EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss J Wilson	**v**	**Ministry of Justice**

Heard at: Watford and by CVP **On**: 28, 29, 30 June, 1 July and 20 October 2021

Before: Employment Judge Manley

Appearances

For the Claimant: In person, assisted by her sister (only in attendance on 28 and 30 June 2021)
For the Respondent: Ms L Robinson, Counsel

JUDGMENT

1. The claimant was dismissed for a reason relating to her conduct.

2. That dismissal was not unfair and the claim is hereby dismissed.

REASONS

Introduction and issues

1 The claimant presented a tribunal claim in May 2016, after her dismissal by the respondent in December 2015, which was struck out for non-payment of fees. It was reinstated following the Supreme Court judgment on tribunal fees and the first preliminary hearing was held in July 2018. In summary, the stated reason for the claimant's dismissal was that there was misconduct because she had failed to inform her employer immediately of an arrest and of a criminal conviction. There have been three further preliminary hearings in this matter, some of which resulted in relatively lengthy summaries, parts of which are reproduced below.

2 A preliminary hearing was held before Employment Judge Warren in October 2018, where he dealt with some other matters and attempted to summarise the claimant's challenges to the dismissal. He provided a

short summary of the background of the dismissal and the claim. Having read the claimant's ET1, the response and an email of 13 July 2018 the claimant had sent entitled "further particulars", and in discussion with her, he recorded that believed these to be her concerns about the dismissal:-

"*Miss Wilson says that her dismissal was unfair for the following reasons, and I am setting out a precis of the many matters that she told me in a one and a half hour discussion with her, as to the basis of her case. This is what she says:*

28.1 She did disclose her arrest. It is just that she did so late. Previously she had disclosed late an earlier conviction under the Education Act 1992. That was in 2013 relating to her daughter's truanting. No action was taken. (Murder is of course, a far more serious matter.)

28.2 The disciplinary officer had said during the hearing that she was inclined to issue a final written warning.- The parenting order matter seems to have tipped the balance and Miss Wilson says the disciplinary officer simply did not understand what that was all about

28.3 The disciplinary officer failed to take into account mitigating circumstances, which would have included:

28.3.1 The distressing state that she was in at the time of, and immediately after, her arrest;

28.3.2 Her having no home to go back to immediately after her arrest;

28.3.3 The fact that she was off ill during a long period with stress and anxiety;

28.3.4 The fact that she had been bullied by her manager at that time;

28.3.5 That her manager was a gossip and she did not want to tell her about the arrest which is why she and her union decided to make the disclosure to somebody senior. (To avoid confusion, I should make the point that the manager that we are talking about here is a different person from that latterly, who the claimant says was supportive with regards the bad parenting order matter.)

28.4 The typed notes of the various meetings in the disciplinary process were not accurate.

28.5 The respondent brought her back to work from her suspension, which suggests they had not regarded the non-disclosure as gross misconduct.

28.6 It is unclear from the dismissal letter, in what way the respondent had thought that she had not been honest about her circumstances. She said she had been more than honest and she says she had not been evasive as was suggested.

28.7 The respondents did not properly investigate the Magistrate's Court fine and it did not put to her, or give her an opportunity to respond to, the manager's alleged evidence in that regard.

28.8. The disciplinary officer would not discuss the investigation report with her during the disciplinary hearing.

28.9 The respondents and the disciplinary officer were biased against her and wanted her dismissed, for two reasons:

28.9.1 Her absence record and

28.9.2 Because she had refused to participate in a conspiracy to undermine her manager when she returned to work.

28.10 The appeal was listed at a time that she had to drop off her youngest child at school. Obviously, given this history, something that is important, and the respondent refused to move the start time to a later time of the day. She says it is not that she did not attend the appeal hearing, she did attend, but she was late.

28.11 In the early stages of the disciplinary hearing, in answering a question from her union representative, the disciplinary officer had said that she regarded the arrest reporting matter as serious misconduct and that the HR advisor had intervened and said that it was gross misconduct. She argues that this suggests that the decision maker was the HR advisor and gives some indication of the view the disciplinary officer took of the matter.

28.12 Lastly, she says that the respondent's disciplinary officer had not taken into account her reassurance that there would be no more issues such as this as her daughter was now over 17 and she was no longer responsible for her".

3 The claimant told me that she does not necessarily agree with the whole of that precis but it does contain matters she raises about the dismissal and she did ask me to refer to that summary rather than her email of 13 July 2018 at the commencement of this hearing.

4 After that preliminary hearing, the claim was struck out for the claimant's failure to comply with an unless order but she was granted relief from sanction at a hearing in October 2020 before Employment Judge Lewis, who allowed the reinstatement of the claim to allow it to continue. He thought it wise to record what he had explained to the claimant about the tests for unfair dismissal as follows:

"6. The only claim which is currently before the tribunal is for unfair dismissal. The respondent says that the reason for dismissal was related to conduct. I became concerned during this hearing that the claimant has not understood what that involves, and I therefore summarised the steps in this case. The claimant said that she had not understood that to be the framework and I hope it is helpful that I record that the steps are the following. The questions for the tribunal which comes to hear this claim of unfair dismissal will be the following. I include questions which are agreed for the sake of completeness.

6.1 Was the claimant an employee of the respondent? This is agreed.

6.2 Did she at the time of dismissal have two years' service? This is agreed.

6.3 Was she dismissed within the legal meaning of a dismissal? This is agreed.

6.4 Did she enter into early conciliation and present her claim to the tribunal in time? These are agreed.

6.5 The tribunal must then decide what was the reason for the claimant's dismissal. In law this means the factual considerations which were in the mind of the person who made the decision to dismiss, Miss Lee. The reason given by Miss Lee, and relied on by the respondent now, is the claimant's failure to disclose that she had been involved in court proceedings and in a police matter. I took some time on this point with the claimant. I understand her to say three things:

6.5.1 First, she agrees that the above is indeed the reason for dismissal which has been put forward by Miss Lee and the respondent;

6.5.2 Secondly, that she does not agree that that was in fact the real or actual reason for her dismissal; and

6.5.3 Thirdly, that she did not, at this hearing (or at any time before) put forward her formulation of what she says was the real or actual reason for her dismissal, if it was not the reason given by Miss Lee.

6.6 If the tribunal accepts that the stated reason was the actual reason, was that a potentially fair reason? Conduct is one of the potentially fair reasons for dismissal set out in s.98(2) Employment Rights Act 1996 ("ERA").

6.7 Have the requirements of fairness been met? The burden of proof is neutral. The tribunal must be satisfied that the respondent genuinely believed that the claimant had committed the misconduct for which

she was dismissed; that it formed the belief on reasonable evidence, and following a reasonable investigation. A reasonable investigation does not need to enquire into every potential point, but should be an investigation which was within the range of reasonable responses to the task of investigating.

6.8 Fairness requires a fair procedure to have been followed. The tribunal will look to see if the claimant had access to the evidence against her, was given enough fair notification of meetings, had the right to have someone with her at meetings, the opportunity to give her side of the story, and had a right of appeal. The tribunal may consider the arrangements made for a claimant with a long stress-related absence before a dismissal meeting.

6.9 Was dismissal within the range of reasonable responses? The question is not, would the tribunal have made the decision to dismiss, but was dismissal a decision which in all the circumstances was reasonably available to the decision maker.

6.10 If the dismissal was unfair, did the claimant in any way bring the dismissal on herself? If so, the tribunal must state a percentage by which she did so, and reduce any compensation payable by the same percentage. In certain cases, the percentage may go up to 100%, which means that an unfairly dismissed employee may receive no compensation.

6.11 If the procedure followed was not fair, would a fair procedure have made a difference to the outcome of the disciplinary procedure? This is known as the Polkey question, and the tribunal must look into what might have happened, but did not.

6.12 If the dismissal was unfair, to which remedy is the claimant entitled? An unfairly dismissed claimant has the right to ask to be re-employed by the respondent, or to be awarded money compensation.

7. The claimant told me that she understood that she must prove that her dismissal was unfair. That is wrong. It is for the respondent to prove each of the above steps except for (a) 6.7 above, for which the burden of proof is neutral; and (b) at the 6.12 stage, it is for the claimant to prove her entitlement to remedy. The fairness of a dismissal is assessed at the time when the dismissal took place. The assessment will depend to a great extent on the information held by the dismissing officer at the time of the dismissal. The date of dismissal in this case was 23 December 2015, and the tribunal may not be greatly assisted by information which came to light afterwards"

8. A further preliminary hearing was held in March 2021 because the strict timetable Employment Judge Lewis had imposed when agreeing to grant the claimant relief from sanction had not been followed. The respondent had applied for strike out of the claim but that was refused.

9. Between that hearing and this merits hearing, there has been further correspondence and some tribunal intervention which it is not necessary to go into at this point. There have been some difficulties agreeing a bundle of documents but I am satisfied I have all relevant documents before me. There are three bundles:- a hearing bundle, a procedural bundle and one from the claimant. I have looked at the documents but only need to refer to those that are relevant which are a very small proportion of those in the bundles.

10. The matter was listed for four days and it was expected to be largely in person. In the event, it was listed last week to be part by CVP, and part with the claimant attending at the tribunal. The claimant wrote shortly before the hearing, stating that she believed she might not get a fair hearing because she thought it would be in person and she and the tribunal were informed on 17 June 2021 that the dismissing officer Ms Lee, who has now retired, was too ill to give evidence, even remotely, as she had been diagnosed with a terminal illness. There was a further email sent by the claimant on the morning of the hearing which I did not see until after we had started hearing the first witness's evidence.

This Hearing

11. On the first morning of this hearing, the claimant attended the tribunal hearing centre, along with her sister, but the employment judge, the respondent's representative and witnesses were all at remote locations. The claimant expressed her concern about that arrangement but it was explained that it had been agreed the previous week. The claimant had believed the hearing would be in person (although she also mentioned that she had been told it would be "hybrid") and felt there was a disadvantage for her for the witnesses to not be present in the room. I informed the claimant that she (the judge) could attend the tribunal hearing centre the next day, if necessary, but also said that the claimant could choose whether to stay at the tribunal hearing centre or continue from home or another remote location. Matters could not be delayed by insisting people attend the tribunal hearing centre without any reason for them to do so.

12. The three bundles of documents were sent to me electronically and I had already read the three witness statements from the respondent, the claim form and many of the preliminary hearings' summaries and judgments. I indicated that I was ready to hear cross examination of witnesses. There were witness statements from three witnesses for the respondent, Ms Lee, the dismissing officer; Mr Evans the investigation officer and Ms Langan, the appeal officer.

13. There was no witness statement from the claimant because of an earlier direction that her evidence would be as in her claim form and further particulars email. I decided to look at all these documents, hear what the claimant asked the witnesses in cross examination, what she

said in her own evidence when cross examined and submissions in order to decide this matter.

14. Having started cross examination of the first witness (Mr Evans) and, after break for lunch, the claimant asked me to confirm I had read her email sent that morning. I confirmed that I had but was still unsure what, if any, application was being made. The claimant had raised concerns about whether there could be a fair trial, issues about documents and Ms Lee not giving evidence. The claimant then made an application to postpone the hearing, primarily on the grounds that she had prepared cross examination of Ms Lee, arguably the most important witness as she was the dismissing officer, who was now not present. Ms Robinson replied on behalf of the respondent and objected strongly to the suggestion of a postponement. Regrettably, she said Ms Lee would not be able to give evidence in the future and the dismissal having taken place well over five years earlier, the other witnesses' recollections would be likely to fade even more. If a postponement was granted, Ms Robinson stated she would have to make an application for the claim to be struck out as a fair trial would no longer be possible. She suggested the claimant could be allowed time to consider what questions she can ask of the two remaining witnesses. After further discussion with the claimant, it was agreed that she be allowed the rest of the first day and all of the second day to make preparations and we would resume on the third day and continue cross examination of the respondent's witnesses and hear the claimant's evidence.

15. I advised the claimant that she could ask the witnesses who would be present the questions she had prepared for Ms Lee and they may or may not be able to answer. Alternatively, she could inform me of those questions and I would look at the witness statements, cross examination and documents to see if the answers were there or she could deal with this potential gap in the evidence in her submissions.

16. We met as arranged on the third day at 10am by CVP, with the claimant running a few minutes late. I was informed an email had been sent by the claimant to the tribunal at 9.35am. I asked for it to be forwarded to me, I read it and we met again at 10.15 when I heard the respondent's submissions on applications made in that email. It is relatively lengthy but the claimant usefully summarised her applications as being i) an application to adjourn, ii) an application for relief from sanctions imposed by Employment Judge Lewis, iii) an order for specific documents (from SAR requests) and iv) an order for medical evidence about Ms Lee being unable to give evidence.

17. Ms Robinson objected to all the applications. She did not repeat what she had said on Monday about a postponement. She referred me to documents in the procedural bundle which set out the reasons Employment Judge Lewis gave for the directions he made when attempting to progress this matter. She says the claimant has had all documents for some time and there are no more relevant ones. She said the respondent had asked for medical evidence from Ms Lee but, given

that she had retired and was unwell and needs to consent, they are not able to force the issue. The respondent has to make do without Ms Lee being cross examined and the fact that I will put the appropriate weight on her evidence as it is untested by cross examination.

18. I asked the claimant some short questions. I asked what documents she believed were still missing and which sanction imposed by Employment Judge Lewis she was concerned about. She said she needed copies of her pay records as there had been discussion at the disciplinary hearing (which is not recorded in the notes) about her pay and hours. She said the sanctions she was concerned about were the prevention of her asking for more documents and not being allowed to prepare a witness statement.

19. I refused the claimant's applications. It is not in the interests of justice to postpone the hearing, for reasons provided on the first day of the hearing, particularly as the claimant has been allowed significant time to prepare for the hearing without Ms Lee. This case must be heard and decided.

20. The sanctions imposed by Employment Judge Lewis were made in the context of case management, in part as an alternative to striking the claimant's case out, and in an attempt to progress the case to a fair hearing. I am satisfied, as was Employment Judge Lewis, that all relevant documents (and many that are not) are in the bundles. The claimant's pay records played no part in the decision to dismiss. I am also satisfied that the claimant has provided considerable information about her challenges to the dismissal, so that what she wrote in the claim form, in her further particulars, in her evidence and in submissions, will provide me with her case in full. I cannot order medical evidence about a witness' inability to attend the hearing without her consent. Ms Lee is not attending and the claimant has been told, a number of times, that she can ask other witnesses questions, provide them to me or include her comments on Ms Lee's witness statement in submissions. The decision was that the hearing must proceed, it being well over 5 years since the claimant's dismissal.

21. The claimant continued with her cross examination of Mr Evans, the first witness, but, after about an hour, she became unwell, stating she had chest pains. We adjourned for early lunch at 11.50, to return at 1pm. Ms Baker informed us that she had taken the claimant to Urgent Care and we agreed to meet again at 2pm. We were then informed that the claimant had had an ECG and been told to go home and rest. It is expected this will be put into a written report. It was agreed to start again the next day (Thursday 1 July) at 10am; to complete Mr Evans' evidence by 11.30 and start Ms Langan's evidence at 2.30pm.

22. On Thursday 1 July, there was no attendance by the claimant. She had sent an email at 8.23 am to say she would not be able to attend. She stated that a consultant at A&E had diagnosed an "*extreme physical stress response*" as she had elevated blood pressure. She stated that

she expected to be asked for medical evidence and that she had a doctor's appointment. It was agreed by the respondent that the hearing could not proceed and it was adjourned to 20 and 21 October 2021. I said I intended to make orders for medical evidence to be provided and set out, in a separate order, details of a timetable for the October hearing to ensure it was completed in time. These orders were sent to the claimant on 1 July 2021.

23. The claimant sent an email on 29 July 2021 (some four weeks after the orders had been sent to her) with a copy of a medical report and stated she could not attend on 20 and 21 October. I did not see that email until 12 October when I caused a letter to be sent to say that, no reason having been given for the claimant's unavailability on 20 and 21 October, the matter remained listed. I was informed that the respondent's representatives had written to the claimant on at least two occasions to ask for further medical evidence but none has been forthcoming and they received no reply.

24. There was no further communication with the claimant that I was aware of before the hearing commenced by CVP at 10am on 20 October. I suggested, and the respondent's representative agreed, that we adjourn for the hearing clerk to make enquiries of the claimant by email as the tribunal has no telephone number for her. There was no reply to that email but, it seems, separately, the claimant had emailed at 9.45am. I did not see that email until 12.15 after I had finished the hearing, which re-commenced at 11am. At 11am I asked some questions of Mr Evans and then of Ms Langan. The respondent's representative then made submissions and I told them I would give judgment at 4pm.

25. Whilst I was deliberating the email from the claimant was forwarded to me. In that email the claimant gave reasons for her non-attendance at the hearing, including a problem with her son at school, anxiety and stress and cold/flu/covid symptoms. She made no direct application for a postponement and sent no medical evidence. As the respondent was no longer present, it was not able to comment. As I had started deliberating and all the evidence and submissions had been heard, I continued my deliberations.

Facts

26. To a large extent, there is little dispute about the facts. What happened on what dates is clear from the documents. The claimant has worked as a civil servant Administrative Officer, Band E for the respondent, part of HMCTS, based at the Royal Courts of Justice (RCJ) for many years. Her employment began in September 1986. The claimant has included in her separate bundle of documents a great many documents about matters which occurred earlier in her employment but I could not see how most of them are relevant. They relate to matters of alleged lateness, attendance and sick leave and actions had been taken and were being taken separately during 2015 about that.

27. The claimant had no recorded conduct matters at the time of her dismissal. The respondent is, of course, a substantial employer, with detailed policies and procedures. The policy the claimant was alleged to have breached was 3.11 E of the Conduct Policy which concerned bringing the employer into disrepute. This provides that "*you will let your line manager know immediately if you are arrested, imprisoned, charged or convicted of any criminal offence".*

28. The claimant was on sick leave from 23 January 2015. On or around 30 January 2015 she and two of her children were arrested on suspicion of murder and placed on police bail. The evidence shows that the claimant was informed by an Enfield Council social worker on 17 February 2015 (doc C587) that the claimant was "*duty bound*" to inform her employer about children's service involvement with the family.

29. On 23 March 2015 the claimant was told by the police that no further action would be taken against her after the arrest but her children remained on police bail.

30. She attended a case conference with her line manager Ms Onansanya on 25 March 2015 to discuss her continuing absence (p49). The notes show a lengthy meeting. The claimant did not inform her manager about the arrest. She said there had been a "*series of events*" which were outside her control and that there was a child protection plan for her two younger children but she had to be careful about what she said. An OH referral was agreed and there was a lengthy discussion about the claimant's hours of work when she returned.

31. The documents show that in May and June 2015, the claimant discussed her situation with the trade union. In an email from the trade union representative of 29 June 2015 it was made clear that the claimant needed to inform her employer of the arrest. (C bundle 534-539)

32. On 11 May 2015 the claimant was summonsed to appear at the Magistrates Court for an alleged breach of a Parenting Order (p108). There were further meetings on 17 July and 7 August with the claimant and officers of the respondent about her sickness absence and her appeals against warnings given about that.

33. By letter dated 28 August 2015 (p56), hand delivered on 8 September, the claimant wrote to the respondent. The relevant part of the letter says:

"On 25 March I attended a case conference with Oludotun Onansanya and shortly thereafter advised her that there was a matter outstanding that may impact on my security clearance. I informed her that I was unsure as to what I was permitted to discuss as I had been advised that I should not at that time disclose what it was – but would do so when I had been cleared to.

On the 30th January 2015 myself and 2 of my children were arrested along with several others on suspicion of murder. On the 31st January I was questioned by the police represented by Shepherd Harris & Co. I asked whether I had to inform my employer tat I had been arrested and what I was allowed to disclose. Detective Clarke along with the other detective who interviewed me said I did not need to inform my employer as I had not been charged with an offence. I queried this with them again in the custody suite in front of several other officers in view of my occupation which they were aware of. They were adamant that I did not need to inform my employer.

……...

On the 23rd March I was advised that no further action is being taken against me although my children still remain on police bail although they have not been charged with any offence.

I sought the advice of my solicitor Mark Davies about whether I had to advise my employer about the arrest and he advised me that as I had not been charged with any offence it was not necessary for me to do so".

34. The claimant went on to say that she had advice from an employment specialist at the solicitor's firm and that the trade union had told her to advise her managers "*as soon as I was in a position to know when I was likely to return to work*".

35. The claimant was due back from sick leave on 16 September 2015. On the same day Ms Lee suspended the claimant on full pay, the reasons being *"breach of conduct policy 3.11.E and Bringing MoJ/HMCTS into serious disrepute*". She completed the standard Suspension Confirmation Form (p68). Around the same time, perhaps on 17 September, she asked Mr Evans (Operations Manager) to carry out an investigation. The claimant was informed of this by letter of 17 September.

36. Mr Evans met with the claimant and her trade union representative on 21 October and the notes of that interview were before me. The claimant and her trade union representative repeated the information in her letter of August, namely that she had been advised by solicitors and police she didn't need to inform her employers but then her trade union had said she should. That the claimant was on sick leave was also put forward as an explanation. More information was provided about what happened around the arrest.

37. Mr Evans prepared an investigation report, dated 9 November, which concluded that the claimant had a case to answer. He believed that the claimant knew of the conduct policy; that it was not a good reason that she was away from work on sick leave; that the purported advice from police and solicitors did not seem "*plausible*"; the claimant should have

consulted the respondent's HR Shared Services confidentially and she had been advised by the union of clause 3.11 E. in May or June.

38. On 11 November 2015 the claimant was convicted of breach of a parenting order made on 10 November 2014 and fined. This followed a summons dated 25 March 2015. A document in the claimant's bundle (pC588) shows that she wrote to the court about this matter, stating that she did not want a criminal record. This shows that she knew then that such a breach would amount to a criminal conviction. The respondent was unaware of this conviction until the disciplinary hearing in December.

39. Ms Lee informed the claimant that there was to be disciplinary action but said suspension was lifted on 12 November 2015. Ms Lee later said the decision to lift the suspension was a bad judgment call but she needed help with the backlog and it was not an indication of any final decision she might take. At this point she was unaware of the criminal conviction for breach of the parenting order. Ms Lee also said that, at this time, she was not minded to consider dismissal but that she changed her mind at and after the disciplinary hearing.

40. There were various attempts to arrange the disciplinary hearing for reasons related to the claimant needing more time and trying to get trade union representation. In the meantime, Ms Lee asked Mr Evans to carry out more investigation into what the claimant had said about advice from the police on this matter. Ms Lee was told by the Met Police public access office that there was no set policy but "*if asked they would advise the individual to inform their employer*" (p129). She also spoke to Ms Onansanya who said the claimant had not mentioned anything about security clearance in their March meeting.

41. In the meantime, the claimant had appealed the Parenting Order conviction to the Crown Court.

42. The disciplinary hearing eventually took place on 17 December 2015. I have seen the notes of that hearing which were taken by Mr Evans (136-141). The claimant was accompanied by the same trade union representative as at the investigation meeting. The claimant was told that this was considered to be gross misconduct and there was discussion about that and the reasons for the claimant not informing the respondent immediately of her arrest. It is recorded that Ms Lee asked the claimant if there was anything else she wished to disclose. At this point the claimant informed Ms Lee that she was subject to a parenting order. Ms Lee asked if it was a criminal offence and the claimant is recorded as stating that she was unable to provide information (although it was clear she did know). She said she had raised the issue at the meeting with her line manager and Ms Lee said she would speak to Ms Onansanya again. She did so in a break with Ms Onansanya stating that the claimant had only said social services were involved but there was no mention of police or court proceedings.

43. On 18 December the claimant sent the documentation about the breach of the parenting order to Ms Lee. Ms Lee checked and discovered that breach of a parenting order was a criminal offence.

44. On 22 December 2015 a letter was sent to the claimant which informed her that she was dismissed for gross misconduct. It is a detailed letter (p157-159), setting out the salient facts, many of which are summarised above. Ms Lee referred to the number of times the claimant had had an opportunity to inform the respondent of the arrest and of the partial information she supplied about social services involvement with her children without mentioning the parenting order and any alleged breach. Ms Lee said she was satisfied that the claimant knew about section 3.11 E of the Conduct Policy and had received advice from the trade union to inform the respondent in May 2015.

45. Ms Lee said this about the decision:

"In coming to a final decision, I had to consider whether dismissal or a final written warning for 3 years was appropriate. Upon consideration of al the facts above, including your mitigation in relation to your ill health, I have found that the late disclosure of your arrest, your lack of honesty about your personal circumstances, which has the potential to cause an embarrassment to MOJ/HMCTS and the subsequent non-disclosure of proceedings in the Magistrates Court has led to an irretrievable breakdown in the relationship of trust and confidence between HMCTS and yourself.

Your arrest could have impacted negatively on the reputation of HMCTS and I am not satisfied that your conduct will reach the required standard going forward. I have decided to dismiss you forthwith".

46. The claimant appealed the decision on 18 January 2016. Ms Langan was assigned to hear the appeal. Like the claimant, Ms Langan has very long service with the respondent and its predecessors, starting her employment in 1978. She is a Senior Operations Manager in the RCJ and has extensive experience of dealing with disciplinary matters. The claimant's file was passed to Ms Langan on 22 December and she read all the correspondence and records of interviews, investigation report and so on. She saw the claimant's appeal letter (p212) which gave grounds for appeal including that mitigation wasn't considered; that the department was not brought into disrepute; that the investigation report was not objective and impartial; that Ms Onansanya was aware of the parenting order and that, at the claimant's level of Band E she was not fully aware of the processes.

47. There were then considerable difficulties setting a date for the appeal hearing, with dates being suggested and a lack of timely replies by the claimant. An appeal hearing was arranged for 17 February 2016 at 11 am and the claimant then said she couldn't attend. In the meantime, Ms Langan asked some questions of Ms Lee. In particular she was concerned to know why Ms Lee had lifted the suspension and how she

had contacted the police about any policy about advice on informing employers.

48. An appeal hearing was then re-scheduled for 23 February at 11am which the claimant had indicated would be convenient. The claimant then said she could not attend but agreed to a new date of 26 February 2016 at 9.30am. No mention was made then of any difficulties with the time of start of the meeting.

49. Ms Langan, a notetaker and the same trade union representative as had been in previous meetings were all present at 9.30 but the claimant was not there. Ms Langan asked the trade union representative to call the claimant around 9.40 and he said the claimant said she should be there in 10 minutes. She was still not there by 10.15 and made no contact. Ms Langan decided to close the meeting, informing the trade union representative who agreed, stating that he had had no contact with the claimant before the meeting. Ms Langan received a phone call at 10.50 to say the claimant had arrived and asked to see her. The claimant indicated she had papers in a small suitcase and was informed that Ms Langan would decide the appeal on the documents she already had and any further enquiries she might need to make. At some point in these proceedings the claimant has said that the time was inconvenient because she was dropping her son off at school and there was a refusal to change it. I do not accept that suggestion. Ms Langan gave evidence that there was no request to change the time and that the claimant had agreed to the date and time.

50. Ms Langan sent a draft of her outcome letter that day to HR and, on 1 March 2016, a long and detailed letter was sent to the claimant, informing her that the appeal was unsuccessful. Ms Langan dealt with the claimant's grounds for appeal individually, providing reasons for her findings on each one. She also informed the claimant that she also needed to consider whether there was new evidence which could justify a change in the decision to dismiss; whether the decision was unfair because policy had not been applied correctly. She went on to say that there was no new evidence or any evidence that policy had not been applied correctly. She concluded:

"*In the absence of any further mitigation I am satisfied that by deliberating failing to immediately inform your employer of your arrest on 30 January 2015 on suspicion of murder that you have failed to behave in accordance with the standards of expectations of MoJ/HMCTS employees. As a result of your late disclosure of your arrest, I find this does constitute gross misconduct by potentially bringing the MoJ into serious disrepute"*

51. Ms Langan gave her explanation for her decision to make the decision in the absence of the claimant.

Law and submissions

52. The legal tests are as set out in Employment Judge Lewis' summary at paragraph 4 above and are those must be applied in an unfair dismissal claim. The relevant statutory provisions are set out in s98 Employment Rights Act 1996 (ERA). Section 98 (1) and (2) contain the potentially fair reasons for dismissal including "*conduct*". The burden of showing a potentially fair reason rests on the respondent.

53. As to the fairness or otherwise of the dismissal, if I am satisfied that there was such a potentially fair reason, Section 98 (4) states;-

> *"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-*
>
> *a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
> *b) shall be determined in accordance with equity and the substantial merits of the case*"

54. I am also guided in my deliberations, because this is said to be a conduct dismissal, by the leading case of *British Home Stores v Burchell [1978] ICR 303* which sets out the issues which I should consider including whether the respondent had a genuine belief in the conduct complained of which was founded on a reasonable investigation and whether a fair process was followed. The investigation should be one which is fair and reasonable and the band of reasonable responses test applies to that part of the process as well as to the overall consideration of the fairness of the sanction (*Sainsburys Supermarkets Limited v Hitt [2003] IRLR 23*)

55. I must also not substitute my view for that of the respondent, a point emphasised in *Iceland Frozen Foods v Jones [1982] IRLR 439* (and re-affirmed in *Foley v Post Office and HSBC Bank Ltd v Madden [2000] ICR 1283*). Rather, I must consider whether the dismissal fell within a range of reasonable responses.

56. The respondent's representative, in submissions, reminded me of the many opportunities the claimant had to inform the respondent of the arrest and of the conviction for breach of a parenting order. The respondent submits that the dismissal was for the potentially fair reason of conduct and that there was a breach of trust and confidence. The respondent further submits that the investigation was manifestly fair, that there was a genuine and honest belief in the conduct, as shown by the documents and all oral evidence. It is submitted that dismissal does not fall outside the range of reasonable responses.

57. The claimant was not present to make any submissions but I assumed she would have made the same points she made in her letter

of appeal. She refers to mitigating factors and to the unfairness of the decision to dismiss. I also looked at what is recorded in paragraph 4 under 6.5.1 – 6.5.3 from the preliminary hearing with Employment Judge Lewis about disputing the reason for dismissal as well as those recorded under paragraph 2 under 28.1 – 28.12 from the preliminary hearing with Employment Judge Warren as to the basis of her case.

Conclusions

58. I consider the first question as outlined above, that is whether the respondent has shown a potentially fair reason for the dismissal. As recorded at paragraph 2 (28.9.1 and 28.9.2) the claimant there stated that she believed her absence record and her refusal to participate in a conspiracy were the reasons, coupled with bias against her. I have found no evidence to support those assertions and there is no reference in the many documents I have been taken to.

59. The claimant was asked again about this at the later preliminary hearing and her reply is as recorded at paragraph 4 (6.5.1 - 6.5.3), where she put forward no alternative reason. The claimant agrees that the reason stated by the respondent was conduct but suggests that was not the real reason. She has said nothing about that in this hearing or in any documents that I can see so I cannot be sure what she means by that. There is no evidence that there was any other reason than the matter with which Ms Lee was concerned. Indeed, given that Ms Lee had lifted the claimant's suspension because of workload concerns only three months earlier, it seems unlikely that there was any other reason. On all the evidence before me, the respondent has shown that the reason for dismissal was the claimant's conduct.

60. I consider next the question of whether the respondent had a genuine belief in the misconduct founded on a reasonable investigation. There is little doubt about the facts here. The section in the conduct policy is clear. The duty is to inform the respondent immediately of arrest, imprisonment, charge or conviction. That did not happen. The investigation considered that and the reasons provided by the claimant and I find it was a reasonable investigation in all the circumstances.

61. As to whether a fair procedure was adopted by the respondent, there seems little doubt that the disciplinary procedure was followed. There was an investigation with the claimant being given an opportunity to explain her conduct. There was then an investigation report. A disciplinary hearing was arranged with sufficient time allowed for the claimant to provide any further explanations and Ms Lee explored other aspects as brought up by the claimant. The claimant was represented at all hearings. Notes were taken and shared with the claimant so that all information was available to her.

62. I have considered the fairness of the appeal, given that the decision was taken without the claimant having the opportunity to address the appeal officer. The claimant has raised an issue about the time of the appeal

being inconvenient because of the need to drop her son at school. I do not accept that suggestion and it was clear it had not been communicated to the respondent or indeed the claimant's own trade union representative. Ms Langan was entitled to consider the claimant's appeal letter and all other relevant information when the claimant failed to attend on time. The claimant has not been able to say whether there was something she would have said to Ms Langan that had not already been communicated in her appeal and at the other hearings she did attend. Considering the fairness of the dismissal process in the round, I find that a fair procedure was followed.

63. Finally, I must consider whether dismissal fell outside the range of reasonable responses. I must consider this bearing in mind the respondent's size and administrative resources which I accept are extensive. I accept that the respondent believed that the claimant's conduct was serious and a clear breach of the conduct policy which is unequivocal. A reasonable employer would be entitled to consider that the claimant's explanations for her late disclosure of the arrest and then of a criminal conviction relating to another matter were so serious as to amount to gross misconduct. The respondent considered the mitigation provided by the claimant for her actions. It is not for me to substitute my view for that of the respondent, as long as it has acted reasonably. In all the circumstances of this case, I cannot say that the decision to dismiss fell outside the range of reasonable responses.

64. The dismissal was not unfair. The claimant's claim is dismissed.

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Employment Judge Manley

Date: 21 October 2021

Sent to the parties on:
17 November 2021

For the Tribunal Office