 2021

FOR THE TRIBUNAL OFFICE

Notes

1. 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.