EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112051/2019
Held in Glasgow on 3rd and 4th December 2020
Employment Judge M Kearns (sitting alone)

Ms B Yasmin	**Claimant** **Represented by:** **Ms C Thomas** **Solicitor**
Dr N Irshad **Practising as Shields Medical Practice**	**Respondent** **Represented by:** **Mr D Maxwell** **of Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal was that:
(1) the claimant was unfairly dismissed by the respondent but she is not entitled to compensation;
(2) the claim for notice pay is dismissed.

REASONS

1 . The claimant, who is aged 48, was employed by the respondent as a receptionist from 3 January 2004 until her resignation with notice took effect on 31 May 2019. On 21 October 2019, having complied with the early conciliation requirements, she presented an application to the Employment Tribunal in which she claimed unfair dismissal and notice pay. The respondent resisted the claims and maintained that the claimant had resigned.

Evidence

2. The parties lodged a joint bundle of documents ("J") and referred to them by page number. The claimant gave evidence on her own behalf. The respondent gave evidence on her own behalf and called her practice manager, Mrs Mooney.

Issues

3. The issues for the Tribunal were:-

(1) Whether the claimant was dismissed;
(2) If so, whether the dismissal was unfair;
(3) If it was unfair what financial award/compensation, if any is due to the claimant taking account of:
a. the percentage or other chance that a fair procedure would have reached the same result;
b. whether the claimant contributed to her own dismissal to any extent;
c. whether the claimant took appropriate steps to mitigate her loss;
(4) Whether the claimant is owed notice pay.

Findings In Fact

4. The following material facts were admitted or found to be proved

5. The respondent is a General Practitioner who practises single-handed as Shields Medical Practice. She has nine employees. The respondent took over the NHS contract for the practice on 1 December 201 6 in partnership with two other GPs. However, the other GP partners left the practice during 201 7 and the partnership was dissolved with effect from 1 January 2018. The respondent has been a sole practitioner from that date. The claimant was employed by the respondent and her predecessors as a receptionist from 3 January 2004 until 31 May 2019. She generally worked 24 hours per week in the mornings.

6. Until around April 201 8 the practice manager was Helen Winton. However, she left and on 1 May 2018 Mrs Mooney took over as the respondent's practice manager. Mrs Mooney worked part time hours but tried to vary her shifts so she would work alongside all staff at some point each week.

7. In April 2018, the claimant was dismissed by the respondent after admitting to an act of gross misconduct. On appeal, the claimant said that she was a single mother with two children, had admitted what she had done and had not made excuses and she asked for another chance. The respondent decided that although the original decision to dismiss the claimant had been the correct one, she would give her one last opportunity to prove herself. The respondent rescinded the dismissal and issued the claimant with a final written warning for 1 2 months with effect from 4 May 2018. At the same time, she made it clear to the claimant in the appeal outcome letter dated 4 May 2018 (J38) that *"Any future infraction of the practice's policies will result in your dismissal. "*

8. The respondent uses personal computers ("PC's) in the surgery. There is a generic windows password known to and used by members of staff to open up the PCs. Thereafter, each member of staff with access to the EMIS NHS system logs into the system with their own personal username and password. Different staff have different levels of access to the system according to the level required to carry out their role. The claimant often started up the PCs when she came in in the morning on behalf of other members of staff. However, for logging into the EMIS NHS system, she had her own personal username and password. The respondent has a rule that every time a PC is left unattended the user must either lock it or log out of it.

9. At a staff meeting which the claimant attended along with others on 22 May 201 8 (J40) Mrs Mooney explained to those present that due to stricter data privacy laws coming into force at that time, staff would no longer be allowed to have mobile phones in their possession at the front desk. Instead all mobile phones would now have to be put in the cupboard behind reception or the drawer units in the back office to protect patient privacy.

1 0. On 25 June 201 8 Mrs Mooney had a one to one meeting with the claimant. A minute was kept (J43). At that meeting Mrs Mooney reiterated to the claimant that she was not allowed her mobile phone at the front desk and that this would be a GDPR breach which would be considered to be misconduct. Mrs Mooney also said that work (landline) telephones were not for personal use unless agreed with a manager.

11. At some point in the summer of 201 8 Mrs Mooney issued the reception staff with a ready reckoner to use when patients ordered a repeat prescription and trained them in how to use it. The ready reckoner was a checking system to make sure patients were not over-ordering medication.

12. On 29 August 2018 Mrs Mooney called the claimant into her room to discuss several issues. A note of the meeting was kept on the claimant's file (J46). One problem they discussed was that the claimant had scanned incoming mail items into the Docman system that should not have been scanned to it, thereby wasting the respondent's time. Mrs Mooney told the claimant that this was down to a lack of care and attention when scanning. The claimant said that she often had not opened the mail herself. Mrs Mooney said that this was not an excuse as she should be checking mail before scanning it onto the system. The claimant told Mrs Mooney that she left her PC unlocked when she went on a break, which meant that it might not have been her who had scanned the items on. Mrs Mooney explained to the claimant that this was a breach of the Data Protection Act and that she must lock her PC or logout when leaving it unattended from now on.

13. NHS GP practices are supported by a prescribing support pharmacist, whose role includes the monitoring and auditing of prescriptions. In or around late December 201 8 the respondent's prescribing support pharmacist Mr Rizwan Din contacted the respondent to say that he was concerned that the practice had been over prescribing Diazepam 5mg, which has a street value as a drug of abuse. Mrs Mooney ran an audit trail in or about early January 2019 and made a hand-written note of the results. She later used her hand-written note to prepare a 'significant event note' (J 14). Mrs Mooney's investigation showed that on a number of occasions between June and December 2018, duplicate and additional prescriptions for Diazepam 5mg had been ordered on behalf of a particular housebound patient from the claimant's computer when the claimant was signed into it. In all, Mrs Mooney discovered that 48 extra weeks' supply of the drugs had been ordered over a six-month period.

1 4. The respondent was very concerned in case the patient had been given too much diazepam and on 7 January 201 9 she contacted the patient and established from her that she had only received the amount of the drug she needed and that she had not ordered or received the additional drugs.

15. Mrs Mooney spoke again to Mr Din, who made some further enquiries. After checking the matter, he told her that 'alarm bells were ringing' because the patient had continued to have her prescriptions delivered from her usual pharmacy, but the duplicate prescriptions had been dispensed at a different pharmacy to an

unidentified person.

16. On 18 January 2019 Mrs Mooney emailed the Health Board's Clinical Director, Richard Groden seeking his advice (J56). On 21 January Mr Groden responded requesting her confirmation that she was happy to involve the Lead Pharmacist for Community Care. Thereafter, Mrs Mooney corresponded with the Lead Pharmacist between 29 January and 28 February 201 9 (J48 - 56) and he made a number of further investigations. In or about early March 2019 the matter was passed to NHS Counter-Fraud. On 1 March 2019 Mrs Mooney was requested not to initiate disciplinary action until Counter-Fraud had given their opinion.

1 7. The claimant had arranged to take annual leave at the end of January 201 9 to go to Pakistan and visit relatives. In the event, she decided to put the holiday back by two or three weeks and she left in or around mid-February for a three week break. The claimant returned from Pakistan on or around 10 March 2019.

1 8. On or about 20 March 2019 at a meeting with the respondent, NHS Counter Fraud confirmed that the respondent could progress the claimant's disciplinary case.

19. Shortly thereafter, Mrs Mooney asked the claimant to come into her room and sit down. She showed her the list of prescriptions ordered under her (the claimant's) computer login (J14) and asked her whether she had printed them out. The claimant replied: *"If its repeats it could have been me, but it might not have been me because my computer gets left on and it also gets logged in for other users. "* She admitted not using the ready reckoner to check the dates when the patient had last ordered the medication. She said that she would sometimes leave her desk and not lock her PC and that 'anyone* could have ordered the duplicate prescriptions whilst she was away from her desk. The claimant said that she was not intercepting the prescriptions and taking them to the pharmacy for her own benefit. She stated that she did not know if the driver was taking the extra scripts. The claimant said that the patient sometimes ordered by phone and sometimes from the pharmacy directly. Mrs Mooney kept a handwritten note of the interview, which she later used to add to the 'significant event report' (J 14). (In the report the interview was erroneously dated 8 January 2019.)

20. After she had spoken to the claimant, Mrs Mooney did a check to see which members of staff had been on shift with the claimant on the dates when the additional prescriptions had been ordered from her computer while she was logged in. She found that there had been different people in on each of the days and that there was no pattern showing the same member or members of staff on shift with the claimant on the dates when duplicate or additional prescriptions had been created. Mrs Mooney reported back to the respondent and it was agreed to progress the disciplinary case against her. Mrs Mooney advised the respondent that she would be unable to chair the disciplinary hearing herself because she had conducted the investigation. The respondent decided to bring in Linda Edgar, a former practice manager at Shields Medical Practice as an independent third party to conduct the disciplinary hearing.

21 . On Wednesday 27 March 201 9 Mrs Mooney came into the surgery before the end of the claimant's shift in order to speak to her. She called the claimant into her room and told her that she would be receiving a letter that Friday inviting her to a disciplinary meeting the following week. The claimant asked Mrs Mooney what the likely outcome of the disciplinary meeting would be. Mrs Mooney told her that because the prescriptions had been printed out under the claimant's username they wanted her to leave, but as she had children they would give her a few weeks to

look for another job. Otherwise they would have dismissed her that day. Mrs Mooney told her: *"You're on a final written warning. I could dismiss you today, but we are giving you the opportunity to resign. If you resign you will have four to six weeks to look for another job. If you decide not to resign, we can dismiss you on the day of the meeting or later. Let me know if you want to give in your resignation. "* The claimant asked Mrs Mooney: *"Why did you not tell me before I went on holiday? I even asked you am I going to be dismissed? I might not have gone on holiday. I might have paid my creditors instead."* Mrs Mooney replied: *"We wanted you to enjoy your holidays and decided we would speak to you when you got back. "*

22. The claimant asked Mrs Mooney, if she was dismissed, what the notice period would be. Mrs Mooney said that it was unlikely there would be any notice period. Mrs Mooney asked the claimant if she wanted to resign. The claimant said: *"Give me two or three days to decide what I want to do -do I want to resign or do I want to call a meeting. "* Mrs Mooney told the claimant to have a serious think about it over the next few days and to let her know that Friday what she wanted to do.

23. On Friday 29 March when Mrs Mooney came into work, the claimant came to see her and asked her what would happen in the disciplinary meeting if she went ahead with it. Would she be dismissed at the meeting or given a couple of weeks' notice? Mrs Mooney said that that would be decided then, but if she resigned, she would have a definite amount of time. The claimant said *7*might just resign then. Don't call the meeting."* Mrs Mooney told the claimant that she would need a letter from her on Monday (1 April) to that effect. The claimant asked Mrs Mooney how many weeks' notice to give and Mrs Mooney said four weeks as per her contract.

24. Mrs Mooney came into work on Monday 1 April and had a very busy shift. When she came to the end of her shift, she realised that she had not received the claimant's resignation letter and she made a note to ask the claimant for it.

25. The next time Mrs Mooney saw the claimant was on Wednesday 3 April 201 9. She said to the claimant that she still had not received her resignation letter. She asked the claimant could she please do it and make sure it was dated 1 April, which was the date she had been supposed to give it to Mrs Mooney. She told her that if she did not receive it that day, she would arrange a disciplinary meeting. The claimant asked if she could give a longer notice period of eight weeks instead of four. Mrs Mooney said she would need to check with the respondent. Mrs Mooney spoke to the respondent who agreed in view of the claimant's length of service. Mrs Mooney calculated when eight weeks would end and asked the claimant if she just wanted to run it to the end of May. The claimant said "Yes''. Mrs Mooney told her to bring the letter in with her as soon as possible, otherwise she would have to fix a disciplinary meeting. Thereafter, the claimant kept out of Mrs Mooney's way as much as possible. Whenever Mrs Mooney saw her, she asked her about the resignation letter and the claimant said she would do it.

26. On one occasion, after a week or so had passed, and Mrs Mooney had asked again for the letter, the claimant asked her what it should say. Mrs Mooney gave her an overview of what she should put in it: 'that she wanted to resign and maybe if she wanted the end date to be flexible in case she wanted to start another job earlier.' The claimant said she did not know how to do it. Mrs Mooney said: 77/ *type it for you"* She asked the claimant to come into her room and told her to sit beside her at her PC. Mrs Mooney typed a resignation letter for the claimant (J59) with the claimant sitting beside her and read it out to her. The letter was in the following terms: *"Dear Dr irshad, I wish to resign from my position as medical administrator and I give you 3 weeks notice. Therefore my last working day will be 31/05/19. 1*

would ask if I get another position before this date, that you consider the leaving date as flexible and can be brought forward if necessary. " Mrs Mooney asked the claimant: *"What do you think of it?"* The claimant asked: *"Why have you dated it 1 April?"* Mrs Mooney replied: 7 *need to put the date I first spoke to you about it"* In the letter, Mrs Mooney had spelled the claimant's first name incorrectly as "Bushra" instead of Bushara. (Mrs Mooney spelled the claimant's name in this way whenever she wrote it down (J40; J43; J44; J45; J46; J62)) . The name of the claimant's street is a familiar Scottish surname, but it has an unusual spelling. In the claimant's address Mrs Mooney had spelled the street name incorrectly with an "o" instead of an "e" and she had made a mistake in the post code. She printed the letter and gave it to the claimant. She said to the claimant: *"Here's a pen. Sign it."* The claimant signed the letter. Mrs Mooney told the claimant that Dr Irshad was in and to go and give her the letter. The claimant did so.

27. At the beginning of May 2019, the respondent received a complaint from another member of staff that the claimant was telling other staff members that they would be next and that Mrs Mooney would be getting rid of all the old staff. The respondent and Mrs Mooney called the claimant and the person who had complained to a meeting. Having listened to both sides they offered the claimant a chance to retract her resignation. She refused. The respondent told the claimant that she must be professional for the remainder of her employment with them.

28. On the claimant's last day, she was given several leaving presents and a lunch. At the end of her shift, the respondent took her home. The claimant was signed off by her doctor as unfit to work due to back pain from 9 September 2019. At the time of the Tribunal hearing she remained unfit for work.

Observations on the evidence

29. It is sometimes the case that a party is very exercised about something which is not germane to the issues being litigated. In this case, the claimant was clearly furious with the respondent for failing to tell her before she went to Pakistan in February 201 9 that her job was in jeopardy. The claimant had been given a final written warning the previous May. At that time, the respondent had told her that she was being given a last chance to prove herself and that if she committed any further acts of misconduct in the 12 months from May 2018 she would be dismissed. For some reason, the claimant had understood that the 12 months ran from February to February and she had asked Mrs Mooney and the respondent on several occasions towards the end of 2018 whether she was going to be dismissed. They had both told her no. Her position was that if she had known that she was going to be dismissed in March / April 2019, she would not have gone to Pakistan when she did and would instead have paid a creditor. Alternatively, she would have remained in Pakistan for longer than she did so that she could have welcomed her mother back to Pakistan from a pilgrimage in Saudi Arabia. As it was, because her mother was delayed leaving Saudi, the claimant had ended up having to return to Scotland on 10 March, thereby missing her mother's return to Pakistan on 12 March. She said she had asked her sister to go and see Mrs Mooney and ask if she could take additional unpaid leave to welcome her mother home and had been told "no". The claimant felt that she had been misled as to the respondent's intentions and said that that was her main reason for bringing the tribunal claim.

30. In fact, the respondent had not been aware of the prescription issues at the point in late 201 8 when the claimant had asked about her position. Once the matter was brought to the respondent's attention, the respondent was prevented by the involvement of the Lead Pharmacist and subsequently NHS Counter-Fraud from

holding disciplinary proceedings in January or February 2019. However, it was a matter that the claimant kept returning to in her evidence, about which she clearly felt enormous resentment.

31 . The claimant testified that the respondent's surgery had a practice that other people could log into the computer system using her login details and that this practice had continued until she left. The claimant's evidence in chief on this matter was somewhat opaque. She said that she switched on and signed in to all the computers when she arrived in the mornings and that practice locums, the dietician and others used her computer login details. I was grateful to Mr Maxwell for his careful cross examination on this point during the course of which the claimant confirmed that she logged in to the practice Windows account to start the computers in the morning and sometimes to start a computer on behalf of someone else. The computers would be started once a day. However, thereafter, everyone, including the claimant had their own EMIS NHS account. The claimant accepted that, whilst it was not necessary to shut down the computer every time she left her desk, she was required either to log out of her NHS account or to lock it if she left her PC unattended. She accepted in cross examination that to leave her computer logged on would be abandoning her duty and that she had been told by Mrs Mooney on 28 August that she must lock her PC or log out [of her NHS account] if leaving her PC unattended from then on.

32. The main conflicts in the evidence concerned the date on which Mrs Mooney first asked the claimant about the duplicate and additional prescriptions, the conversations between the claimant and Mrs Mooney about the claimant's resignation and the events surrounding the resignation letter, which I concluded was typed by Mrs Mooney and signed by the claimant at some point in the second week of April 2019.

33. With regard to the prescriptions, the claimant was adamant that she was not asked about this on 8 January 2019 as noted by Mrs Mooney (J14) because if she had been asked about it then she would not have gone to Pakistan. Her position was that although the note of the conversation was substantially correct, Mrs Mooney had had the conversation with her when she returned from Pakistan in March 201 9, not in January. Nothing much (relevant to the case) turned on the timing of this conversation, though the timing was clearly of importance to the claimant. On balance, and taking account of the documentary evidence (including the email correspondence from the Lead Pharmacist on 1 March suggesting that no disciplinary action be initiated until an opinion had been obtained from the Counter Fraud team), it seemed likely that, as the claimant testified, this questioning must have taken place after the claimant returned from Pakistan in March 201 9. Although she disputed the date, the claimant confirmed in cross examination that the main thrust of the conversation noted with her at J14 had taken place. She said that Mrs Mooney had called her into her room, shown her a piece of paper and asked her whether she had printed the prescriptions in question out. The claimant said that she had replied: "*If it's repeats it could have been me, but it might not have been me because my computer gets left on and it also gets logged in for other users."* She agreed that she had admitted not checking the dates, though disputed having said she was too busy to do so.

34. There was a conflict in the evidence concerning the conversation Mrs Mooney had with the claimant on or about 27 March regarding the disciplinary invite letter. I preferred the claimants evidence on this conversation and found Mrs Mooney's evidence unsatisfactory for the reasons given below. The claimant's evidence, which I accepted, was that Mrs Mooney had told her that because the prescriptions

had been printed out under the claimant's username they wanted her to leave, but as she had children they would give her a few weeks to look for another job. Otherwise they would have dismissed her that day. The claimant testified that Mrs Mooney had told her: "*You're on a final written warning. I could dismiss you today, but we are giving you the opportunity to resign. If you resign you will have four to six weeks to look for another job. If you decide not to resign we can dismiss you on the day of the meeting or later. Let me know if you want to give in your resignation.* * The claimant said that she had asked Mrs Mooney: *"Why did you not tell me before I went on holiday? I even asked you am I going to be dismissed? I might not have gone on holiday. I might have paid my creditors instead.* " The claimant said that Mrs Mooney had then replied: "IVe *wanted you to enjoy your holidays and decided we would speak to you when you got back. "*

35. In contrast, Mrs Mooney's evidence was that she had replied that because she (Mrs Mooney) would not be involved in the disciplinary meeting she could not say what the outcome would be but that typically the meeting could have one of three outcomes: firstly, the claimant might be exonerated depending on the information she brought into the meeting; secondly, she could have a further written warning; thirdly, she could be dismissed. For the reasons set out in the next paragraph, I concluded that aspects of Mrs Mooney's evidence were unsatisfactory. Furthermore, the textbook answer above that Mrs Mooney testified she had given was not really applicable to the claimant's circumstances and would have been disingenuous. The claimant was on a final written warning. Whether she was disciplined for alleged prescription fraud or for gross negligence in leaving her computer unlocked, she stood accused of a major act of gross misconduct amounting to a breach of trust and confidence. She was almost certainly facing dismissal and on balance, for the reasons set out in the next paragraph, I did not accept Mrs Mooney's evidence on this point.
36. With regard to the events of April 201 9, 1 accepted Mrs Mooney's evidence to the extent that it was corroborated by the claimant. However, there were parts of Mrs Mooney's evidence that I did not accept. Mrs Mooney testified that the claimant had asked her to type the letter of resignation for her and that she (Mrs Mooney) had said "No", that it would not be appropriate for her to type a resignation letter. I concluded that this was untrue. I preferred the claimant's evidence about the resignation letter because the letter mis-spells the claimant's first name, the name of the street in which the claimant resides and the claimant's post code. I considered that it was most unlikely that the claimant would make mistakes in the spelling of her own name and address. Furthermore, in all the documents in the bundle in which Mrs Mooney refers to the claimant she calls her "Bushra" as in the resignation letter, whereas the claimant spells her name "Bushara". The letter does not reflect the way the claimant expresses herself but is consistent with Mrs Mooney's manner of speaking and writing. The claimant is very direct. She also made a number of significant concessions in her evidence. Finally, as Ms Thomas submitted, both Mrs Mooney and the respondent were vague about the circumstances of their receipt of the claimant's resignation letter. In Mrs Mooney's case, the vagueness was inconsistent with the fact that she had had to request the letter on a number of occasions.

Submissions
Submissions for the claimant.

37. Ms Thomas submitted that the claimant had resigned under duress. Her consent was not freely given. She cited the case of Sandhu v Jan de Rijk Transport Ltd [2007] IRLR 519 CA which, she submitted, was authority for the proposition that if an employee does not have an opportunity to seek advice regarding resignation,

that can point to a dismissal as opposed to a resignation. In that case, the employee was called into a meeting without advance warning and told that he was to be dismissed. He was invited to resign. In this case, the claimant's position was that she had been called into a meeting on 27 March 2019 with Mrs Mooney. The situation presented to her on her version of events was that she would be dismissed and should resign. There had also been evidence regarding the tendering of the letter of resignation. The claimant's position was that following the meetings she had with Mrs Mooney on 27 and 29 March 201 9, she wanted time to think, and reflect and that she was continuing to do so until around mid-April. Her evidence was that Mrs Mooney, having lost patience, typed the resignation letter for her and instructed her to hand it to the respondent. The timescale of receipt of the letter of resignation would accord with the evidence of the respondent that she received that sometime later. The only evidence the tribunal heard that the letter was signed and delivered on 3 April was from Mrs Mooney.

38. The respondent's evidence had been that she first heard of the resignation of the claimant from Mrs Mooney on 1 April 2019. She had no recollection that Mrs Mooney immediately came to see her on 27 March after speaking to the claimant at that time. The respondent did not appear to have any recollection of how the resignation letter got to her. Given the very serious nature of the allegations and the fact of the ongoing investigation together with the fact that this was a small practice with a relatively small number of staff, it was not credible that the respondent would have no recollection of how the resignation letter came to be in her possession.

39. Ms Thomas submitted that the resignation amounted to a dismissal because it was not freely given. Therefore, the conduct of the employer's agent constituted a material breach of the implied term of trust and confidence and a breach of contract.

40. Ms Thomas submitted that the claimant gave her evidence candidly. She did not try to hide her faults. Her version of events regarding when her resignation letter was completed agreed with the respondent's version in relation to timescale. Ms Thomas submitted that the tribunal should prefer the claimant's evidence and find that she was constructively dismissed on the basis that her resignation was obtained under duress.

Submissions for the respondent

41. On behalf of the respondent, Mr Maxwell tendered a skeleton argument. He submitted that where it is alleged that resignation was forced upon the employee, the relevant test was identified in Martin v Glynwed Distribution Ltd [1983] ICR 51 1 CA per Sir John Donaldson MR:

"Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, "Who really terminated the contract of employment?" If the answer is the employer, there was a dismissal within paragraph (a) of section [95(1) of ERA]... If the answer is the employee, a further question may then arise, namely, "Did he do so in circumstances such that he was entitled to do so without notice by reason of the employer's conduct?" If the answer is "Yes", then the employer is nevertheless to be treated as if he had dismissed the employee, notwithstanding that it was the employee who terminated the contract."

42. Mr Maxwell submitted that it does not follow that an employee who chooses to resign rather than face or continue with the disciplinary process has necessarily been dismissed by the employer. He cited the case of Staffordshire County Council v Donovan [1981] IRLR 108 EAT, per Slynn J at paragraph 23:

"Now it is clear that this Appeal Tribunal has on a number of occasions said that if an employee is told 'Either resign or you will be dismissed' and the employee then chooses to resign under the threat of dismissal, that in reality is to be treated as a dismissal for the purposes of a claim under the [1996] *Act. This present case, however, it seems to us, is very different from that. Here there had been warnings and, from time to time, proposals to refer the complaints of those senior to Mrs Donovan, to the disciplinary sub-committee under the council's rules. In June 1978 the matter was so referred, and adjourned for the purpose of obtaining medical evidence. In the intervening period there was a discussion between both sides - everybody, no doubt, by this stage realising that relationships had broken down between Mrs Donovan and other members of the staff. If the agreement which was reached is one which was arrived at under duress, and if it could really be seen as amounting to a dismissal or threat of dismissal by the council, then the majority would perhaps have been justified in their conclusion. But we have considered carefully and at length the proof which was put in by Mr Hudson, the solicitor on behalf of the authority, and the notes of evidence of Mr Kingshott the NALGO representative acting at the meeting for Mrs Donovan. We find it quite impossible to say, on the basis of those statements - which in substance are saying very much the same thing - that there was here a threat of dismissal even seen in the context of all that happened before. It seems to us that the proceedings were continuing subject to a right of appeal. In our judgment the majority clearly misdirected themselves as to the effect of the earlier cases and as to their analysis of the evidence. It seems to us that it would be most unfortunate if, in a situation where parties are seeking to negotiate in the course of disciplinary proceedings and an agreed form of resignation is worked out by the parties, one of the parties should be able to say subsequently that the fact that agreement was reached in the course of disciplinary proceedings entitles the employee thereafter to say that there was a dismissal. Accordingly, we are satisfied here that there has been an error of law on the part of the majority. We consider that the Chairman was right in the conclusion to which he came"*

43. Mr Maxwell acknowledged that the position would, however, be different where the employee had only resigned under duress. He referred to Sandhu v Jan de Rijk Transport Ltd [20071 IRLR 519 CA, a case in which the Employee was called to a meeting without any advanced warning, told he was going to be dismissed and invited immediately to agree terms under which his employment would terminate, which he did. This was held to be a dismissal. Wall LJ summarised the decided cases in this area before observing:
"37 *What is striking in the authorities, and is amply demonstrated by the cases I have discussed so far, is that in none of the cases in which the employee has been held to resign has the resignation occurred during the same interview/ discussion in which the question of dismissal has been raised, and in no case in which the termination of the employee's employment has occurred in a single interview has a resignation been found to have taken place. The reason for this, I venture to think, is not far to seek. Resignation, as the authorities indicate, implies some form of negotiation and discussion; it predicates a result which is a genuine choice on the part of the employee. Plainly, if the employee has had the opportunity to take independent advice and then offers to resign, that fact would be powerful evidence pointing towards resignation rather than dismissal."*

Discussion and decision
Was there a Dismissal?

44. In his summary of the relevant case law, Mr Maxwell helpfully highlighted the first question which I must apply to the facts of this case: *"Who really terminated the*

contract of employment?" Was this a case in which the employer was saying to the employee (to quote Lord Slynn at paragraph 23 of Donovan): 'Either resign or you will be dismissed'? Or was it (Per Wall LJ at paragraph 37 of Sandhu) a case in which there was some form of negotiation and discussion resulting in a genuine choice on the part of the employee? I examined the facts with this in mind. I concluded that the facts set out in paragraphs 21 to 26 above amounted to a clear indication to the claimant by Mrs Mooney that she had no future with the respondent. She was expressly invited to resign. It is true that the claimant was given time to think about her position and that she managed to negotiate some additional notice. However, the consistent message to her was that if she did not resign, she would be dismissed. Ultimately, when the claimant delayed in handing in her resignation letter, Mrs Mooney typed it for her and instructed her to sign it and give it to the respondent. On the facts of this case, I have concluded that the claimant was dismissed.
Was the dismissal unfair?

45. Section 98 of the Employment Rights Act 1996 indicates how a tribunal should approach the question of whether a dismissal is fair. There are two stages. The first stage is for the employer to show the reason for the dismissal and that it is a potentially fair reason. A reason relating to the conduct of the employee is a potentially fair reason under Section 98(2).

46. To establish that a dismissal was on the grounds of conduct, the employer must show that the person who made the decision to dismiss the claimant (in this case Mrs Mooney) believed that she was guilty of misconduct. Thereafter the Employment Tribunal must be satisfied that there were reasonable grounds for that belief and that at the time the dismissing officer reached that belief on those grounds the respondent had conducted an investigation that was within the range of reasonable investigations a reasonable employer might have conducted in the circumstances. The onus is neutral in relation to the grounds for the respondent's belief and the sufficiency of the investigation. In this case, it was clear that Mrs Mooney believed the claimant guilty of misconduct. On the facts before her, either the claimant was guilty of alleged prescription fraud, or she had enabled it to take place by leaving her PC unlocked and logged in, which is an act of serious misconduct. The claimant volunteered to Mrs Mooney that she had committed the latter offence. The claimant accepted in cross examination that, whilst it was not necessary to shut down the computer every time she left her desk, she was supposed to either log out of her NHS account or lock her PC if she left it unattended. She conceded that to leave her computer logged on would be abandoning her duty and that she had been told by Mrs Mooney on 28 August that she must lock her PC or log out [of her NHS account] if leaving her PC unattended. Together with the other information Mrs Mooney had before her, these were reasonable grounds for believing the claimant guilty of misconduct. At the point where she reached that belief on those grounds, Mrs Mooney had done a fairly thorough investigation. I therefore concluded that the respondent had established the reason for dismissal being the claimant's conduct.

47. If the employer is successful in establishing the reason, the tribunal must then move on to the second stage and apply Section 98(4) which provides:
"...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"

48. In applying that section, the Tribunal must consider whether the procedure used by the respondent in coming to its decision was within the range of reasonable procedures a reasonable employer might have used. Obviously, the dismissal in this case was procedurally unfair. There was no disciplinary hearing and the claimant did not have an opportunity to be accompanied or to prepare and state her case before a separate impartial disciplinary hearer. She was dismissed by the person who had conducted the investigation and Mrs Mooney had already communicated to her a wish for the claimant to leave. There was also no appeal. Taking the procedure or lack of it as a whole, the dismissal was clearly unfair.

Remedy
Basic award
Conduct before the dismissal

49. Mr Maxwell submitted that in the event that the claimant's dismissal was found to be unfair the basic award should be nil to reflect the claimant's misconduct. Section 1 22(2) of ERA provides as follows:
"(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

50. In view of the admitted conduct of the claimant in this case before the dismissal, I consider that it would be just and equitable to reduce the basic award to nil. The claimant accepted that the lesser offence of repeatedly leaving her computer unattended and signed in, (which was her explanation for how prescription fraud could have occurred a number of times under her username) was an abandonment of her duty. It was clearly gross negligence for all the reasons set out above and below.
Compensatory award

51 . Section 1 23(1) ERA provides that the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
The likelihood that a fair dismissal would have occurred in any event

52. In determining what sum would be just and equitable in the circumstances under section 123(1) Mr Maxwell submits that I must consider the likelihood that the claimant might have been fairly dismissed in any event pursuant to Polkey v A E Dayton Services Ltd 1988 ICR 142 HL. I have assessed the likelihood of this at 100% on the basis that, on the facts found, it was inevitable that a fair procedure would have reached the same result. The claimant was on a final written warning and prescriptions for a drug with a street value had been ordered and made up on a number of occasions under her PC username. Even if the claimant had not ordered the prescriptions herself, she admitted creating the conditions whereby someone else could do so by leaving her PC unlocked and signed in. There was a major issue of trust and confidence. In these circumstances, and taking account of the need for a GP practice to have confidence in the security of the data held on its IT systems and trust in those with access to those systems, dismissal as a sanction would clearly have been not only within the band of reasonable responses a

reasonable employer might have adopted to the conduct in question, but inevitable.

53. It follows that in these circumstances the claimant is not entitled to an award of compensation.

Contributory Fault

54. Had it been necessary to do so, I would have found the claimant's dismissal was caused by her actions. Section 123(6) of ERA provides that:
"(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding." I have concluded that the claimant's dismissal (whilst subject to a final written warning) was caused by her actions in (put at its lowest) repeatedly leaving her computer unattended and signed in, this being her explanation for how prescription fraud could have occurred a number of times under her username. She accepted that this was an abandonment of her duty. I would have assessed her contribution at 100%.

Breach of Contract/ Wrongful Dismissal claim

55. In this case, the claimant also claims damages for breach of contract. It is her position that her dismissal was in breach of her contract of employment. The claimant's terms and conditions of employment (J31) entitled her to statutory notice. Under section 86 ERA, the claimant would have been entitled to 12 weeks' notice, being the statutory maximum. Since she worked 9 weeks' notice, the measure of her loss would have been three weeks' pay. However, the respondent states that the claimant was guilty of gross misconduct and that she was therefore in repudiatory breach of the contract entitling the respondent to dismiss her with immediate effect.

56. In this case I have concluded that the claimant was in repudiatory breach of contract. Being on a final written warning, on her case, she repeatedly, over a period of some six months left her PC unlocked and signed in. Even if the claimant had not ordered the duplicate prescriptions herself, she admitted creating the conditions whereby someone else could do so. It follows that the claim of wrongful dismissal does not succeed and is dismissed. The claimant is not, therefore entitled to the balance of her notice pay.

Employment Judge: Mary Kearns
Date of Judgment: 15 March 2021
Entered in register: 16 March 2021
and copied to parties