

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100205/2017

5 Held in Glasgow on 4, 7, 8, 9, 10, 11 & 14 August 2017

Employment Judge Shona MacLean

10 Mrs Elizabeth McCarthy

Claimant
Represented by:
Ms L MacSporran
Solicitor

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Joan's Carers Ltd

Respondent
Represented by:
Mr G Bealey
Consultant

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The judgment of the Employment Tribunal is that the claimant was unfairly dismissed by the respondent.

REASONS

Background

1. On 17 January 2017, the claimant sent a claim form to the Tribunal
30 complaining that the respondent unfairly dismissed her on 13 October 2016.
The claimant denied the allegations made against her. She said that she
had been dismissed after raising a grievance against the Managing
Director's son. The claimant complained that the procedure was flawed as
the Managing Director's son who was biased against her undertook the
35 investigation.

2. The Tribunal received a response resisting the claim. The respondent said
that it became aware of the claimant's absences on Wednesday mornings
for which the claimant gave differing explanations and failed to provide
evidence of legitimate reasons for her absence from work. As a result of the

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disciplinary hearing there was a finding of gross misconduct for which the claimant was summarily dismissed.

3. A case management Preliminary Hearing took place at which the parties agreed that the case should be heard before an Employment Judge sitting alone. It was subsequently agreed that the Hearing be restricted to liability only.
4. The parties prepared a joint set of productions to which the Tribunal was referred during the Hearing. For the respondent the Tribunal heard evidence from Joan Graham, Managing Director, Gordon Miller, Accountant, Russell Graham Jnr, Managing Director and Russell Graham Snr, Director. The claimant gave evidence on her own account. Donna Faulkner, Carer, gave evidence on her behalf.
5. The Tribunal found the following material facts to have been established or agreed.

15 **Findings in Fact**

6. The respondent is a limited company providing care in the community. Originally the respondent's Directors were Joan Graham and Russell Graham Snr. Mrs Graham was involved in the day-to-day running of the business. Mr Graham Snr worked offshore and had no day-to-day involvement in the business.
7. In February 2002 the claimant commenced employment with the respondent as a Carer. On 1 April 2005 the respondent appointed the claimant Assistant Manager. The respondent issued the claimant with a contract of employment (the Contract) (productions 27 to 32).
8. The Contract provided that the claimant was paid hourly. She worked at such times and for such periods as necessary for the efficient discharge of her duties. It was a condition that the claimant was willing to work at short notice. She was paid hourly and had to submit timesheets on a weekly

basis and no later than the last Wednesday of the month (production 4/28 to 29).

5 9. The Contract referred to a separate disciplinary procedure and grievance procedure, which did not form part of the terms and conditions of employment.

10 10. The claimant's main responsibility as Assistant Manager was co-ordinating the carers and preparing the weekly roster. She would liaise with the carers. Initially she was involved in invoicing private clients and co-ordinating holidays. The claimant continued to provide caring services to the respondent's clients. Her caring services tended to be provided at the start and end of the day, which allowed the claimant to spend time in the office. Thursday was usually the claimant's day off.

15 11. Mrs Graham was based in the office. She usually took Wednesday as a day off. Mrs Graham and the claimant had a good working relationship and covered for each other. Around 2014 Mrs Graham took over responsibility for approving holidays.

20 12. The claimant was not asked to provide appointment cards for any medical or dental appointments. The claimant understood that she was paid for the hours that she worked. If she was away from work on a personal matter she would make up the time on other days.

13. John Bell was appointed as Administrator and was office based.

25 14. In early 2015 Mrs Graham's sons, Russell Graham Jnr who was working offshore said that he would like to work for the respondent. Mrs Graham thought that he was joking having never previously shown any interest in the business. Mr Graham Jnr proposed that he keep his existing job but would come into the business on a voluntary basis during the weeks he was not working offshore. Mrs Graham agreed to this.

15. While Mrs Graham was on holiday in July 2015 there was an altercation between the claimant and Mr Graham Jnr. The incident was brought to Mrs Graham's attention on her return to work. No action was taken.
- 5 16. Around 10 August 2015 the claimant wrote to Mrs Graham expressing concern about dealing with Mr Graham Jnr (production 43). The claimant indicated that she was keeping a log and recording any conversations she had with Mrs Graham about Mr Graham Jnr. The claimant referred to a conversation that they had had during which Mrs Graham advised that her Mr Graham Jnr did not have to adhere to the same policies, as he would be
10 in charge in future. The claimant referred to one member of staff having a problem with Mr Graham Jnr telling her what to do about caring as he did not have any experience in the field. Mrs Graham said that she would speak to Mr Graham Jnr.
- 15 17. The respondent moved premises in early 2016. Following the move the claimant had her own office. Mrs Graham and Mr Graham Jnr shared another office. Mr Bell sat at a desk in the hallway. There was a third room, which was used for training.
- 20 18. Given the location of the new office, security cameras were installed. While Mrs Graham was on holiday between 29 April 2016 and 13 May 2016 the claimant switched off the security cameras when the premises were occupied.
- 25 19. Mr Graham Jnr continued to work on a voluntary basis until around 22 May 2016 when the respondent employed him as Managing Director on a fulltime basis. He shared the role of Managing Director with Mrs Graham who had decided to step back from the business.
20. Mrs Graham became aware that the security cameras had been switched off while she was on holiday. She was also made aware of a client complaint against the claimant. Mrs Graham investigated these matters on 31 May 2016 but took no action as there was no CCTV policy in place and

there was insufficient evidence for any complaint to be upheld (production 128).

21. Mr Graham Jnr led the claimant to believe that he was now the owner of the business and in charge. The claimant knew her relationship with Mr Graham Jnr was poor and felt that her position as Assistant Manager was under threat following his appointment. The claimant was concerned that Mr Graham Jnr was taking over matters for which she had been previously responsible. Their relationship continued to deteriorate and there was an atmosphere in the office.
22. The claimant continued to express concerns about her role to Mrs Graham. Mrs Graham told the claimant that her role had not changed.
23. Around June 2016 to ensure that the office was properly manned Mrs Graham spoke to the claimant about what hours the claimant worked in the office. The claimant started recording in the office diary her start and finishing time in the office. She also recorded any absences from the office for medical or personal appointments during those hours.
24. Mrs Graham knew that the claimant attended two medical appointments on Wednesdays in June/July 2016.
25. Mr Bell was on holiday on Wednesday 29 June 2016. Mr Graham Jnr was on a course on Wednesday 13 July 2016 (productions 35 and 37).
26. On Wednesday 13 July 2016 Mrs Graham telephoned the office to speak to the claimant. Mr Bell said that the claimant was out. Mrs Graham recorded in the office diary that the claimant attended a doctor's appointment from 10.35am to 11.40am (production 37).
27. Around 25 July 2016 Mrs Graham was on holiday abroad for two weeks. Mr Graham Jnr was at work.
28. Mr Graham Jnr asked the claimant why she needed time off on 27 July 2016 and 3 August 2016. The claimant said that she was giving blood and it

was "woman's troubles". Mr Graham Jnr said that the claimant was to produce appointment cards.

29. On 4 August 2016 at 13:20 the claimant sent an email to Mrs Graham (production 40). The claimant asked to meet Mrs Graham and Mr Graham Snr as she had concerns of a sensitive manner that she wished to discuss informally and resolve. The claimant received confirmation that the email had been read but no reply.
30. The claimant and Mrs Graham had a conversation during which grief counselling was mentioned.
31. Around 11 August 2016 the claimant received an out-patient appointment at the Vale of Leven Hospital for Wednesday 7 September 2016 at 9.30am (production 151). The claimant provided this letter to Mr Graham Jnr.
32. The claimant sent an email to Mrs Graham on 12 August 2016 at 13:00 referring to her earlier email sent on 4 August 2016 to which there had been no reply. The claimant formally asked for a meeting to discuss several issues and grievances (production 44).
33. In the afternoon of 12 August 2016 Mrs Graham spoke to the claimant. Mrs Graham said that Mr Graham Snr was unavailable but they could have an informal chat. The claimant agreed to this. The claimant said that she felt Mr Graham Jnr was demeaning her position as Assistant Manager. She was receiving information from other members of staff rather than from management. Discussion took place as to how information could be more effectively communicated. Mrs Graham said that the claimant's position had not changed nor had her responsibilities. The claimant indicated that she was content to leave matters informal at that stage.
34. Around 12 August 2016 Mr Graham Jnr issued a reminder to all staff about the process for requesting holidays (production 129). He also introduced return to work interviews for any period of absence that was not authorised annual leave and requiring all sick absence to be certified (production 130). Neither of these documents stated that employees had to provide

appointment cards to and obtain the authorization of Managing Directors before attending medical appointments.

- 5 35. Mrs Graham wrote a letter to the claimant dated 15 August 2016 confirming a conversation they had about the claimant swapping her day off from Thursday 22 September 2016 to Friday 23 September 2016 (production 45). Mrs Graham said that the swap was not permitted due to other staff being off that day. The claimant was reminded that if she wished to swap her normal day off this had to be put in writing to the Managing Directors for their approval
- 10 36. On 19 August 2016 the claimant was surprised to be hand delivered a letter from Mrs Graham dated 17 August 2016 (production 46). The letter acknowledged receipt of the claimant's written grievance dated 12 August 2016. It made no reference to the original email sent on 4 August 2016 or to the discussion that took place on 12 August 2016. The letter stated that a formal grievance hearing would take place on 22 August 2016 and Mr Bell would be present to take notes. The claimant was advised that she had the right to be accompanied by a work colleague or an accredited trade union representative. The claimant was asked to provide further written details of her grievance before the proposed hearing.
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- 20 37. The claimant responded to Mrs Graham by email sent on 19 August 2016 at 19.36 (production 47). The claimant expressed her confusion given their discussion on 12 August 2016. The formal grievance hearing referred to in the letter dated 17 August 2016 did not take place.
- 25 38. On 23 August 2016 Mr Graham Jnr and Mrs Graham spoke to the claimant accusing her of closing the office on the Friday of the September bank holiday for several years without Mrs Graham's knowledge or consent. Following this conversation the claimant requested a formal meeting by email dated 23 August 2016 (production 48). The email included the following:

*"There are several matters that I would also like to be addressed at this formal stage, as during past informal discussions you advised and reassured me that my responsibilities or duties as Assistant Manager were not changing although on a daily basis now I am being informed of duties I am no longer responsible for. I would hope that you understand my reason for requesting a formal discussion and hopefully then we can move forward in a professional manner. **

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39. Mrs Graham replied by letter dated 24 August 2016 advising that a formal grievance hearing would take place on 1 September 2016 and Louise Stenhouse would be present to take notes. The claimant was advised of her right to be accompanied (production 49).

40. The grievance hearing was then rescheduled to 6 September 2016 but was cancelled.

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41. On 7 September 2016, the claimant was intending to attend her hospital appointment. She discovered that she had misplaced her mobile telephone. She visited various clients whom she had seen the previous evening to ascertain whether she had left her mobile telephone at their homes. While doing so the claimant was seen by Mr Graham Snr and Mr Graham Jnr. The claimant returned home. Around 10am she located her mobile telephone. She had a cup of tea. The claimant contacted the hospital to explain that she was running late. The claimant was advised that as she had missed the appointment it would need to be rescheduled. A rescheduled appointment was issued on 7 September 2016 for 28 September 2016 (production 52).

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42. The claimant knew that Mrs Graham and Mr Graham Jnr were not at work. She did not contact Mr Bell who was in the office. The claimant's daughter, who was also employed by the respondent as a Carer was at the civic centre. The claimant went there to give her daughter some mail before going into the office.

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43. Mr Graham Snr saw the claimant around 11am on 7 September 2016 leaving the civic centre with four carers: Donna Faulkner, Jean Kelly,

Adrienne Martin and Kelly McCartney. Mr Graham Snr and Mr Graham Jnr also saw the claimant crossing the road at around 11.30am.

44. The claimant returned to the office. From her remarks Mr Bell's impression that the claimant had attended the hospital appointment.

5 45. Mr Graham Jnr told Mrs Graham that he had seen the claimant in town on 7 September 2016 when she was meant to be attending a hospital appointment.

46. On 8 September 2016 Mrs Graham wrote to the claimant advising that the grievance hearing would take place on 19 September 2016 on the claimant's return from annual leave (production 53).

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47. The claimant did not advise Mrs Graham that she did not attend the hospital on 7 September 2016 and the reason for that.

48. On 9 September 2016 just as the claimant was leaving the office to go on annual leave Mr Graham Jnr asked her if she went to the hospital appointment. The claimant was reluctant to have any discussion with Mr Graham Jnr without a witness. The claimant said she had and that she would discuss the matter with Mrs Graham on the claimant's return from holiday.

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49. The claimant was on annual leave during the week commencing 12 September 2016. While abroad on holiday the claimant was sent by email a letter dated 15 September 2016 advising that she was being suspended on full pay with effect from 18 September 2016 pending investigations into the following allegations (the Suspension Letter) (production 55):

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a. Alleged falsifying attending hospital appointment on Wednesday 7 September 2016 at 9.30am to 11.30am.

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b. Alleged falsifying attending grief counselling on Wednesdays, 22 June 2016, 29 June 2016, 6 July 2016, 13 July 2016, 27 July 2016 and 3 August 2016) at 10am for one hour.

50. The Suspension Letter stated that the claimant was being suspended because of allegations of potential acts of gross misconduct. The suspension was precautionary but employees accused of gross misconduct offences would not be allowed to remain at work. The claimant was further
5 advised that she was not to contact or attempt to contact or influence anyone connected with the investigation in any way or to discuss the matter with any other employee or client of the company. If the claimant wished to contact anyone to assist in preparing an explanation the claimant was to contact Mrs Graham so that arrangements could be made for someone to
10 be available for interview.
51. On 19 September 2016, the claimant attended the pre-arranged grievance meeting (the Grievance Meeting). Adrienne Martin accompanied the claimant. Louise Stenhouse, Mr Graham Jnr's aunt was present to take notes (productions 22/56 to 58).
- 15 52. At the Grievance Meeting the claimant expressed concern about the presence of Ms Stenhouse given her relationship to Mr Graham Jnr. The claimant referred to the issues that she had raised informally with Mrs Graham. The claimant expressed concern that Mr Graham Jnr had taken over most of her tasks; holidays, interviews and dealing with staff. The
20 claimant was concerned about her position particularly as staff had been told that there would be no pay rises. The claimant also expressed concern that she was unable to access information and certain records were locked in a cabinet to which she no longer had access. She was concerned at the way Mr Graham Jnr had stated that he was dealing with holidays. The
25 claimant felt that he did not want her there and was trying to make her life difficult. The Grievance Meeting concluded on the basis that Mrs Graham would consider the matter and revert to the claimant.
53. On 19 September 2016 Mr Graham Snr and Mr Graham Jnr prepared witness statements detailing their recollection of events on the morning of
30 Wednesday 7 September 2016 (productions 60 and 61). Mr Graham Jnr's

witness statement also referred to his recollection of his discussion with the claimant on 9 September 2016.

54. Mr Graham Jnr then individually met Christine Whyte, Jean Kelly, Donna Faulkner, Pauline Breeze and Adrienne Martin (the Carers) in the Managing Directors' office. Mrs Graham was present during these meetings.

55. Mr Graham Jnr asked each of them the following questions:

- a. Do you normally go for coffee/tea on a Wednesday morning?
- b. What time do you normally go for coffee/tea?
- c. Where do you go for the coffee/tea on a Wednesday?
- 10 d. Who normally goes for coffee/tea on a Wednesday morning?
- e. Is it normally the same group of carers that go for coffee/tea on a Wednesday?
- f. How long has this been happening for?
- 15 g. Can you recall who attended coffee/tea on morning of 7 September 2016?
- h. Was this at the time stated earlier?
- i. How long does the tea break normally last for?

56. The Carers were asked then to sign a statement (Christine Whyte - productions 62 to 63); (Jean Kelly - productions 64 to 65); (Donna Faulkner - productions 66 to 67); (Pauline Breeze - productions 68 to 69); (Adrianne Martin - productions 70 to 71).

57. Ms Whyte and Ms Breeze said that they did not go for coffee on 7 September 2016. Ms Kelly and Ms Faulkner did go for coffee but could not recall if the claimant was there. Kelly McCarthy, the claimant's daughter who was seen by Mr Graham Snr and mentioned in his statement was not interviewed.

58. On 21 September 2016 Mrs Graham wrote to the claimant asking her to attend an investigation meeting on 23 September 2016 to discuss the alleged falsifying attending a hospital appointment on Wednesday 7 September 2016 at 9.30am to 11.30am and the alleged falsifying attending

grief counselling on Wednesdays, 22 June 2016, 29 June 2016, 6 July 2016, 13 July 2016, 27 July 2016 and 3 August 2016 at 10am for one hour (production 59). The letter reiterated that the allegations were potential gross misconduct and that the investigation meeting was to consider the claimant's explanation about the concerns and that she should attend prepared to explain these matters. The letter was sent to the wrong address. It did not say who was conducting the investigation.

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59. On 21 September 2016, the claimant was confused and erroneously attended hospital when her appointment was scheduled for the following week. The claimant was seen and to prove that she was there that day an amended appointment was provided (production 54).

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60. The claimant attended the investigation meeting on 23 September 2016 (the Investigation Meeting). She was accompanied by her husband but he was not allowed to attend the Investigation Meeting which was conducted by Mr Graham Jnr. His wife Katrina Graham attended to take notes.

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61. The claimant explained that the letter that had been sent to her had been wrongly addressed and that a neighbour had brought it to her. She was surprised that the Investigation Meeting was being conducted by Mr Graham Jnr given that she had raised a grievance against him and it was still pending.

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62. The claimant confirmed that she did not attend a hospital appointment on 7 September 2016 because she had lost her mobile telephone. She did not contact the office; she did not need to tell Mr Bell as she was in charge that day. The claimant considered that she was not being paid during that time and would make up the time later. The claimant explained that she had stopped at the civic centre on her way to work to give mail to her daughter as she and Ms Martin were there having coffee. The claimant alluded to meeting with staff at various times including Wednesdays, Fridays and sometimes Saturdays. The claimant indicated that she often had discussions with the staff and at times would do so by telephone.

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63. When pressed to say which dates the claimant had doctor's appointments she explained that she would need to check the diary. She said that she might have said to Mr Graham Jnr that she had woman's troubles.

5 64. Mr Graham Jnr then referred to an informal meeting on 5 August 2016. The claimant said that she had had so many informal meetings she would need to check the date. Mr Graham Jnr referred to that being the informal meeting where the claimant advised Mrs Graham that she was taking time off for grief counselling at the Jeanie Deans following referral by her doctor. The claimant denied ever having said that she was going to grief
10 counselling. Mr Graham Jnr checked the computer and confirmed the date. The claimant said that Mrs Graham had authorised doctor's appointments and on another occasion, she was accompanying a client. She reiterated that she would need to check as she had a number of doctor's appointments and some may have been on a Wednesday.

15 65. The claimant was confused about the discussion on 9 September 2016 and asked if that was when Ms Martin and Ms Whyte were in the office. The claimant maintained that she did not say that she did not attend the hospital and said that she would sort it when she got back from holiday.

20 66. On 23 September 2016 Mrs Graham asked Mr Bell to produce a handwritten statement, which stated (production 72).

"On the Wednesday 7 September 2016 when Liz returned from her hospital appointment as she entered the office she stated 'it's no fun being poked and prodded'.

25 *As far as I'm aware Liz was attending doctor's appointments every Wednesday over a 6 to 8 week period. As it was the Managing Director's day off, she had asked me to note the times she left and returned. It was literally 10.30am to 11.30am each week.*

30 67. On 23 September 2016 a letter was sent to the claimant inviting her to attend a disciplinary hearing on 30 September 2016 to address the following allegations where the possible outcome was summary dismissal:

a. Alleged breach of trust and confidence by falsifying attending a hospital appointment on Wednesday 7 September 2016 at 9.30am to 10.30am to be absent from work.

5 b. Alleged breach of trust and confidence by falsifying attending grief counselling on Wednesdays, 22 June 2016, 29 June 2016, 6 July 2016, 13 July 2016, 27 July 2016 and 3 August 2016 at 9.30am for one hour to be absent from work.

68. The claimant was informed that Laureen Hier would be attending as a witness and notetaker. The claimant was advised she had the right to be
10 accompanied by a fellow employee or an accredited trade union representative. If the claimant chose to be accompanied by a fellow employee they would be paid normal pay for them to spend time with the claimant before the hearing and to be in attendance. The letter referred to the witness statements being enclosed, which they were not.

15 69. The letter was hand delivered to the claimant on 27 September 2016. She attempted unsuccessfully to contact Mrs Graham.

70. On 29 September 2016 Mrs Graham wrote to the claimant confirming the
20 outcome of her grievance (the Grievance Outcome Letter) (production 104A to 104B). It stated that the claimant had raised the matters informally and was happy to move forward but then subsequently raised the same issues at her Grievance Meeting. Mrs Graham considered that Mrs Stenhouse's role was to take minutes only. Mrs Graham concluded that it was at the Managing Directors' discretion as to who was placed on courses and not paying salary increases did not mean to say that business was downsizing.
25 In relation to holidays she concluded:

*"You raised a concern about Russell taking over certain tasks which you previously dealt with, namely dealing with holidays, interviews and dealing with staff queries. As the company continues to grow certain changes have to be made to process and certain procedures have to be changed. The
30 holidays are now managed by the Directors as explained in the communication letter handed out on 12/8/16. It is imperative that the*

5 *Directors are aware of who is off and when and as such it makes business sense that they deal with and approve holidays in line with the holiday request procedure detailed on 12/9/16. This does not mean any detriment to yourself, its simply a change of procedure enabling you to spend more time on other tasks. Yourself and the Directors still carry out interviews and this has not changed. Dealing with staff is still a part of your role, as it is part of the Directors' role. I do not believe you have suffered any detriment as a result of this change to process, therefore this point of your grievance is not upheld.*

io *You raised a concern regarding access to information - emails to the office are now on a communal computer in the hall which was at your request and can be accessed by all office staff there. Staff records are in the Managing Directors' office as they have to be private and confidential information inside. This is to ensure the company complies with data protection obligations and it is not unreasonable. I do not believe this causes any detriment to your job role and you still have access to the computer if required. I do not uphold this point of your grievance."*

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71. Mrs Graham concluded that the grievance was not upheld and that no further action was necessary. The claimant was then advised that she had a right to appeal the decision to Mr Graham Snr.

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72. On 30 September 2016, the claimant attended a disciplinary hearing conducted by Mrs Graham (the Disciplinary Hearing). Ms Hier was present to take notes (productions 82 to 85). Mrs Heir is Mr Graham Jnr's mother-in-law. Mary Sommerville accompanied the claimant

25 73. The claimant was provided with the witness statements and investigation meeting notes that were not enclosed in the letter inviting her to the Disciplinary Hearing. The claimant expressed concern about Mrs Hier's presence. Mrs Graham said that the Disciplinary Hearing would be recorded.

74. The claimant expressed concern about the change in wording of the allegations and the short notice of the Disciplinary Hearing. The claimant said that she had a hospital appointment on 7 September 2016 and that she had provided this to Mr Graham Jnr. She then went on to explain that morning she had lost her mobile telephone and by the time she had found it she had missed her appointment. She telephoned the hospital who advised that they would issue another appointment. The claimant explained that she had attended the next appointment scheduled for 28 September 2016 on the wrong date: 21 September 2016 and when she discovered she had come a week earlier.

75. The claimant said that her son had contacted her to say that he had her mobile telephone; that had been left in his car. The claimant had mail for her daughter, which she dropped off while her daughter and Ms Martin were having a coffee at the civic centre. The claimant could not recall who was at the civic centre that day but thought it was just her daughter and Ms Martin. The claimant was asked about Mr Bell's statement. She denied saying that, "it is no fun being prodded and poked." Mrs Graham asked about grief counselling. Mrs Graham said that the claimant had been handed a letter on 8 August 2016 and it there was a witness confirming that the letter had been handed over. The claimant said that she had never received the letter and that had been noted in the last minutes. The claimant said that she was not conducting staff meetings in public places but was having an informal chat with colleagues. The claimant said that issues that had been raised had been brought to Mrs Graham's attention. The claimant maintained that all of this had come about since she had made a formal grievance against Mr Graham Jnr. The Disciplinary Hearing was adjourned.

76. By letter dated 3 October 2016 the claimant was invited to attend a reconvened disciplinary hearing on 6 October 2016 (production 86). Enclosed with the letter was a "Letter regarding Informal Meeting on 05/08/16" (production 41).

77. On 7 October 2016, the claimant wrote to Mr Graham Snr appealing the outcome of her grievance (production 37/87 to 88). Mrs Graham opened the letter.
78. The reconvened disciplinary hearing took place on 11 October 2016 (the Reconvened Disciplinary Hearing). Katrina Graham took notes (productions 38/89 to 104). Ms Somerville accompanied the claimant.
79. Mrs Graham asked questions and said that the claimant should respond in a concise way; yes or no. The claimant maintained that her son had found her mobile telephone. The claimant said that the investigation meeting notes were inaccurate. The claimant said that she did not do back to the office after cancelling her appointment because she was delivering mail to her daughter. The claimant thought she had flexible hours; she would make up her time. The claimant provided copies of her hospital appointments. The claimant was asked who was at the civic centre on 7 September 2016. The claimant denied saying to Mr Graham Jnr on 9 September 2016 that she attended hospital on 7 September 2016.
80. Mrs Graham referred to an informal chat that she had with the claimant on 5 August 2016 about the claimant attending grief counselling. The claimant denied that she had said that she was attending grief counselling. Ms Somerville suggested that the claimant go through the allegations date by date. Mrs Graham declined to do this. The claimant asked for the office diary to be produced but it was not. The claimant reiterated her concern about Mr Graham Jnr's involvement in the investigation.
81. By letter dated 13 October 2017 Mrs Graham wrote to the claimant (the Dismissal Letter) (production 105). Mrs Graham said that she found the claimant's explanations about the events on the morning of 7 September 2016 unsatisfactory. The claimant gave conflicting information. Mrs Graham also found the claimant's explanation regarding grief counselling unsatisfactory. Mrs Graham enclosed a copy of the letter, which she said that she gave to the claimant after the informal meeting. Mrs Graham considered that the claimant's explanation of meeting employees in a cafe

was without authorisation and inappropriate to discuss “private and confidential information about the company in a public place”. Other staff said that the meetings were a social gathering during their break times and not a company meeting or forum to discuss their concerns. Mrs Graham advised that she considered that the claimant’s actions were “gross misconduct/a gross breach of trust, resulting in the company losing faith in” the claimant’s integrity in her role. The claimant was advised of her right of appeal to Gordon Miller, Chartered Accountant.

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82. In reaching her decision Mrs Graham also took into consideration the claimant turning the security cameras and the claimant meeting staff without Mrs Graham’s authorisation in a public place. Mrs Graham did not consider any sanction other than dismissal.

83. The claimant exercised her right of appeal on 17 October 2017 because she said the allegations were untrue and unfounded and the investigation and disciplinary hearings were carried out in a biased way (production 108).

84. Mr Graham Snr wrote to the claimant on 19 October 2016 advising that he would conduct the claimant’s grievance appeal hearing on 31 October 2016 (the Grievance Appeal Hearing) (production 109). The claimant was advised of her right to be accompanied.

85. Mr Miller wrote to the claimant on 20 October 2016 inviting her to a disciplinary appeal hearing to be held on 1 November 2016 at the respondent’s premises (the Disciplinary Appeal Hearing). The claimant was advised of her right to be accompanied.

86. The claimant attended the respondent’s premises for the Grievance Appeal Hearing on 31 October 2016 but left as she was unable to have a private space with her colleague despite this having been requested in advance.

87. The claimant attended the Disciplinary Appeal Hearing on 1 November 2016 conducted by Mr Miller. Ms Sommerville accompanied her. Ms Stenhouse took notes (productions 117A to 117N).

88. In preparation Mr Miller had read through the documentation provided by Mrs Graham and had spoken to her.

89. At the Disciplinary Appeal Hearing the claimant said that she considered the minutes relating to the Investigation Meeting were inaccurate: she did not say that that she found her mobile telephone in the service user's house. The claimant also said that she never said that she attended the hospital appointment on 7 September 2016 although she did have an appointment for that day. She did subsequently attend the hospital appointment on 21 September 2016. The claimant said that she did not say that she was attending grief counselling. The first time she saw the letter that Mrs Graham said was hand delivered to her on 8 August 2016 was in October 2016. The claimant said that the informal chat in August 2016 was about September holidays. The claimant asked Mr Miller to speak to Ms Martin about the way the statements were taken. She also expressed concern about the partiality of those taking notes of the meetings. The claimant commented about not seeing the office diary; advising Mrs Graham about the issues raised by the Carers. She did not believe that the matter had been properly investigated.

90. Mr Graham Snr wrote to the claimant on 7 November 2016 offering to reschedule the Grievance Appeal Hearing to 29 November 2016 (production 115A).

91. Following the Disciplinary Appeal Hearing Mr Miller clarified with Mr Graham Jnr that the minutes of the Disciplinary Hearing were sent to Ms Somerville.

92. Mr Miller concluded that the claimant had lost her mobile telephone and did not attend her hospital appointment. She did not inform her employer. Mr Miller considered that there was no reason to disbelieve Mrs Graham about the meeting about grief counselling on 5 August 2016 and the follow up letter. In any event Mr Miller believed that the claimant did not have authority to have staff meeting in a public place when there was office space available.

93. Mr Miller considered that the respondent was a small company, which had appointed an organisation specialising in employment law. He believed that the respondent had therefore carried out the procedures fairly and that Mr Graham Jnr was only gathering information and was not biased.

5 94. Mr Miller wrote to the claimant on 14 November 2017 advising her that her appeal was refused (productions 118 to 119).

Observations on Witnesses and Conflict of Evidence

10 95. The Tribunal considered that this case was unusual in number of factual disputes between the parties albeit that only some were in the Tribunal's view related to material findings.

15 96. The Tribunal's impression was that the claimant and Mrs Graham had worked well together for years. Mrs Graham had an informal management style, which was understandable given the type of business and the number of employees involved. As a result the claimant had significant autonomy and flexibility, which for a number of years suited Mrs Graham. There had been no issues about the claimant's work or commitment to the business.

20 97. The Tribunal considered the claimant and Mr Graham Jnr had little respect for each other. Their relationship deteriorated further when Mr Graham Jnr was employed as Managing Director in May 2016. In the Tribunal's view Mr Graham Jnr left the claimant in no doubt that he was in charge and she now reported to him. The claimant resented this and thought that Mrs Graham would support her given their long-standing relationship. In the Tribunal's view the claimant did not appreciate that Mrs Graham wanted Mr Graham Jnr to manage the business as was aware of what he was doing. The claimant seemed oblivious to the fact that following Mr Graham Jnr's appointment her relationship with Mrs Graham was also deteriorating.

25 98. Mrs Graham was lead through productions and her evidence was at times evasive and unconvincing particularly about the about her involvement in the investigation and the letter about the informal meeting on 5 August 30 2016.

99. Mr Graham Jnr was also in the Tribunal's view evasive at times and contradicted Mrs Graham's evidence. The Tribunal did not consider that he was particularly credible or reliable. Often when pressed on issues rather than answer the question his response was that he had taken advice.

5 100. Mr Graham Snr's evidence related events on 7 September 2016 and the Grievance Appeal Hearing. Little turned on his evidence. The Tribunal considered that his evidence about events at the Grievance Appeal Hearing was inconsistent with contemporaneous correspondence, which he sent. The Tribunal had doubts about his reliability.

10 101. The Tribunal considered that Mr Miller was reluctant to conduct the Disciplinary Appeal Hearing and appeared uncomfortable while giving evidence. The Tribunal's impression was that Mr Miller did not question the process that had taken place and believed unquestionably Mrs Graham and Mr Graham Jnr.

15 102. Ms Faulkner was in the Tribunal's view a credible and reliable witness whose evidence the Tribunal had no hesitation in accepting.

103. The claimant's evidence was at times rambling, confusing and overstated. The Tribunal felt that the claimant had difficulty focusing on the question and tended to go off on a tangent. She was unreliable when recalling dates.
20 For example, the claimant's email sent on 19 August 2016 refers to her having received a hand delivered letter on 20 August 2016. She also had written notification of a hospital appointment for 28 September 2016 but attended on 21 September 2016. The Tribunal's impression was that the claimant was further confused because of the number of "informal meetings", "informal chats" and formal meetings that had taken place and
25 the different process (grievance and disciplinary) that were ongoing.

104. The Tribunal then considered the following key factual disputes.

Contractual Arrangements

105. The respondent's position was that the claimant worked in the office 10am to 4pm for which she was paid. The claimant said that she was paid for the hours that she worked. The claimant worked in the office but usually carried out caring duties before and afterwards. The claimant completed weekly timesheets recording the hours that she had worked and was paid for those hours.
106. The Contract said that the claimant is paid hourly; she had to work such times necessary for the efficient discharge of her duties and had to complete weekly timesheets. No weekly time sheets were produced during the internal process or at the Hearing. The only extracts produced from the office diary were for Wednesdays 15 June 2016, 22 June 2016, 29 June 2016, 6 July 2016, 13 July 2016, 27 July 2016 and 3 August 2016. Most of these showed the claimant starting work in the office around 9am with various finishing times.
107. The Tribunal considered that claimant had significant autonomy over the years. Mrs Graham was based in the office. She would be privy to the time sheets completed by the claimant. She would be aware if the claimant was "popping out" of the office. Mrs Graham did not question this or ask the claimant to produce appointment cards. The claimant said that she would make up time but in any event was only paid for the hours that she worked.
108. In the Grievance Outcome Letter Mrs Graham stated, "as the company continues to grow changes have to be made to process and certain procedures have to be change". In the Tribunal's view it was highly likely that following his appointment Mr Graham Jnr wanted curtail the claimant flexibility while she was in the office to ensure that it was efficiently managed. The Tribunal therefore considered it probable that in June 2016 Mrs Graham spoke to the claimant about her the hours she spent in the office especially as the claimant started recording her start and finishing times in the office diary. The claimant also recorded when she was out of the office for a personal appointment. In the absence of timesheets and payslips the Tribunal could not form a view if the claimant was paid when

she was out of the office on a personal matter and had not made up the hours at some other point in the week. The Tribunal was satisfied that the claimant believed that she was only paid for the hours that she worked.

Grievance against Mr Graham Jnr

5 109. The respondent's position was that there was an altercation between the claimant and Mr Graham Jnr in 2015 following which no action was taken. The claimant did not raise any other complaint until 4 August 2016, which was after Mr Graham Jnr asked the claimant to produce appointment cards for her absences. The claimant's position was that Mrs Graham was aware
10 of the claimant's concerns, as she had raised them with her.

110. The Tribunal considered that following the incident in the summer of 2015 Mrs Graham was aware of the claimant's poor relationship with Mr Graham Jnr. However Mrs Graham had decided to step back from the business and Mr Graham Jnr wanted to be increasingly involved. After Mr Graham Jnr
15 became Managing Director his relationship with the claimant deteriorated further; there was mutual disrespect. Ms Faulkner referred to the atmosphere in the office; no one spoke to each other. In the Tribunal's view it was highly likely that Mrs Graham was knew that the claimant was concerned about her position following Mr Graham Jnr's appointment but it
20 was Mrs Graham's decision to appointment him and blood is thicker than water.

The Medical Appointments

111. There was conflicting evidence about when the claimant attended medical appointments and who was aware of them.

25 112. Mrs Graham said that she knew of and authorised two of the claimant's appointments although was equivocal about which ones. Mrs Graham understood it was for "bloods". She said that she telephoned the office one Wednesday and was told by Mr Bell that the claimant was not available. Mrs Graham said that she asked Mr Bell to keep a record of when the claimant
30 left and returned. Mrs Graham said that when Mr Graham Jnr telephoned

her while she was on holiday he said that the claimant had left the office on both Wednesdays (27 July 2016 and 3 August 2016) and when he challenged her he was told that it was none of his business; it was woman's troubles.

5 113. Mr Graham Jnr said that when the claimant left the office on 27 July 2016 and 3 August 2016 she gave contradictory explanations; she said it was for "bloods" and "woman's problems".

114. The claimant's evidence was that she attended numerous medical appointments but could not recall if they were always on Wednesdays. She recalled that she might have taken a client to an appointment. The claimant
10 said that she made a note of it in the office diary.

115. From the extracts of the office diary that were produced at the Hearing there was a note of a doctor's appointment on 15 June 2016 and 13 July 2016. Mrs Graham said that the entry on 13 July 2016 is in her handwriting. On 22
15 June 2016 there is a note of "1 hour off Private App" and on 6 July 2016 "1 hour appointment". There is also reference to "John Holiday" on 29 June 2016 and "Russell on a course" on 13 July 2016.

116. Also produced is a statement written by Mr Bell on 23 September 2016 stating that as far as he was aware the claimant was attending doctor's
20 appointments over a six to eight week period. As it was the Managing Director's day off, "she asked me to note the time she left and returned. It was 10.30 to 11.30 each week."

117. The Tribunal did not consider that any of the witnesses were reliable on this issue. Given that Mrs Graham said that she had authorised two absences
25 the Tribunal found it surprising that having done so and given the issues that arose subsequently she could not recall which ones. Mrs Graham was vague about when she asked Mr Bell to keep a note of the times the claimant left and returned. His statement does not state who made him aware that the claimant was attending doctor's appointments; what period
30 he is referring to; when he was asked to make a note of the claimant leaving

and coming back; and it is ambiguous as to who made the request although the Tribunal thought it was more likely than not Mrs Graham. Mr Graham Jnr referred to the claimant's different explanations for attending doctor's appointments, which was inconsistent with Mrs Graham's evidence that Mr Graham Jnr told her that the claimant left the office and told Mr Graham Jnr that it was none of his business; it was woman's troubles. The claimant was vague about when she attended doctor's appointments but said that she did not ask Mrs Graham if she could attend as she did not need to. The claimant said that she did not tell Mr Graham Jnr that she was going for "bloods" and then "women's problems".

118. The Tribunal considered that it was highly likely that the claimant attended appointments with her general practitioner some time in June and July as she has an outpatient hospital appointment on 7 September 2016 for which her general practitioner would have referred her probably after some preliminary investigation into the possible cause of her symptoms.

119. The Tribunal also felt that it was highly likely that the claimant did not ask Mrs Graham for authorisation to attend the appointments, as she had not done so in the past and did not think she need to. However Mrs Graham would be aware of the claimant going to a doctor's appointment from the entry in the office diary and from the discussion, which presumably prompted Mrs Graham to make the entry on 13 July 2016.

120. Mrs Graham was vague about when she requested Mr Bell to keep a note of the claimant leaving and returning to the office on a Wednesday. It was in the Tribunal's view likely to have been around 13 July 2016. At that point according to the extracts of the office diary the claimant had appointments on 15 June 2016, 22 June 2016 and 6 July 2016 of which only one (15 June 2016) states that it was a doctor's appointment. There was no appointment noted on 29 June 2016 when Mr Bell is noted as being on holiday. If Mrs Graham had concerns about the nature of and/or number of the claimant's appointments the Tribunal found it strange that Mrs Graham asked Mr Bell to keep a note rather than ask the claimant what was happening. Mrs

Graham was also vague about when she went on holiday. There is no office diary extract produced for 20 July 2016. The note that Mr Bell kept was not produced during the disciplinary process or referred to at the alleged meeting on 5 August 2016 or in the letter of 8 August 2016.

5 121. The extracts from office diary do not disclose the claimant attending any
appointments on 27 July 2016 and 3 August 2016. Mr Graham Jnr was at
work on these dates. The Tribunal thought it was likely that the claimant
said to Mr Graham Jnr that it was for "woman's troubles". The Tribunal's
reasoning was that Mr Graham Jnr said that was one the explanations given
10 to him. Although in cross examination the claimant denied that she said
that, the Tribunal noted that in examination in chief the claimant explained
that she was stressed and had palpitations. She was to get a heart monitor
but did not want to tell as Mr Graham Jnr so said it was woman's problems.
The claimant was vague as to when she said that to Mr Graham Jnr but the
15 Tribunal though it was more likely than not that it would have been said
while Mrs Graham was on holiday.

The 5 August Meeting and Follow up Letter

122. Mrs Graham said that Mr Graham Jnr said that the claimant was absent
while Mrs Graham was on holidays so on her return Mrs Graham said that
20 she had an "informal" meeting with the claimant during which the claimant
explained that her absences on Wednesdays were due to attending grief
counselling. Mrs Graham asked the claimant to reschedule these meetings
but the claimant said that she had tried but was unable to do so. Mrs
Graham had indicated that she considered attending grief counselling
25 herself and the claimant had advised that she could get a general
practitioners referral. Mrs Graham said that she prepared a letter confirming
what had been discussed and hand delivered it to the claimant.

123. Mr Graham Jnr said that after the claimant had referred to "woman's
troubles" it was suggested by his advisers that Mrs Graham should speak to
30 the claimant on her return from holiday. Mr Graham Jnr said that that
meeting took place on 5 August 2016 and he was aware of this because he

was in the office at the time. Mr Graham Jnr said that the meeting took place in the Managing Directors' office; he was in the claimant's office. Mrs Graham told him about it afterwards.

5 124. The claimant denied that she had a discussion with Mrs Graham on 5 August 2016 during which the claimant said that she was attending grief counselling at the Jeanie Dean's Ward. She conceded that at some point there was discussion about grief counselling but this was about other employees. The claimant also denied that she was handed a letter dated 5 August 2016 on 8 August 2016 or any time before the Disciplinary Hearing
10 (production 41).

15 125. The evidence was vague about when Mrs Graham returned to the office from annual leave. The claimant sent an email to her on 4 August 2016 requesting an informal chat about concerns of "a sensitive nature". The Tribunal thought it likely that Mrs Graham returned to work on 4 August 2016 that was a Thursday and the claimant's day off. The Tribunal also thought it was likely that Mrs Graham would have read her emails and would have known that the claimant wished to discuss a sensitive matter. Mrs Graham would not have known the nature of the sensitive matter that the claimant wanted to discuss. If as Mrs Graham suggested that she had
20 an "informal" meeting with the claimant on 5 August 2016 to discuss a personal issue: why the claimant was attending so many doctor's appointments the Tribunal thought that it was surprising in that context that Mrs Graham did not ask about the sensitive matter and very unlikely that the claimant would not have raised it.

25 126. Mrs Graham's explanation for having the meeting was out of concern. In early August 2016 the Tribunal did not understand Mrs Graham to believe that the claimant's appointments were not genuine; it was the number of appointments, which appeared to be the concern. As indicated above if Mrs Graham was concerned it was surprising that she waited to speak to the
30 claimant rather than raising the matter on or around 13 July 2016.

127. Mr Graham Jnr on the other hand appeared less concerned about the claimant and more concerned about the claimant's "contradictory" reasons for consulting her doctor. He had sought advice, which was for Mrs Graham to speak to the claimant given the reference to "woman's trouble".

5 128. The Tribunal did not consider that it was unusual for blood tests to be taken as part of a general practitioner's investigation into symptoms and for results to be discussed at a separate consultation, which might involve further investigation including a referral to a specialist. The claimant had no sick leave in this period. The Tribunal was not convinced by Mr Graham
10 Jnr's evidence on this point.

129. Mrs Graham said in her evidence that "the following day she expected the claimant to go to the grief-counselling meeting" but she did not do so. If the meeting was on 5 August 2016 (a Friday) that did not make sense. Nonetheless as Mr Graham Jnr had spoken to Mrs Graham about the
15 claimant's absence the Tribunal thought it was likely that sometime after her return from holiday Mrs Graham asked the claimant about her appointments.

130. Given the claimant's tendency to change the subject and go off on a tangent the Tribunal considered that it was probable that the claimant and Mrs
20 Graham discussed grief counselling because they and other employees had family bereavements. The Tribunal thought it was unlikely that the claimant would have said to Mrs Graham that she had been attending grief counselling over the previous six weeks. The Tribunal's reason was that the claimant had not said that she had been attending doctor's appointments
25 every week. In the Tribunal's view there was no reason for the claimant to lie to Mrs Graham. The claimant thought that she still had a good relationship with Mrs Graham and had no reason to think that Mrs Graham was checking up on her. The claimant thought she was only paid for the hours that she worked. The Tribunal considered that had the claimant she
30 had been attending grief counselling and was continuing to do so it was strange that Mrs Graham did not request the appointment card when the

claimant did not subsequently produce it or enquire why the claimant was not attending the sessions when the appointments were on going.

131. Mrs Graham also said that she prepared a letter, which was handed to the claimant on 8 August 2016, which the claimant denied. The Tribunal was not convinced that a letter was handed to the claimant on 8 August 2016. The Tribunal thought that if as Mrs Graham suggested the letter confirmed what was discussed at the meeting it was unusual to have two drafts with contradictory facts. Had the claimant received the letter on 8 August 2016 the Tribunal thought it was likely she would have responded as she did not accept that she was absent every Wednesday in the previous six weeks for one hour or that she was attending grief counselling.

132. Although Mr Graham Jnr said that he was in the office on 5 August 2016 when the meeting took place and Mrs Graham told him about it, the Tribunal did not find his evidence convincing. The Tribunal's reasoning was that had Mr Graham Jnr been aware of the meeting and letter it was surprising that he did not ask the claimant about the appointment card especially as in the same week he introduced return to work interviews for any period of absence that was not authorised annual leave and requiring all sick absence to be certified. The Tribunal noted that the claimant gave Mr Graham Jnr the letter dated 11 August 2016 about her hospital appointment on 7 September 2016 yet there was no evidence to suggest that he asked her about the appointment card for grief counselling which is surprising if in light of what he had been told he expected the claimant to have ongoing appointments for grief counselling.

Conversation on 9 September 2016

133. The parties agreed that that the claimant and Mr Graham Jnr spoke as she was leaving the office to go on annual leave. Mrs Graham referred to Mr Graham Jnr's witness statement. She said that she was in the office when the conversation took place and she overheard it.

134. Mr Graham Jnr said that he asked the claimant if she attended her hospital appointment and she said that she had. When he challenged the claimant about this as he had seen her in the town the claimant said that she was leaving as it was the end of the day and she would think about it while on holiday and get back to him.
135. The claimant said that she was on the way out of the office. She did not want to speak to Mr Graham Jnr alone as she had raised a grievance against him. The claimant said she did not hear clearly what he asked and said that she would speak to Mrs Graham when the claimant returned from holiday.
136. The Tribunal considered that the claimant did not believe that there was anything wrong with her conduct on 7 September 2016 and there was no reason to say she had attended the hospital appointment when she had not. However by this stage raised she had raised a grievance against Mr Graham Jnr. The Tribunal's view was that the claimant wanted to avoid any conversation with Mr Graham Jnr and preferred to deal with Mrs Graham. The Tribunal had no doubt that Mr Graham Jnr was aware of that and it was no coincidence that he raised the issue just as the claimant was leaving. The Tribunal's impression was under pressure the claimant tended to speak without listening and thinking. The Tribunal therefore thought that it was likely the claimant answered yes and said that she would speak to Mrs Graham on the claimant's return from leave.

Submissions

137. The representatives helpfully prepared written submissions, which is summarised below.
138. In terms of the law the representatives referred the Tribunal to Sections 98(1) and 98(4) of the Employment Rights Act 1996.
139. Section 98(1) provides that in determining 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 principle reason) for the dismissal; and
- b. That it is either a reason falling with subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.”

140. If the Tribunal finds that the respondent has made out its potentially fair reason in this case, under section 98(4) it then must make a determination on whether the decision to dismiss for that reason is fair or unfair taking account of:

- a. 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 sufficient reason for dismissing the employee; and
- b. Shall be determined in accordance with the equity and the substantial merits of the case.

141. The Tribunal must apply the principles of *British Home Stores Ltd v Burchell [1978] IRLR 379*. A dismissal for misconduct will only be fair if, at the time of dismissal:

- a. The employer believed the employee to be guilty of misconduct.
- b. The employer had reasonable grounds for believing that the employee was guilty of that misconduct.
- c. At the time it held that belief, it had carried out as much investigation as was reasonable.

142. The Burchill test is subjective (see *Scottish Midland Co-op v Cullion [1991] IRLR 261 CS*). The Tribunal must decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (see *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439*). The range of reasonable responses test applies both to the decision to dismiss and to the investigation (see *Sainsbury's Supermarkets Ltd v Hitt [2003]*

IRLR 23 and boys and girls Welfare Society v McDonald [1996] IRLR 129 EAT).

143. The investigation must be "even-handed" to be reasonable. In cases that may result in dismissal, particularly where the employee has been suspended and therefore has no access to witnesses during the investigation, the investigation should not simply be a search for evidence against the employee, but should also include evidence that may point towards innocence (*A v B [2003] IRLR 405*). Even-handedness may also mean following up aspects of a witness's evidence that raise unanswered questions.

144. The Tribunal was also referred to the following cases: *Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT/0032/09*, in which the EAT considered case law on what amounts to gross misconduct and found that it involves either deliberate wrongdoing or gross negligence. In cases of deliberate wrongdoing, it must amount to wilful repudiation of the express or implied terms of the contract (*Wilson v Racher [1974] ICR 428 (CA)*). *Leach v The Office of Communications (OFCOM) [2012] EWCA Civ 959*, in which the Court of Appeal considered loss of trust and confidence as a reason for dismissal and stated that it is not an automatic solvent of obligations nor a convenient label for an employer to stick on any situation in which it feels let down by an employee. It held that all the relevant circumstances must be examined. While this case was considered in relation to SOSR, it is submitted that it is relevant where an employer seeks to rely on trust and confidence in relation to conduct and makes clear that all the circumstances must be considered as per s.98(4) and citing loss of trust and confidence does not in itself render dismissal fair.

The Respondent's Submissions

145. This is an unfair dismissal claim. The respondent's position was that the claimant was dismissed for conduct, which is a potentially fair reason. The claimant said that she was dismissed because Mr Graham Jnr wanted rid of

her. However, during her evidence this changed to Mrs Graham wanting rid of her.

5 146. The respondent submitted that the claimant's conspiracy theory was untenable. The claimant made unsubstantiated comments about Mr Graham Jnr during her evidence. The claimant was obsessed about her status. While an incident occurred in 2015 this was not taken further. It was only in August 2016 that the claimant raised other issues about Mr Graham Jnr. There were issues about the claimant's allocation of holidays; invoicing turning off CCTV and attitude. New policies were introduced or reinforced. 10 This was progress not undermining the claimant. The claimant painted a false picture of conditions at the respondent company. The claimant persuaded staff who were talking about leaving to stay. Her daughter travelled from East Kilbride to work for the respondent.

15 147. The claimant took time out from work on six Wednesdays in June, July and August 2016. For the last two of those, 27 July and 3 August 2016 Mrs Graham was on holiday. Mr Graham Jnr was in charge. It was then that he questioned her appointments, and asked for some evidence. This is true because on two occasions, 23 September 2016 and 11 October 2016 the claimant accepts that she told Mr Graham Jnr that she was going to the 20 doctors with woman's trouble.

25 148. The earliest record of the claimant asking for a discussion with Mrs Graham is on 4 August 2016. The first request for a formal meeting is on 12 August 2016 both dates are after Mr Graham asked the claimant to bring in appointment cards for the Wednesdays she has had off. Appointment cards which have never been produced.

30 149. There was no plot to trump up reasons to dismiss the claimant. If the company wanted to reorganise so that Mr Graham Jnr took over the claimant's responsibilities that could be done perfectly lawfully as redundancy or some other substantial reason. The respondent took legal advice, there was no reason to embark on the laborious and time consuming disciplinary process which consumed so much time and energy.

150. The respondent is a small company with a small management structure. As the claimant was Assistant Manager, the choices of senior staff to deal with this were limited.
- 5 151. Much has been made of the involvement of Mr Graham Jnr. He simply collected information. The claimant did raise issues about the questions he asked staff. Other than complaining about the atmosphere, the claimant did not say how anyone else would have conducted the investigation any differently. There was a clear case to be dealt with by the disciplinary process.
- 10 152. The claimant said that the respondent should have brought in someone from outside to deal with the matter, which was done at the appeal stage. However she then argued that, a professionally qualified accountant, would not overturn the decision as he was paid by the respondent. The claimant was never going to be happy.
- 15 153. As for taking the minutes, the claimant has told the Tribunal that Mr Bell is someone she did not want to know her private life, she never asked for him to take minutes, indeed he is someone she says is beneath her. The respondent chose family members for privacy. The claimant had her daughter and two sisters working for the respondent, so could have had her family with her had she wished. She was never told she could not have the sister whom was questioned about the 7 September, and anyway that still left two other family members she could have taken with her.
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154. The claimant accepted that she read the suspension letter which lays out the process for asking to contact employees whom might help her, she does not do so, she could not point to any such request, she did not make such a request. Hearings were postponed so that she could be accompanied wanted at each hearing. The claimant was receiving independent advice
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155. The respondent carried out as much investigation into the matter as was reasonable in all the circumstances in the case, giving it reasonable

grounds on which to sustain the belief that the claimant had broken its trust and confidence.

5 156. The Tribunal was invited to accept that the minutes of the hearing were accurate. It was also invited to prefer the respondent's evidence in relation to the hours the claimant worked and how she was paid which was more reliable. The Tribunal was also invited to prefer Mrs Graham's evidence about the grief counselling as there was no reason for Mrs Graham to have made this up. Mrs Graham's evidence was unchallenged that she was in the office on 9 September 2016. The claimant's evidence was vague. There
10 was no reason for the respondent to make up this evidence. The claimant's explanation at the disciplinary hearing were vague and contradictory.

15 157. As Assistant Manager, the claimant had important responsibilities towards the respondent. In the absence of the two Managing Directors the claimant ran the company. It was therefore a post which required them to have the utmost trust and confidence in her.

158. The key part of her role was to co-ordinate where staff were, ensuring that they met their commitments, and were in the right place at the right time. Although there were times when the claimant was rostered to visit clients, at all other times, the respondent had every expectation that she would be
20 carrying out her duties at the office.

159. The claimant's meeting with staff at the Civic Centre was unauthorised, and she knew this to be the case. The claimant accepted they could have met at other times, such as after work, and other places, such as her home. She tried to make out the issues were urgent, however, none of the examples
25 she gave were urgent, indeed none of them justified a get together. Furthermore, both Mr Graham Jnr and Katrina Graham confirmed that she had said clients were discussed. It is hard to imagine meetings of carers which would not involve some mention of clients. Even if the clients were not mentioned by name, the Civic Centre was a public place, people could
30 identify who the carers were, and whom they visited, especially in a small place like Helensburgh.

160. The claimant deliberately chose to conduct some of them on Wednesdays when Mrs Graham was not present. It was not until Mr Graham Jnr noticed these absences and asked for some evidence of the reason for them, that the matter came to light. The claimant decided that the best approach was not honesty, but to begin a web of lies and confusion. The changes her story.

161. Mrs Graham had a choice, to reject what she had heard with her own ears, and what was recorded from the Investigatory Meeting, or believe an evasive claimant. By the time of the Reconvened Disciplinary Hearing and the appeal hearing the claimant's defence was that she has always worked flexi time and she has always been free to come and go as she pleased. If that was true then she would have raised it at the very beginning of the whole investigatory process, indeed why would either of the Grahams have asked her where she was going.

162. The hearings may not have been the best ordered procedure, but Tribunal has read the evasive and unhelpful responses the claimant gave throughout the investigatory and disciplinary process and witnessed it first hand during this hearing.

163. During the disciplinary process, she claims various people witnessed thing but only Ms Faulkner who is still employed by the respondent attended.

164. The claimant knowingly and deliberately did acts which anyone would know would breach that trust and confidence, she then did everything possible to avoid taking responsibility for what she had done. This was even to the extent of accusing both of her managing directors of lying about conversations she had had with them. She destroyed the trust and confidence that her employers had in her; it was gross misconduct, and, particularly as she occupied a management position, dismissal was the correct sanction.

165. The claimant's evidence that she had unblemished service is simply not true. Mrs Graham quite rightly considered the claimant's record to see if

there was mitigating factors, the issues regarding the CCTV were right referred to as part of considering the claimant's overall service.

166. There are circumstances when summary dismissal is the only possible outcome, this is one of them, the respondent could not trust the claimant, she held a position in which trust was essential. The decision is clear. Mrs Graham found that the claimant gave conflicting information about 7 September, that she had failed to justify why, once she had found her phone, a little after 10 o'clock she did not arrive back in the office until approximately 11.30. The claimant gave differing explanations for her absences on the six Wednesdays. She had told her she was going for grief counselling, but that was not true, she was holding meetings. Mrs Graham found it was completely inappropriate to have staff meetings regarding private and confidential information about the company in a public place. Mrs Graham concludes, "The main issue is that you advised that you were doing one thing when in fact you were doing something completely different, which would not warrant you taking time out of the office, when you were meant to be in the office carrying out your normal duties." The claimant then had a very thorough appeal hearing.

167. The claim should be dismissed. The respondent did follow a very fair procedure, which allowed the claimant all her legal rights, allowed her to say exactly what she wished by way of explanation. In the event the Tribunal feels there was a failure to follow a fair procedure in any respect, the respondent relies on *Polkey* to argue that dismissal is still reasonable even if there were failures in procedure. Although this hearing is on merits only, the respondent also argues that the claimant contributed 100% to her dismissal.

The Claimant's Submissions

168. The claimant invited the Tribunal to prefer her evidence particularly in relation to key disputes over that of the respondent. Generally, the respondent's witnesses were directed to documents to read and asked if the documents state the position as they see it, rather than offering evidence

from their own recollection. In contrast, the claimant and Ms Faulkner, who gave evidence for the claimant, discussed evidence from their own recollection before being directed to relevant documents. Accordingly, greater weight can be given to the evidence of the Claimant witnesses. The Respondent's witnesses were also at times asked leading questions. Further, points were put to the claimant, which had not been established as being the respondent's case by the respondent witnesses. In particular, diary entries and discussion of rostering on particular dates were put to the claimant in reference to documents, which were not in evidence before the Tribunal, had never been mentioned before during the respondent's evidence nor ever produced in the disciplinary process. The Tribunal should give no weight to this evidence as it was not fair to put this to the claimant and there is no evidence before the Tribunal from which it could assess the veracity of the points being put to the claimant. If this evidence was available to the respondent at the time of the disciplinary process, it would have been reasonable to discuss it at that stage. I would suggest this gives weight to the position that the respondent had constructed a reason to dismiss the claimant, which it is now retrospectively attempting to justify.

169. The claimant assessed the credibility of each witness and highlighted why her evidence should be preferred.

170. The respondent's reasons for dismissal were based on those allegations put forward in the disciplinary proceedings, being allegedly falsifying a hospital appointment on 7 September 2016 and allegedly falsifying attending grief counseling on six specific dates. The Dismissal Letter is unclear in its reasoning but states that the claimant is being dismissed for gross misconduct/gross breach of trust. In her evidence Mrs Graham suggested that loss of trust and confidence was a key reason.

171. The claimant submitted that the respondent did not have a fair reason to dismiss the claimant in the circumstances. While conduct is a potentially fair reason in terms of Section 98(2), in the circumstances the respondent seeks to rely on gross misconduct. The allegations do not amount to gross

misconduct in the circumstances. In terms of *Sandwell*, gross misconduct amounts to deliberate wrongdoing, which amounts to wilful repudiation of the contract, or gross negligence. In this case, it is submitted that the allegations could not reasonably be considered to amount to either of these.

5 172. In relation the hospital appointment, it is accepted the claimant had a hospital appointment, she had intended to go to it, but was advised to reschedule it after running late due to looking for her lost mobile telephone. The claimant clearly understood herself not to be paid for this time and she did go to work. While it might be argued that the claimant should have returned to work immediately upon its cancellation, this could have been raised with her as a point for future. It was submitted that it could hardly be said to amount to deliberate wrongdoing or wilful repudiation of the contract. The claimant did not regard it as such and had no intention of committing any form of wrongdoing. Further, while the respondent witnesses gave various (and conflicting) accounts of procedures regarding time off and pay for appointments, no evidence of any written procedure was produced.

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173. The claimant's position was that she never said she was going to grief counselling. From the Dismissal Letter it is not clear what ultimately led to the finding of misconduct in relation to this allegation. It is suggested that meeting up with staff was unauthorised and therefore this formed a reason for dismissal. The claimant considered doing so part of her role and that this was not an unreasonable position to have. Even if Mrs Graham had not been clear that these conversations were taking place, the claimants conduct in this regard could not be said to amount to deliberate wrongdoing. She was in fact meeting with the staff for the sake of the company to try and stop them from leaving. If the respondent preferred that she did not do so, they could have made this position clear to her without taking disciplinary action.

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174. The reasons given by the respondent for dismissal rely on loss of trust and confidence. The addition of the words 'breach of trust and confidence' to the allegations at the stage of the Disciplinary Hearing suggest that the

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respondent was seeking to rely on this reason from the start. The Tribunal must have regard to the reason for dismissal, whether it is substantial and sufficient to justify dismissal taking account all the relevant circumstances. In the circumstances, the claimant's conduct could not be said to amount to a breach of trust and confidence justifying dismissal.

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175. Mrs Graham gave various reasons for alleging trust was lost. None of these can be relied upon as substantial reasons why a breakdown in trust and confidence had occurred such that continuing to employ the claimant was impossible. This included having told the respondent that she was going for grief counselling when she was not. Given the claimant's position that this never occurred and the contradictions in the respondent's position, put this allegation to the claimant knowing she would deny it, so that that denial could be relied on as a breach of trust and confidence. Mrs Graham also referred to an incident with CCTV cameras, which had been discussed with the claimant and in relation to which no action was taken. Mrs Graham admitted that the respondent had not been acting properly in this regard as there was no CCTV policy in place. This was never mentioned to the claimant in the disciplinary process and therefore it was not fair to rely upon it.

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176. If the Tribunal finds that the claimant's dismissal was for the potentially fair reason of conduct, the claimant submitted that the respondent did not act fairly and reasonably in all the circumstances in treating it as a fair reason for dismissal and that the claimant was unfairly dismissed in breach of section 98(4).

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177. The respondent failed to meet its required obligations under the three stage Burchell test. The range of reasonable responses test applies both to the decision to dismiss and to the investigation, which means that the Tribunal has to decide whether the investigation was reasonable.

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178. Further the sanction of dismissal falls outside the range of reasonable responses open to the respondent in this case because the investigation carried out was not reasonable; the Respondent did not hold a genuine

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belief that the claimant was guilty of gross misconduct nor were there any reasonable grounds for such a belief; the disciplinary process was carried out unreasonably; and no mitigating factors or alternative sanction were considered.

5 179. The respondent, as part of the reasoning for dismissal and for not upholding
the claimant's appeal, relied on the position that it was inappropriate for the
claimant to hold unauthorised staff meetings in a public place. Despite the
claimant providing sufficient information to allow them to do so, the
respondent did not investigate these meetings further or interview staff
10 about these conversations and the nature of them, including their subject
matter, location and general surrounding circumstances. The claimant and
Ms Faulkner confirmed that there was no discussion of service users, only
the working terms of staff. Ms Faulkner confirmed that she was interviewed
on three occasions by the respondent throughout the disciplinary process.
15 She therefore could have been asked about these matters but confirmed
she was not. Mrs Graham attempted to suggest that the staff would have
mentioned that they had such meetings or conversations, despite the
questions put to them presupposing tea/coffee breaks. Mrs Graham was not
clear as to why the staff members should be expected to bring up matters
20 they were not specifically asked about. Mr Graham Jnr also suggested that
it was difficult to get staff into the office, even though he accepted he spoke
to some on more than one occasion and as Managing Director he is
presumably able to require them to attend.

25 180. Witness statements were produced with no obvious questioning, including
the statement from Mr Bell which Mrs Graham confirmed she requested him
to produce. He could simply have written what he was asked to write. Even
then, what he states does not appear to fully accord with the position
advanced by the respondent but the ambiguity does not appear to have
been addressed by the respondent. He was not questioned on the contents
30 of his statement and therefore the position was not considered in an even-
handed manner.

181. It was put to the claimant that the suspension letter advised she could ask to speak to staff if necessary to prepare a case. The claimant's position was that Mrs Graham would not take any of her calls. She had also had minimal notice of the investigation meeting due to the letter being sent to the
5 incorrect address. In any event, the claimant had given information from which the respondent could have carried out further investigation. It is the respondent's duty to carry out a reasonable and even handed investigation, and not the claimant's duty of the Claimant to obtain evidence where the respondent has failed.

10 182. It was unreasonable and inappropriate for Mr Graham Jnr to investigate given the claimant's grievance against him. At the stage of the investigation, the grievance had been heard in that same week and no outcome had been produced. The outcome was produced only the day before the first
15 Disciplinary Hearing. While it was argued that Mr Graham Jnr was only gathering facts, it is these facts on which the disciplinary and decision would be based. Therefore, bias could have had an impact, as Mr Miller acknowledged was a fair point. It was Mr Graham Jnr's mother who was holding the Disciplinary Hearing and she was involved in the investigation anyway, and not impartial given the grievance against her son.

20 183. In regard to the first allegation made against the claimant, being that she allegedly falsified attending a hospital appointment, the claimant was clear throughout the investigation and disciplinary process that she had not
25 attended the scheduled hospital appointment because she had lost her mobile telephone, in retracing her steps to look for it had been running late and was subsequently advised by the hospital that it would be preferable to reschedule her appointment. The respondent accepted this explanation.

184. The respondent accepted that the claimant had a hospital appointment
30 booked and had produced a letter to this effect. She had taken time off work to go to that appointment and for no other reason. While the claimant ultimately missed her appointment due to the way events unfolded, she had

never intended not to go to the appointment and could not be said to have 'falsified' it in this sense.

185. The claimant did return to work, albeit not immediately after the cancellation of the appointment, because she had become worked up and she believed she was on unpaid leave. While there is dispute on this and Mrs Graham stated that appointments were paid the claimant was clear that her understanding was that she was not being paid for that time. The claimant stated that she would make up her time in any case where she had been absent. It was put to her that this was not true, but there was no evidence produced by the respondent to contradict her position. Mrs Graham suggested she knew this was not true only because she is there and knows exactly when every employee arrives and leaves. As Mrs Graham is not there every day this was not credible. While it was put to the claimant that she had not made up her time on 7 September 2016 but the respondent put no evidence of this before the Tribunal and neither Mrs Graham or Mr Graham Jnr were present that day to be in a position to dispute this.

186. There was discussion of whether, after she had missed her hospital appointment, the claimant should have returned immediately to the office, why she had not told anyone what happened, why she should have mentioned it when she had phoned Mrs Graham at one stage and so on. It is clear from the claimant's evidence that the nature of the relationship between her and Mrs Graham was such that she did not consider there to be a serious issue and there had always been flexibility such that she did not think it necessary to mention it. That their relationship had been like this was not challenged. It was put to the claimant that she should have been back as Mrs Graham and Mr Graham Jnr were out of the office that day. On their evidence, it was known that she had a hospital appointment so they would not have been expecting her in that morning anyway.

187. For these reasons, the lack of reasonable investigation and unreasonable nature of the disciplinary process, it is submitted that the respondent did not

hold a genuine belief that this allegation amounted to gross misconduct necessitating the claimant's dismissal.

188. In relation to the allegation of grief counselling, it is submitted that this allegation was fabricated and therefore the respondent cannot have held a genuine belief in the claimant's guilt. It is submitted that there are significant contradictions in the Respondent's position regarding this allegation such that their evidence cannot be relied upon.

189. It was never made clear, either at the time or during the Tribunal process, where the respondent alleged the claimant was on the six Wednesdays in the allegation, if she was not attending grief counselling. Mrs Graham was very evasive on this point. The claimant was asked in the Disciplinary Hearing "If it wasn't grief counselling what was it?" It was the respondent who alleged she was falsifying grief counselling. If they already had reason to believe she was not going to grief counselling (given their position that she had told them this), there was no evidence put forward as to why. Throughout the disciplinary process it was entirely unclear what it was the respondent believed the claimant had been doing which had led to the allegation. This is because the respondent never believed she had been going to grief counselling, because she had never told them so. The respondent knew the claimant would deny having gone, so they could then insist she was lying.

190. Mrs Graham suggested that after the alleged meeting on 5 August 2016 the claimant did not attend an appointment thereafter, despite also giving evidence that the claimant had said the appointments would be ongoing and could not be changed in terms of date and time. There was no evidence given of any challenge to the claimant if this allegedly raised suspicion at the time. It again also does not make logical sense why the claimant would give an explanation she thereafter did not stick to.

191. The respondent had no clear explanation as to why, if it believed the claimant was going to doctors' appointments, there was a need to question her about this and why the claimant would feel the need to fabricate the

explanation of grief counselling given she was specifically noting her hours. It is also not clear why, given Mr Graham Jnr's position that he authorised two appointments as stated by him, there was any concern about their legitimacy.

5 192. The claimant gave evidence that she was regularly writing her arrival and
leaving times for her work in the office diary as she was concerned that Mr
Graham Jnr might question her about this, as he was doing so about
matters generally. Mrs Graham stated in her evidence that she did not know
the claimant was doing so and had never seen the diary entries, despite
io evidence from other witnesses that everyone in the office had access to the
diary. The diary entries for the six Wednesdays which are the subject of the
allegations do not bear out that the claimant was out of the office on the
alleged dates. It was noted in evidence that the claimant did not challenge
the allegation or suggest she had not left the office. In fact, the claimant
15 stated in the investigation, as noted in the minutes at p75 -76, that she was
not out every Wednesday, if she was it was not always at the same time,
and that she would have to check the dates, which, as confirmed in her
evidence, she no longer had access to.

193. Mrs Graham admitted that during the Disciplinary Hearing, it had been
20 suggested that the claimant go through the allegations date by date but Mrs
Graham refused to hear this. It was unreasonable for Mrs Graham to refuse
to hear the claimant's position in this regard. At p102 of the minutes of the
Reconvened Disciplinary Hearing, the claimant asks for the office diary to
be produced as she wrote her in and out times. Mrs Graham says that they
25 will 'discuss these issues later*' but the hearing finishes shortly thereafter.

194. During the claimant's cross-examination, diary entries for these
Wednesdays were put to her. The claimant confirmed, and the minutes of
hearings bear out, that no evidence of this diary was produced to the
claimant at the time, nor was any evidence of where the Respondent states
so she should have been, or where they believed she was on the dates
alleged.

195. It appears from the position sought to be advanced at the Tribunal that there perhaps was evidence which could have been put to the claimant in this regard, but it was not. If that evidence was available to the respondent at the time, it was never investigated and never put to the claimant. For these reasons, the respondent did not hold a genuine belief in the claimant's guilt.
196. The disciplinary process was carried out unreasonably, including the investigation. Mrs Graham was involved in the investigation, despite stating that the reason for Mr Graham Jnr carrying out the investigation was to allow her to hold the Disciplinary Hearing. Mrs Graham denied being present in the investigation meetings with staff, before accepting she may have been present on some occasions purely because it happened to be occurring in her office. Ms Faulkner confirmed that Mrs Graham was present on all three occasions she was spoken to and took part in the questioning. Ms Faulkner also noted she was being asked if she wished to change her statement. Mr Graham Jnr also confirmed that Mrs Graham was present.
197. Witnesses with key disputed evidence, being Mr Graham Jnr and Mrs Graham, were those involved in the investigation and decision making.
198. Those involved at every stage were family members, down to minute takers who were all relatives of Mr Graham Jnr, resulting in the claimant feeling intimidated and in extreme doubt about the impartiality of the process. The claimant noted that at times these family members interjected in meetings.
199. Mrs Graham was hostile during the process, refusing to accept any explanation from the claimant other than one which fit her narrative and did not allow the claimant access to the diary which she said would assist her in confirming her whereabouts on the dates in the allegation. The respondent later sought to put entries from this diary to the claimant in the Tribunal, despite having not produced it at the time.
200. Mr Miller had a predetermined decision and, as the respondent was a client of his, had no intention of overturning the decision to dismiss the claimant. It

was clear from his evidence that he attached weight to the conversations with staff about which he had no evidence and which had not been the subject of further investigation.

5 201. While the respondent is a relatively small business and in other disciplinary matters it could be appropriate for the process to be entirely internal, in these circumstances it was unreasonable for the disciplinary process to be carried out by family members. Given the claimant's seniority, the fact of her grievance against Mr Graham Jnr, the family relationships involved and the fact that Mrs Graham is the only source of evidence for one of the
10 allegations, in these circumstances it would have been reasonable to instruct a different person to conduct the disciplinary process. It would have been possible for the respondent to instruct an external HR person and, given they can employ two managing directors, their instruction of an accountant (who advised he will likely be paid for carrying out the appeal
15 process) and of legal advisors at Citation, presumably not beyond their resources.

202. Mrs Graham accepted that the claimant had never been subjected to any form of disciplinary action or given any formal warnings in the past. The claimant had been employed for 14 or 15 years at the time of her dismissal:
20 a significant period of time with a good record. It is also noted that issues only arose after the claimant sought to raise a grievance about Mr Graham Jnr. Mrs Graham acknowledged in her evidence that no other sanction was considered and she had decided that dismissal was the only option. It is submitted that it was unfair and outwith the range of reasonable responses
25 to fail to consider the claimant's previous record and long service. This is another reason why the decision to dismiss the claimant was substantively unfair.

30 203. The claimant's position is that the disciplinary process was effectively constructed to facilitate her dismissal, either by Mrs Graham, Mr Graham Jnr or both. The respondent had brought in Mr Graham Jnr as a new managing director and he began taking on tasks the claimant had

5 previously done. The relationship between the claimant and Mr Graham Jnr became strained to the point that they were not speaking, the claimant was frequently trying to raise issues about his behavior towards her with his mother, Mrs Graham. The claimant eventually raised a grievance, which the family were not happy about. The respondent concluded that the easiest route would be to dismiss the claimant and took the opportunity when the mix up occurred with her hospital appointment on 7th September 2016 to construct allegations against her. The respondent alleged the claimant said she had been at grief counselling, knowing she would deny it, to dismiss her. The matter having now reached the Tribunal, the respondent is attempting to retrospectively justify her dismissal and provide explanations which do not tie up, explaining the contradictions and lack of logic in their position as compared to the claimant's position. This case which is unusual in the amount of factual dispute, this is the only explanation which makes sense.

10 204. The Tribunal was invited to prefer the claimant's evidence and find that her dismissal was not for a fair reason and, if it was, her dismissal was not within the range of reasonable responses and was unfair in all the circumstances.

15 **Deliberations**

20 205. The Tribunal started its deliberations by referring to Section 98 of the ERA. The respondent must show the reason for the dismissal and that it was for one of the potentially fair reasons set out in Section 98(2). At this stage the Tribunal noted that it was not considering the question of reasonableness.

25 206. The Tribunal asked whether the respondent had shown the reason for the claimant's dismissal. The respondent said that the reason for dismissal was the claimant's conduct. The respondent's position in the Dismissal Letter was that the reason for dismissal was "gross misconduct/a breach of trust, resulting in the company losing faith". The claimant's position that the reason for her dismissal was because she raised a grievance against Mr Graham Jnr.

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207. The Tribunal heard evidence relating to the grievance raised by the claimant and Mrs Graham's reasons for not upholding it. Although Mrs Graham remained Managing Director, following his appointment Mr Graham Jnr was the driving force behind introducing new procedures and formalising others. The Tribunal considered that Mr Graham Jnr came from a different working background. It did not consider that the introduction of these procedures was to undermine the claimant but rather to have the business operate efficiently. While these procedures were not directed solely at the claimant Mr Graham Jnr was not prepared to let her stand in his way.
208. The Tribunal felt that by September 2016 the claimant was a thorn in Mr Graham Jnr's side. The claimant did not accept his authority; she took issue with his attempts to take ownership of policies and introduce new ones; and had raised a grievance against him. The claimant's absence from the office when she said that she was attending a hospital appointment on a day when neither Managing Director was at work was an opportunity which in the Tribunal's view Mrs Graham and Mr Graham Jnr did not hesitate to pursue. It also allowed them to suspend the claimant and explore other issues.
209. The Tribunal referred to the case of *British Homes (above)* where the Employment Appeal Tribunal held that in cases of alleged misconduct an employer must show that (i) he believed the employee was guilty of misconduct; (ii) he had in his mind reasonable grounds to sustain that belief and (iii) at the stage he formed that belief on those grounds he had carried out as much investigation was reasonable in all the circumstances of the case.
210. At the Hearing Mrs Graham said that she had lost faith in the claimant as she gave unsatisfactory explanations for not attending work until around 11.30am on 7 September 2016 and for her absence from work on various Wednesdays. She formed this belief based on the investigation undertaken by Mr Graham Jnr.

211. While the Tribunal had no doubt that Mrs Graham and Mr Graham Jnr no longer wanted the claimant to work for the respondent the Tribunal felt that the reason she was dismissed was because Mrs Graham believed that the claimant was guilty of misconduct. The Tribunal was satisfied that the respondent had shown the reason for the dismissal was misconduct. The Tribunal therefore concluded that the respondent was successful in establishing that the dismissal was for a potentially fair reason.
212. The Tribunal referred back to Section 98 of the ERA and in particular Section 98(4). It noted that it had determine whether the dismissal was fair or unfair, having regard to the reasons shown by the employer, and the answer to that question depends upon whether, in the circumstances (including the size and administrative resources of the employers' undertaking) the employer acted reasonably in treating the reason as a sufficient reason for dismissing the employee; and this should be determined in accordance with equity and the substantial merits of the case.
213. The Tribunal referred to the decision of the Employment Appeal Tribunal in *Iceland Frozen Foods Limited (above)* which sets out the correct approach for a tribunal to adopt when answering the question posed by Section 98(4). It noted that the starting point should always be the words of Section 98(4). In applying this Section, a tribunal must consider the reasonableness of the respondent's conduct, not simply whether the Tribunal considered the dismissal to be fair.
214. In judging the reasonableness of the respondent's conduct, the Tribunal must not substitute its own decision as to what the right course to adopt for that with the respondent. In many (although not all) cases, there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and other quite reasonably take another.
215. The Tribunal's function is to determine whether in the particular circumstances of this case, the decision to dismiss the claimant fell within the band of reasonable responses, which a reasonable employer might

have adopted. If the decision falls within the band, the dismissal is fair: if the dismissal falls outside the band it is unfair.

5 216. Having established that the potentially fair reason for dismissal was conduct, the Tribunal had to determine, the burden of proof being neutral, whether the respondent had carried out a reasonable investigation and had reasonable grounds for that belief. In answering those questions the Tribunal had to again apply the range of reasonable responses approach.

10 217. The Tribunal noted that a failure to carry out a reasonable and proper procedure at each stage of the dismissal process, including the appeal stage is relevant to reasonableness of the whole dismissal process.

15 218. The Tribunal turned to consider the investigation in this case. So far as Mr Graham Jnr *s involvement was concerned the Tribunal appreciated that the claimant held a management position and the respondent is a small employer with limited resources. The Tribunal considered that it was not unreasonable for Mr Graham Jnr to carry out the investigation. However, in so doing the Tribunal considered that a reasonable employer would have ensured that the investigation was impartial and seen to be so especially as the Managing Directors were witnesses in the investigation (the events on 7 September 2016 and comments about grief counselling) and Mrs Graham was also to be involved in the decision making process.

20 219. The claimant was on annual leave from 9 September 2016. Mrs Graham sent the Suspension Letter on 15 September 2016. It referred to not only to the allegation of falsifying the hospital appointment but also falsifying attending grief counselling. Mrs Graham was equivocal why this second allegation had now become an issue especially as on her own evidence the claimant had not attended grief counselling since their meeting on 5 August 2016 and there was no evidence of any investigation while the claimant was on annual leave.

25 30 220. Ostensibly Mr Graham Jnr investigated the allegations. Mrs Graham asked Mr Graham Snr and Mr Graham Jnr to provide statements. Their typewritten

statements were dated 19 September 2016. She also asked Mr Bell to produce a statement which he handwrote and dated 23 September 2016.

221. Mr Graham Jnr met individually Ms Whyte, Ms Kelly, Ms Faulkner, Ms Breeze and Ms Martin on 20 September 2016. He asked set questions. Mrs Graham was present while the meetings took place. Some employees were interviewed on more than one occasion. There was no record of what was discussed. Mr Graham Jnr said that they were asked to confirm that they stood by their statement.

222. Mr Graham Jnr met with the claimant on 23 November 2016 during which he raised grief counselling. As it was Mrs Graham who had the discussion with the claimant, Mrs Graham and Mr Graham Jnr must have discussed it. The Tribunal considered that in reality both Mrs Graham and Mr Graham Jnr were involved in the investigation of the allegations.

223. In relation to the allegation of falsifying attending a hospital appointment on 7 September 2016. Mr Graham Jnr knew that the claimant had a hospital appointment as he had been shown the appointment letter. Mr Graham Snr and Mr Graham Jnr saw the claimant that morning in town. On 9 September 2016 Mr Graham Jnr asked the claimant if she had attended. She said that she had but would discuss this on her return from holiday. Ms Martin recalled Ms McCartney, Ms Breeze, Ms Faulkner, Ms Kelly and the claimant attending coffee on 7 September 2016. Ms Kelly and Ms Faulkner said they went for coffee on 7 September 2016 but did not recall the claimant being there. Ms Breeze and Ms Whyte said that they did not go for coffee on 7 September 2016. The claimant confirmed at the Investigation Meeting that she had a hospital appointment and intended to go but lost her mobile telephone; she did not attend the hospital appointment; she rescheduled the hospital appointment and went to the civic centre to give mail to her daughter before going to the office. Mr Bell understood that the claimant had attended the appointment.

224. At the Investigation Meeting the claimant volunteered to Mr Graham Jnr that she sometimes had staff meetings on a Wednesday or sometimes on a Friday or a Saturday. She needed to check.
225. Although Mr Graham spoke to some of the Carers on more than one occasion he did not ask what the claimant had said to them about events on the morning of 7 September 2016.
226. Turning to the allegation about falsifying grief counselling, Mrs Graham and Mr Graham Jnr started from the position that the claimant said that she said in 5 August 2016 that she had been attending grief counselling for six weeks and this was ongoing. The claimant denied at the Investigation Meeting that she said that she was attending grief counselling although conceded that there may have been discussion about it in relation to other employees.
227. The Tribunal appreciated that a reasonable investigation did not need to leave no stone left unturned. However, this was an unusual situation in that the claimant was disputing what Mrs Graham said. Mr Graham Jnr also claimed to have been aware of the conversation but did not produce as part of his investigation the letter which Mrs Graham said she handed to the claimant on 8 August 2016 that Mr Graham said he knew about. That letter was not produced to the claimant until October 2016 after the Disciplinary Hearing.
228. The Tribunal felt that Mr Graham Jnr was partial in that he accepted what Mrs Graham said without question. However given the nature of the allegation the Tribunal considered that a reasonable investigation would involve speaking to individuals who might be supportive of the claimant's position: the Carers to ascertain if and when the claimant had mentioned grief counselling to them and in what context.
229. The Tribunal turned to consider the investigation into staff meetings. Although the claimant referred to this at the Investigation Meeting, Mr Graham Jnr made no further enquiries of the Carers who had previously

said that the claimant only attended coffee occasionally on a Wednesday and none of them was asked or referred to there being any staff meetings.

230. The Tribunal's concern was that Mr Graham did not appear to be investigating impartially. Mrs Graham was involved in requesting statements, being a witness to allegations and being present when other witnesses were being interviewed. The Tribunal's impression was that before Mrs Graham conducted the Disciplinary Hearing and the Reconvened Disciplinary Hearing she had already formed a view of the claimant's misconduct and the investigation focussed on validating that view rather than considering matters objectively.

231. Mr Graham Jnr was not involved at the disciplinary stage. Various family members attended disciplinary hearings to take notes. The Tribunal did not consider this was unreasonable in the circumstances especially as the only other employee in the office was Mr Bell who had also given a statement.

232. The Tribunal considered the investigation during the disciplinary hearings. At this stage the allegations had changed to alleged breach of trust and confidence by falsifying attending the hospital on 7 September 2016 and falsifying attending grief counselling.

233. The claimant reiterated what happened on the morning of 7 September 2016 regarding her hospital appointment. She dropped off mail to her daughter at the civic centre and recalled Ms Martin being there. The claimant denied telling Mrs Graham that she was attending grief counselling and that she was handed a letter on 8 August 2016. The claimant said that she did not conduct staff meetings in public places but was having an informal chat with colleagues. The claimant said that she had raised staff issues with Mrs Graham.

234. Mrs Graham adjourned the Disciplinary Hearing. She did not carry out or request any further investigation. However she produce the letter, which she said she handed to the claimant before the Reconvened Disciplinary Hearing.

235. At the Reconvened Disciplinary Hearing the claimant asked for the office diary to be produced. Mrs Graham declined this. The Tribunal considered that a reasonable employer would have been willing to consider this especially as there continued to be uncertainty and confusion about which dates the claimant said that she was at medical appointments.

236. In relation to the respondent's concerns about the alleged breach of trust and confidence by falsifying a hospital appointment on 7 September 2016 Mrs Graham accepted that the claimant had a hospital appointment that morning but did not attend. Mrs Graham also accepted that the claimant had lost her mobile telephone although she thought that the claimant had conflicting accounts as to where it was found. The claimant went to the civic centre. She did not arrive at work until around 11.30am. Before going on holiday the claimant did not tell Mrs Graham or Mr Graham Jnr that the hospital appointment had been rescheduled. When challenged as she was leaving the office to go on holiday the claimant said to Mr Graham Jnr that she had attended but had subsequently denied this to him. There was no evidence produced that the claimant had been paid for more hours than she had worked that week. The claimant's position during the disciplinary process was that she understood she was not being paid while she was not at work.

237. The Tribunal did not consider that the investigation reasonably tested the claimant's deliberate wrongdoing or wilful repudiation of the contract on 7 September 2016. While there were issues about the informing the Managing Directors about her whereabouts during the periods when the claimant was scheduled to be in the office the Tribunal did not consider that the respondent had reasonable grounds to believe that the claimant breached trust and confidence by falsifying attending a hospital appointment on 7 September 2016.

238. As regards alleged breach of trust and confidence by falsifying grief counselling on specified Wednesdays the claimant's position was that she never said this and did not received a letter. Mrs Graham produced the

letter in October 2016. As set out above the Tribunal did not accept the respondent's evidence about grief counselling.

239. It was agreed that the claimant was not at grief counselling. The investigation did not focus on where the claimant was on 22 June 2016, 29 June 2016, 6 July 2017, 13 July 2016, 27 July 2016 and 3 August 2016. The claimant position was that she was not out every Wednesday. She had doctor's appointments, dealt with clients and sometimes met with colleagues to discuss some of their concerns. The claimant asked to refer to the office diary. Mrs Graham declined to make it available to the claimant during disciplinary hearings and did not look at it as part of the investigation. Mrs Graham said that she authorised two doctor's appointments but could not confirm the dates. It was unclear from her evidence if she accepted that these were genuine appointments.

240. The allegation did not refer to 20 July 2016. It was not clear why that date was excluded and what Mrs Graham believed happened on that day. The inference was that might have been the day the claimant took a client to hospital. However this seemed to contradict Mrs Graham's belief that the claimant has been at grief counselling on Wednesdays for six weeks before 5 August 2016. Given the confusion over the dates and the six to eight week period being referred to the Tribunal considered that a reasonable employer would have made the office diary available during the disciplinary process for reference.

241. Some of the Carers said that the claimant on occasions attended coffee on a Wednesday. Although some were interviewed more than once they were not asked if the claimant attended meetings at the civic centre on 22 June 2016, 29 June 2016, 6 July 2017, 13 July 2016, 27 July 2016 and 3 August 2016. They were not asked what was discussed on 7 September 2016 or any other Wednesday that they recalled the claimant being present.

242. As the claimant was Assistant Manager the Tribunal considered that it was reasonable for her to speak to the Carers about their concerns and relay those concerns to Mrs Graham.

243. The Tribunal considered that the way the Carers were interviewed did not lend itself to them volunteering information rather than being asked about what was discussed when they met for coffee with the claimant. The claimant's evidence was that the discussions were about personal issues such as pay and people indicating that they were considering leaving all of which the claimant mentioned to Mrs Graham. If there was concern that clients were being discussed at these meetings the Tribunal considered that a reasonable employer would have investigated this with Carers as this would have been an issue that the respondent should have addressed with all the employees.

244. There was no evidence that the claimant was having meetings about private and confidential information about the respondent in a public space. The Tribunal did not consider that the respondent had reasonable grounds for believing that the claimant had discussed personal information about the respondent in a public place. The discussions that had taken place appeared to be with a view to reassuring and retaining employees and therefore the Tribunal did not consider that there was evidence of a breakdown of trust and confidence.

245. The Tribunal then applied the range of reasonable responses test to the decision to dismiss and the procedure by which that decision had been reached. The Tribunal noted that a failure to carry out a reasonable and proper procedure at each stage of the dismissal process, including the appeal stage is relevant to reasonableness of the whole dismissal process.

246. Mrs Graham believed that the trust and confidence in the claimant had been breached. The Tribunal did not consider that the investigation carried out by the respondent fell within a reasonable band of responses to the situation. The disciplinary investigation was triggered because the claimant was seen in town when she was expected to be at a hospital appointment. The investigation focus on finding evidence to justify dismissing the claimant and ignoring avenues of inquiry that might support the claimant. The case against the claimant evolved; by the Disciplinary Hearing the allegations

were of breach of trust and confidence. While Mrs Graham took the decision to dismiss the claimant she was also involved in the investigation.

247. From a procedural perspective Mrs Graham appeared to be going through the motions. She adjourned the Disciplinary Hearing but did not carry out
5 any further investigation other than to produce a letter that could have been produced after the Investigation Meeting. Mrs Graham did not consider any other sanction than dismissal.

248. While Mr Miller conducted the Disciplinary Appeal Hearing he was inexperienced. The Tribunal was not convinced that Mr Miller's decision at
10 the Disciplinary Appeal Hearing was independent particularly as Mrs Graham had already decided that the claimant was dismissed on the grounds loss of trust and confidence and had spoken to him before the Disciplinary Appeal Hearing. Mr Miller's only enquiry after the Disciplinary Appeal Hearing was to speak to Mr Graham Jnr about minutes. Mr Miller
15 accepted that if advised had been taken the procedure was fair.

249. In all the circumstances the Tribunal concluded that the dismissal was unfair.

250. The case should now proceed to a Hearing on Remedy.

20 Employment Judge: Shona MacLean
Date of Judgment: 24 November 2017
Entered in register: 27 November 2017
and copied to parties

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