EMPLOYMENT TRIBUNALS

Claimant: Ms L Atherton

Respondent: Dr M Corrie, Ms K Robinson and Ms Hornby: the Partners of Commonfield Road Surgery

Heard at: Manchester **On:** 13-14 January and 1 April 2022

Before: Employment Judge Cookson sitting alone

REPRESENTATION:

Claimant: Mr Griffiths (counsel)
Respondent: Mr Hoyle (consultant)

JUDGMENT having been orally to the parties on 1 April 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant in this case, Ms Atherton is 40 years of age. She was employed from 14 February 2005 to 23 September 2020 as a medical secretary. On 9 December 2020 after early conciliation between 12 and 30 November 2020, she brought claims against her former employer, which is a GP practice, for unfair dismissal and breach of contract (wrongful dismissal). The respondents filed a response to the claims denying both claims. They assert that the claimant was dismissed for a fair reason, namely gross misconduct which also entitled them to summarily dismiss her.

Documents considered in reaching my judgment

2. In reaching my judgment I considered the following

    a. a bundle of documents which is unpaginated and runs to some 211 pages,

b. A bundle of witness statements for the respondent containing statements for the following

   i. Dr Kathryn Moore (a doctor employed in the practice)

   ii. Ms K Hornby (practice manager and a partner at the Surgery)

   iii. Ms Robinson (advanced nurse practitioner and partner)

   iv. Mr Michael Corrie (GP and partner)

   together with their oral evidence

c. The evidence given by the claimant in her witness statement and in her oral evidence

d. Oral submissions made by both representatives by the claimant and on behalf of the respondent.

Findings of Fact

3. I have made my findings of fact on the basis of the materials before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on the balance of probabilities. I took into account in my assessment the credibility of witnesses and the consistency of their evidence with the surrounding facts. I have not made findings of fact in relation to every matter which was contested in evidence before us, simply those which were material to the determination of the legal issues in this case.

4. The claimant's role involved, amongst other things, processing and completing all patient referrals, communicating with secondary care, and dealing with patient queries. The respondent is a small GP surgery. There are 3 partners all of whom appeared in these proceedings. The letterhead from the relevant time refers to four salaried GPs. I was not given evidence about the number of other employees but I understand there were a small number of support staff.

5. Within the bundle of documents is the most recent copy of the claimant's contract of employment dated 16 March 2009. The contract states at clause 25 that "the attached disciplinary and grievance procedures do not form part of the contract of employment". The disciplinary procedure itself contains examples of gross misconduct which include the usual matters such as theft, fraud, assault and also includes serious negligence which causes unacceptable loss, damage or injury or gross acts of insubordination. The list is stated not be exhaustive. The disciplinary policy also says the staff who are alleged to have committed gross misconduct will normally be suspended from work on full pay.

6. There is also disciplinary procedure in the staff handbook which is dated July 2017. The procedure states that an employee may be dismissed for gross misconduct as follows "*you may be summarily dismissed (i.e. without notice) if there has been an act of gross misconduct. Generally this includes a fundamental breach of your contract of employment which conduct brings the practice into disrepute or action which is inconsistent with the relationship*

required between employee and employer. Further examples are contained in the gross misconduct section of rules and procedures."

7. A disciplinary rules and procedure document was sent the claimant at the time she was invited to the disciplinary hearing to which these proceedings relate. That document contains the same gross misconduct clause as is included in the original contract of employment. The disciplinary procedure section says that the person with the power to dismiss the claimant is Dr Corrie *"who has been delegated this power by the other partners. A notice of dismissal will include the identity of the partner or partners whom you may appeal under paragraph 5.8 below"*.

8. In 2016 concerns were raised about how the claimant had handled some cash received from a patient for which no receipt had been given. That had resulted in a letter being issued to the claimant following an investigatory meeting on 2 March 2016. The letter stated that the decision had been taken that the practice would not be taking disciplinary action against the claimant although it is somewhat ambiguously worded. The letter stated that *"the action was considered as the claimant had not followed procedures on two separate occasions which had resulted in a financial loss for the practice".* The letter also stated *"as discussed with you at our meeting on 2nd March any further incidents of misconduct will result in disciplinary action taken, this letter will remain on your employment file for 12 months".*

9. The events which would lead to the claimant's dismissal began on 7 August 2020 when Dr Moore made a gynaecology referral for a patient. On 12 August 2020 the claimant picked up Dr Moore's dictation about that referral from a pool of work to be done by secretarial/support staff. The claimant says that she believed, based on her experience, that there would be a delay before the patient will be seen by the local hospital due to the covid-pandemic and that it might be quicker if the patient was seen by members of the community midwife service.

10. The claimant left a message for the community midwife service team and says that she then spoke to Ms Robinson to explain that she was waiting for the community midwife service to return a call. After that the claimant says that when she spoke to the community midwife service she was told that they would visit the patient at home and asked the claimant to tell the patient that. The claimant says that she informed Ms Robinson what had been discussed. It is the claimant's case that Ms Robinson authorised the change to the patient's referral. Matters were documented on the patient's record as follows *"spoken to the community midwives who will contact (patient) and arrange to visit her at home either today or tomorrow to review her ongoing problem. I have informed patient. LA"*. Ms Robinson denies that she spoke to the claimant at all. The claimant did not make the referral which Dr Moore had instructed.

11. I accept that the claimant did speak to Ms Robinson about the patient and her intention to contact the community midwife team but I find that the claimant did not tell Ms Robinson that she was doing that in place of making the referral in accordance with Dr Moore's instructions. I am satisfied that if she had, Ms Robinson would have told her that only a GP could change Dr Moore's decision to make the hospital referral.

12. On 17 August 2020 the patient contacted the surgery again and was seen by Dr Moore. Dr Moore assured the patient that she had made the referral and that the patient could expect to hear shortly about an appointment. I accept that Dr Moore had no reason to believe that the referral which she had directed had not been made. She could have discovered that if she had investigated the electronic records further but I accept that Dr Moore had no reason to undertake those investigations. The patient contacted the surgery again on 25th August and was again told that her case was waiting the referral.

13. On 3 September 2020 the patient contacted the surgery again, this time in some distress. On 15 September she spoke to Dr Corrie. He identified that the referral had not been made. He explained to the patient that she could make a complaint if she wished that he would look into matters to see what had happened. At this point Dr Moore also became aware that her referral not been made.

14. I accept that this was a serious matter. The effect of the claimant's actions was that the patient has been removed from any care pathway. In this patient's case that had serious although not life-threatening consequences. However, if the patient had not pursued matters with the surgery, her situation might have not addressed at all with potentially very serious implications.

15. In consequence of this potentially serious patient safety incident, an investigation was initiated and statements were taken from Dr Moore and Dr Corrie. It transpired that the community midwife service had been in contact with the patient but had not visited her because the patient had told them she had a referral to the gynaecological department at the hospital.

16. On 17 September 2020 Ms Robinson informed the claimant that the practice would be conducting an investigation into her possible disciplinary misconduct and she was moved to the general office so she would no longer be undertaking her medical secretary duties.

17. The partners decided that Ms Robinson would investigate the incident. She held a meeting with the claimant on 17 September 2020. The meeting was also attended by Ms Hornby to take notes. The claimant says that at the meeting she explained that she had spoken to Ms Robinson about the referral to the community midwife team. That is not referred to in the minutes of the meeting and in its pleadings and witness statements the respondent has referred to the claimant changing her story to implicate Ms Robinson during the disciplinary process. However, both Ms Robinson and Ms Hornby conceded in the course of cross-examination that the claimant had referred to speaking to Ms Robinson. It was Ms Hornby's evidence that because Ms Robinson had disputed that the claimant had spoken to her and Ms Hornby had not believed the claimant she had not recorded what the claimant said but rather what Ms Hornby had concluded what about what had happened. No investigation report was produced so the only record of the investigation is Ms Hornby's notes. In other words, Ms Hornby was not simply a passive notetaker, she was actively involved in the investigation process. The notes of the investigation meeting also record that the claimant had acknowledged that the referral should have been completed and that she said that she had done what she thought was best for the patient in the circumstances so that the patient would be seen as soon as possible in light of delays at the hospital.

18. The claimant's written statement provided to the respondent at the disciplinary stage says that she had contacted the midwives and left them a message and she had then gone to see Ms Robinson and explained the situation to her. She had told Ms Robinson that she left a message with community midwives to see if they could help and that her phone had then rung which was the community midwives returning her call. The investigation notes record that the claimant said that she had been going to speak to Ms Robinson but her phone rang and it was community midwives so she continued with the pathway she felt was best for the patient. In light of Ms Hornby's concession that she did not accurately record the investigatory meeting, I am satisfied that what the claimant said in meeting and what she said in the disciplinary written statement were consistent.

19. There is no evidence before me that any attempt was made to investigate precisely what the claimant had discussed with the community midwives after the investigation meeting and no witness statements were taken from them. Ms Robinson did not provide a witness statement and I had no evidence that her account was ever investigated beyond a simple acceptance of her denial, despite the obvious potential conflict of interest for Ms Robinson professionally..

20. The claimant was subsequently invited to a disciplinary hearing to consider the following disciplinary charges

    a. failing to refer a patient following doctor's instruction – the letter records that *"it has been alleged that you failed to complete a referral to gynaecology department, secondary care on 12th August for patient under the direct instruction of a general practitioner"*; and

    b. failing to follow doctor's course of treatment which led to medical negligence – *"it has been alleged by changing the clinical pathway a patient complaint has been received regarding their care and treatment. This change happened without the consent of the referring general practitioner or any other general practitioner within the practice, resulting in the patient suffering delayed treatment continued pain and distress, bringing the practice into disrepute"*.

21. Despite the document enclosed with the invited disciplinary hearing referring to Dr Corrie as being the partner with the power to dismiss, the claimant's letter informed her that Ms Hornby would be conducting the hearing with Kim Robinson present to take notes.

22. A disciplinary hearing was held on 22 September 2020. In addition to Ms Hornby and Ms Robinson, the claimant was accompanied by Jackie Connor. Unfortunately there are no typed notes of the disciplinary hearing and I was only presented with some handwritten notes which are somewhat difficult to follow. What is clear is that at this hearing the claimant again raised that she had spoken to Ms Robinson. The claimant accepted that she had a learning need and that she should have consulted with Dr Moore. However, the claimant also sought to blame the midwives who had failed to follow visit the patient without letting the claimant know. A written statement presented by the claimant also made representations about the degree of responsibility she felt she had shown in the job until that stage and the extent to which she sometimes had to change

referrals from GPs because if she followed their strict instructions the referrals would be rejected by the secondary care team. It does not appear that that assertion was considered or investigated further.

23. The claimant denied that she had made any sort of clinical decision about the patients because she had gone to see Ms Robinson. She also stressed that she had acted with the best of intentions for the patient and that she had acted without malice and the belief that she was not doing the right thing. She apologised for what has happened and she offered to contact the patient to apologise personally but that she also referred to feeling let down and angry which somewhat tempers her expressions of remorse.

24. I accept that Ms Hornby concluded that the claimant had not genuinely acknowledged what the consequences of her actions could have been and had not accepted responsibility in a real sense. I accept that Ms Hornby genuinely believed that the claimant was guilty of gross misconduct but there had been a failure to carry out an impartial and proper investigation of all the facts. Ms Hornby's belief in the claimant's was not based on any proper investigation.

25. The claimant was telephoned the next day and told by Ms Hornby that she was to be summarily dismissed on grounds of gross misconduct with effect from 23 September 2020 but she was given four weeks' notice pay, in recognition of her long service with the practice.

26. The decision was confirmed in writing by a letter dated 28 September 2020 which explains the decision in some detail. It recorded that in relation to the allegation about failing to refer a patient following doctor's instructions, the claimant had admitted the allegation and the letter says that *"based on everything that has been discussed through the investigation the disciplinary I believe you have failed to provide an acceptable explanation for your actions. Therefore I uphold this allegation"*.

27. In relation to the second allegation, the letter says the patient had complained and suggested that Dr Moore had been negligent in not completing the referral and was very upset due to pain and discomfort during the seven weeks that had passed. The letter records that the patient told the midwifery department that she had been referred for a gynaecology appointment and the midwifery team had agreed that this had been the most appropriate pathway. The patient had been unaware that the claimant had changed her care pathway and the letter notes that as this was a doctor's referral it was not *"within the remit of the secretary to change the course of treatment or referral pathway*". The claimant's actions had caused a delay in the treatment for something which was likely to require surgical intervention and psychological treatment. The letter continued that Ms Hornby believed that the claimant had failed to provide an acceptable explanation of her actions, that she had worked negligently outside the remit of her role and as a result the practice had lost trust and confidence in her. The second allegation was upheld and the letter concluded by confirming that the claimant has been summarily dismissed but because of her for long service, four weeks' pay would be paid. Any appeal was to be made to Dr Corrie.

28. In relation to who took the decision to dismiss, I heard contradictory evidence from each of the partners about whose decision it had been to dismiss the

claimant. Ms Hornby told me that it was her decision. Ms Robinson and Dr Corrie told me that the decision to dismiss had been discussed by all the partners but Dr Corrie said ultimately the decision was his.

29. The claimant appealed against the decision to dismiss her on the grounds that the sanction imposed on her have been disproportionate to the events. She referred in particular to the fact that the dismissal letter had referred to the claimant having failed to provide an explanation for her actions but the claimant said she said she had consistently provided an explanation for what she had done and why and that given the claimants' long years of service and previously unblemished disciplinary record, the claimant felt that she deserved a lesser sanction. The claimant informed the respondent that she did not feel well enough to attend the appeal hearing.

30. On 15th October 2020 the respondent wrote to the claimant to acknowledge her appeal. She was informed that the appeal would be by way of a review of the original decision, conducted by an independent consultant from Croner via video conference. The letter also stated that the consultant would consider the decision and provide a recommendation and that the surgery would write to provide the claimant with an outcome after that. Despite the fact that the claimant had already made clear that she felt unable to attend the appeal hearing on health grounds, the appeal hearing invite told the claimant that she was expected to make every effort to take part in the hearing or it would proceed in her absence. There was no acknowledgement of what the claimant had said about her health.

31. The appeal hearing was conducted by Ms Victoria Hart. She did not appear before me as a witness but the bundle of documents includes the report that she prepared.

32. That report contained a summary of events which is broadly consistent with the findings of fact I have made above except that Ms Hart concluded that there was "no evidence that Miss Atherton had spoken to "Kim"" [Ms Robinson]. As a matter of fact that was clearly incorrect. There was no statement from Ms Robinson saying the conversation had not taken place but the statement submitted by the claimant and the notes of the disciplinary hearing both refer to the claimant saying that she had spoken to Ms Robinson. There was witness evidence from the claimant that there had been a conversation. There was no evidence from Ms Robinson. There is no evidence before me that Ms Hart conducted any wider investigation to establish what the claimant had said during the investigation and disciplinary process or what had happened at the time and therefore it is unclear on what reasonable basis she could reach the conclusion there was "no" evidence to support the claimant's account. If she had decided to reject the claimant's evidence, there is no explanation for that decision. That is unfortunate because the report appears to suggest the "absence" of evidence in support of the claimant's case is something she took into account when she considered the appeal.

33. Ms Hart reached a number of conclusions including that the claimant had failed to understand the severity and consequences of her actions, that she had admitted failing to follow Dr Moore's instructions and that the claimant had made a clinical judgement of "the care navigation of the patient which had led to

unnecessary delay, medical intervention and neglect of the patient's needs". She also noted that this could have a significant impact on the surgery and also raise reputational concerns. In consequence she recommended that the appeal should be rejected.

34. Ms Hart said the following in her conclusions "*VHA finds that the dismissal appears [sic] appropriate outcome given the lack of response and reasoning from LA, LA has not provided an acceptable explanation and did not even attend her own appeal, and therefore it is with regret that no lesser sanction should be applied*". Ms Hart did not refer to the fact that the claimant had explained that she did not feel well enough to attend the appeal hearing because of the stress that she was under and Ms Hart had no medical evidence on which to base a conclusion about the claimant's mental health. By this stage the claimant was no longer employed by the respondent so the claimant was not subject to any reporting obligations about her ill-health and she had not been asked to provide evidence she was not well enough to attend. I have had no explanation for why Ms Hart felt it was appropriate to criticise the claimant for "not even attending the appeal" and seeming to attach weight to that without having made any enquiries about the claimant's health.

35. On 3 November 2020 Ms Hornby wrote to the claimant to provide her with an outcome from the disciplinary appeal. The letter is somewhat curiously worded. It says "*after an adjournment which gave me time to consider properly your grounds for appeal I confirm my decision as follows: I have consider carefully the facts presented and listen to and taken account of your comments.…*" The letter then goes on to quote the findings made by Ms Hart apparently on a cut and paste basis. These findings are presented as if they are the findings of Ms Hornby and conclude *"I'm satisfied that the matter was dealt with properly and thoroughly at the disciplinary hearing and that the correct decision was made at the hearing and consequently I am unable to hold your appeal"*.

36. On 16 November 2020 a firm of solicitors instructed by the claimant wrote to Ms Hornby to ask who the decision maker have been for the disciplinary outcome, and in the event that the decision was taken by more than one person, the names of the decision-makers; and who the decision maker have been at the disciplinary appeal and if more than one person the name of all of the decision-makers and who else if anyone was in attendance at the appeal hearing.

37. The reply to that letter from Ms Hornby says that the decision on the disciplinary outcome was agreed by Dr Corrie, Ms Hornby and Ms Robinson. There had been no indication of that in the dismissal letter and in witness evidence Ms Hornby said the decision was hers. The letter says said that the disciplinary appeal decision maker was Ms Hart. That reply contradicts the evidence contained in the witness statement of Ms Hornby presented to this employment tribunal which says that the consultant completed the appeal process on the respondent's behalf with Dr Corrie making the final decision. In her witness statement, Ms Robinson says that the decision in relation to the appeal was taken *"by Dr Corrie as he is the senior partner and the practice*" and also says that *Dr Corrie and the practice* felt the decision was the right one, in other words the decision was not Dr Corrie's alone but involved a decision by all of the partners to some extent. In his witness statement, Dr Corrie says that Ms Hart was involved as consultant "as a reasonable option for further fairness because,

due to recent experience I had had with my wife who had suffered from a birth trauma, it was appropriate to pay for external representative practised to allow Laura an impartial and fair appeal process" but that the decision about the appeal was his. I have explained in my discussion the conclusions I reached about the decision making process.

38. In relation to the reasons for his decision on the appeal, Dr Corrie referred adversely to the claimant "changing her story to implicate Ms Robinson". As Ms Hornby and Ms Robinson's evidence to the tribunal has made clear, the claimant did not "change her story". The claimant's account was consistent throughout, Dr Corrie's belief that the claimant change to story was based on the inaccurate notes which Ms Hornby took at the investigatory stage and was therefore misplaced and if there had been discussions between the partners it seems odd this had never been discussed.

39. In the course of the disciplinary proceedings the claimant refers having a clean and unblemished disciplinary record. This is disputed by the respondent's witnesses based on the letter from 2016 and Dr Corrie says that this further diminished his trust in her. The letter of 2016 records that the firm is not taking any disciplinary action but it shows that a conclusion about misconduct had been reached. In terms of good employment practice the letters seems to be poorly worded and based on what the letter itself said it should have been removed from the claimant's file and it is clear that it was not. Equally however it was misleading of the claimant to say there had never been issues raised about her and she had an unblemished disciplinary record. Clearly there had been a disciplinary issue in the past although she had no live disciplinary warnings at the time of her dismissal.

Submissions

40. I heard oral submissions from both representatives. I do not seek to set out the submissions in detail but very briefly summarise them as follows.

41. Mr Griffiths for the claimant asked me to prefer the claimant' evidence that what she had done had been with the approval of Ms Robinson. If the claimant has acted with Ms Robinon's approval claimant conduct could not be categorised as a gross misconduct and could not justify summary dismissal. The dismissal was substantively unfair and wrongful.

42. Mr Griffiths also argued the procedure adopted by the respondent was specifically unfair. He pointed to the unclear nature of the respondent's evidence on the decision-making process, the failure of the respondent to take into account the lack of impartiality on the part of Ms Robinson and the failure to carry out a proper investigation. He suggested that the respondent had reached the conclusion that this was gross misconduct leading inevitably to dismissal without considering alternatives and appeal process failed to follow the ACAS code of practice. He also pointed to the unfairness of the letter from 2016 been taken into account when considering disciplinary action. He submitted that both the process and the outcome in this case must fall outside the bands of a reasonable responses to the circumstances. He highlighted that they had not been deliberate insubordination by the claimant but attempts by her to follow what she thought was the best interests of the patient.

43. Mr Hoyle argued that the evidence given by the claimant demonstrated a lack of understanding on her part of her actions and the potential consequences. He suggested that the procedural defects argued by Mr Griffiths had to be conceded that those defects could not unmake the consequences of the claimant's attitude to what she had done and he argued that it was her attitude in this case which was material. He pointed to the fact that the claimant had accepted that she had not made the referral required by Dr Moore but that she had subsequently sought to deflect her responsibility and blame others and that the way she had denied her own negligence had destroyed the trust and confidence the employer could have in her. Dr Moore had made a clinical decision and the claimant had made her own without authority or training and have thereby derailed the pathway determined by the GP. Mr Hoyle suggested the claimant's denial and refusal to accept responsibility could be seen in her continuing insistence that she had not made a referral herself when instead of making the hospital referral she sought to refer the patient to the community midwives.

44. Mr Hoyle highlighted the degree of responsibility and trust which has been placed in those undertaking the claimant role dealing as they do with medical records, records in relation to medication and with the ability to change those records which makes the matter of trust particularly significant. In terms of the procedure, he argued that in light of the concessions made by the claimant whoever heard the disciplinary hearing the outcome would have been the same because through the conduct the claimant had destroyed the trust and confidence in her and summary dismissal was the appropriate outcome. He pointed to the fact that if a statement had been taken from Ms Robinson the evidence before the tribunal makes clear what she would have said and what the response to that would have been. Hoyle also suggested that in the event the dismissal was found to be unfair, the appropriate Polkey reduction would be 100% and in any event any award would have to be reduced by 100% to take account of the claimant's contributory conduct.

The law

Relevant Law – Unfair Dismissal

45. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of a complaint to the Tribunal under section 111. An employee must show that they were dismissed by the respondent under section 95, but in this case the respondent admits that it dismissed the claimant within section 95(1)(a) of the ERA.

46. Section 98 of the ERA deals with the fairness of dismissals. There are two stages within section 98. First the employer must show that it had a potentially fair reason for dismissal under section 98(2). Second, if the respondent shows that it had a potentially fair reason for dismissal, the Tribunal must consider whether the respondent acted fairly or unfairly in dismissing for that reason.

47. In this case the respondent says it dismissed the claimant because it believed that she was guilty of misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2).

48. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case. The Tribunal must decide whether the dismissal of the employer was a reasonable response to the misconduct. Reasonable employers will follow principles of natural justice, with decision makers approaching questions in an openminded and fair way, so a decision should not be taken until all the evidence has been considered, decisions must not be pre-judged and the decision maker must be unbiased and acting as impartially as possible. There should be an impartial appeal. These principles are reflected in the ACAS Code of Practice.

49. All aspects of the case including the investigation, the grounds for belief, the penalty imposed and the procedure followed, must be taken into account in deciding whether the employer acted reasonably or unreasonably, and in assessing that the Tribunal must decide whether the employer acted within the range of reasonable responses to the reason for dismissal open to an employer in the circumstances. It is immaterial how the Tribunal itself would have handled events or what decision it would have made, and the Tribunal must not substitute its view for that of the employer.

Relevance of the claimant's conduct

50. s 122(2) ERA says: *Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly*.

51. S123 (1) says *Subject to the provisions of this section and sections 124, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer…..*

(6)Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

52. The "Polkey Principle": The decision *in Polkey v AE Dayton Services Ltd* 1988 ICR 142, HL, concerned a redundancy dismissal but the significance of this judgment is not limited any specific reason for dismissal. An employer cannot elude a finding of unfair dismissal by pleading that a failure of procedure made no difference to the outcome of the dismissal process, but in all such cases, tribunals will be entitled, when assessing the compensatory award payable in respect of the unfair dismissal, to consider whether a reduction should be made

on the ground that the lack of a fair procedure made no practical difference to the decision to dismiss.

Breach of Contract/Wrongful dismissal

53. In terms of breach of contract, the question is not what the employer believed but whether the claimant had acted in fundamental breach of contract. If she did, the employer would be entitled to terminate her contract summarily, that is without notice.

Discussion and Conclusions

54. First I accept that the respondent dismissed the claimant by reason of its belief in her misconduct. Indeed the claimant admitted that she had not made the Dr Moores' referral and that she accepts that she should have done. In that sense the claimant has conceded the reason for her dismissal was her conduct, this is case about the reasonableness of the employer's response to that.

55. In terms of the thrust of the claimant's case it is significant that although I consider that it is more likely than not that there was some conversation between the claimant and Ms Robinson about contacting the midwifery team, I accepted Ms Robinson's evidence that she had not sanctioned the claimant referring the patient to the community midwife team in place of making Dr Moore's referral to the hospital. For that reason I cannot accept Mr Griffith's submissions that the claimant's conduct could not amount to gross misconduct. By changing the patient's clinical care pathway without the approval of the GP the claimant acted outside her authority in a way which could have endangered patient safety. Whilst I accept that the claimant did not act out of malice that was nevertheless an act of gross misconduct. Mr Griffiths' submissions about this were dependent on my finding the claimant acted with Ms Robinson's approval and I did not not find that to be what happened.

56. Nevertheless the fact that employer may have a potentially good reason for dismissing an employee because they believe them to be guilty of gross misconduct is not enough for a dismissal to be fair. What the tribunal has to consider is whether in the circumstances the employer acted reasonably or unreasonably in treating that reason is a sufficient reason for dismissing the employee in question which is determined in accordance with equity substantial merits of the case. The question of whether the employer acted reasonably is assessed at point of dismissal unless any procedural defect is cured at the appeal stage.

57. In reaching my decision about the reasonableness of the respondent's response and in determining whether it fell within the bounds of reasonable responses to the reason for dismissal, I have been mindful that this is a small employer with limited resources. However although this is a small employer, it is a GP surgery so this as an employer that operates within a regulated environment where it can be expected that employers will have an understanding of the importance of proper and accurate record keeping and following defined processes. I have also recognised that the employer does not have to undertake a "perfect"

process, they must take an approach which falls within the range of responses of reasonable responses taking into account all the circumstances of the case.

58. From the investigation stage the claimant asserted as part of her mitigation and explanation for her actions, that she had spoken to Ms Robinson. It was not the case, as the respondent has repeatedly sought to suggest in its ET3 response and in its tribunal witness statements, that the claimant had changed her story to implicate Ms Robinson at a late stage. It is clear from the evidence of Ms Robinson and Ms Hornby that the claimant had given the same version of events throughout (albeit a version of events disputed by Ms Robinson).

59. It should have been clear to the partners that it was wholly inappropriate for Ms Robinson to continue the investigation or to play any part in the decision-making process. As her own statement makes clear, a suggestion that she was involved in what happened could have serious implications for her own career. This meant she could not be seen as an impartial investigator or decision maker. This in fact would not only be in the claimant's interests but also the respondent's to avoid any suggestion of a cover-up.

60. I recognise that for small employers it can sometimes be difficult to find someone to investigation misconduct in some way who has not otherwise been involved in the case to some extent. However, in this case the partners had access not only to the services of Croners, they employed a number of salaried GPs. Clearly Dr Moore could not have been involved but there seems to have been other GPs who could have been approached. In her evidence Ms Hornby said that she did not believe that this would have been appropriate, and she did not know if they would have taken on the role. The latter may be true but it simply cannot be credible or reasonable to suggest the salaried GPs did not offer a possible resource for the partners to undertake an impartial investigation. Presumably those GPs are intelligent, well-educated individuals who undertake jobs of the utmost responsibility and trust and are expected to undertake investigations with patients in a logical and confidential manner every day. Accordingly, although this is a small employer, when I take into account the resources which were available to it I cannot accept that it would not have been practicable for this respondent to conduct an investigation in accordance with the ACAS code of practice which states that "In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing" to ensure at the disciplinary stage a proper decision was taken and this is relevant to whether this employer acted in a reasonable way.

61. The investigation was flawed in another more serious respect. The investigation meeting was conducted by Ms Robinson but Ms Hornby, who the partners had decided would conduct the disciplinary hearing, attended that meeting to take notes. She was not a passive notetaker, as her evidence about the investigation notes shows. Ms Hornby was actively involved in the investigatory process because she reached conclusions about whether the claimant had spoken to Ms Robinson during the investigation hearing and edited her notes of the hearing accordingly. Ms Hornby had made decisions during the investigatory meeting which she carried through to the disciplinary hearing. She made no attempt to further investigate the conflict of evidence between the claimant and Ms Robinson, in essence she decided at the investigatory stage that the

claimant was guilty of misconduct and in that sense she acted as a judge in her own cause. Ms Hornby cannot have approached the disciplinary hearing impartially and with an open mind. She had already reached conclusions about the claimant's guilt. I am satisfied that no employer acting reasonably reach a decision to dismiss an individual for gross misconduct in this way. Ms Hornby's belief that the claimant was guilty of gross misconduct was not based on any proper and thorough investigation.

62. One of the striking aspects of this case was the conflicting evidence given by the partners about decision-making. I was given contradictory evidence by each of the partners about the extent to which they were involved in the decision-making at each stage. The information in the letter to the claimant solicitors was not consistent with the information set out in the decision letters which had been provided to the claimant nor the evidence given in the witness statement for this tribunal. I found the respondent's evidence to be unreliable and I was left with the clear impression that there was simply no clear decision-making process. Insofar as I have to reach a finding of fact I find that on the balance of probabilities all of the partners were involved in the decision making to some extent at both dismissal and appeal and there was no proper regard by them to the importance to having a clear and defined decision making process. I conclude that no employer acting within the range of reasonable responses could approach decision-making about the termination of an individual's employment in this way.

63. Although this was a small employer, as the document sent to the claimant at the investigatory stage showed, there was no reason why the partnership could not have conducted a fair process – the decision on dismissal could have been delegated to one partner with an appeal to another. It would have been practicable for the respondent to follow the ACAS code of practice. There were some concerns about Dr Corrie's ability to be impartial because of his wife's experience but it is the respondent's evidence that he had been involved in the decision-making in any event so that does not explain why the respondent did not follow or adapt the procedures it had sent to the claimant.

64. It would have been possible for procedural flaws to be corrected at the appeal stage. There was nothing wrong with the employer seeking the advice and recommendations of an external consultant at the appeal stage, although that still requires a decision-maker to take a careful approach to decide whether to accept or reject the consultant's recommendations. However but in this case the appeal did not correct the previous unfairness. First Ms Hart appears to be adopted an unreasonable approach herself to the claimant's case as evidenced by her assertion that there was no evidence of a conversation with Ms Robinson without apparently giving any regard to the claimant's evidence, and her criticism of the claimant's failure to attend the appeal hearing without exploring the reason the claimant had offered.

65. However more significant to the terms of the reasonableness of the response of the partners to the appeal, was the contradiction between the evidence in the witness statements to the tribunal and the letter to the claimant sent by Ms Hornby explaining what appeared to be "her" decision on the appeal. Dr Corrie's statement suggested he took a careful measured approach but the appeal

outcome letter suggested it was her decision without any involvement of Dr Corrie was involved in the decision at all. Ms Hornby's letter suggests she simply "cut and paste" Ms Hart's decision without any indication that there was any critical engagement with Ms Hart's recommendations and that is consistent with what Ms Hornby said the claimant's solicitors - that the decision on appeal had been Ms Hart's. I conclude that on the balance of probabilities the letter reflected the reality of what happened and the witness statements to this tribunal reflect what the respondents recognise *should* have happened. I do not consider that there had been any proper consideration of the grounds of appeal by the respondent.

66. I accept that in this case the partners believed that the claimant was guilty of gross misconduct however an employer acting within the range of reasonable responses to a conduct situation will follow a fair process to ensure that belief is reasonable. The decision making here was muddled and was based on an incomplete and partial investigation with guilt being concluded before the claimant had had an opportunity to have her case properly considered. The failures by the partners in this case were so serious I am satisfied that their approach fell outside the range of responses of a reasonable employer to the circumstances and therefore the claimant was unfairly dismissed.

67. I recognise however I must also consider the claimant's conduct and how likely her dismissal was in any event.

68. There are 2 matters that I must consider. First whether if a fair procedure had been followed, would the claimant have been dismissed in any event? That should I make a reduction under s123(1) under the Polkey principle.

69. Second, I must consider whether either the basic award or the compensatory awards should be reduced under 122(2) or s123 (6) because any conduct of the claimant has caused or contributed to the dismissal and it is just and equitable to do so.

70. I have reflected on this very carefully. It would only be appropriate to reduce the claimant's compensation to nil under the Polkey principles if I am satisfied that her dismissal was inevitable notwithstanding that on the facts the employer had taken an approach to the reason for dismissal at the time which no employer acting reasonably (taking into account the factors in s98(4)) could take. I accept that the claimant's conduct and attitude was significant in this case. The criticism of the claimant changing her story was unfair and not well founded, nor was it true that she did not express any remorse as the respondents suggested, but I accept that the partners had good reason to conclude the claimant had not fully accepted responsibility that what she done was wrong and that she appreciation the significance of changing the GP instructions without reverting that or another GP. I agree with Mr Hoyle that this was reflected in the claimant's evidence to this tribunal. Notwithstanding her expressions of regret, the claimant at this hearing sought to justify what she had done by reference to her knowledge about hospital waiting lists, she did seem to seek to suggest she had some understanding of the clinical issues and she sought to apportion blame to the community midwives. I am satisfied that if the employer had approached the procedure in a fair way, for example if the assertion about speaking to Ms

Robinson had been properly and impartially investigated, I am satisfied that the respondent would have concluded that it could not be satisfied that that the claimant would not do the same or something similar in the future and it would have had no choice but to dismiss her.

71. I was also considered contributory fault. I agree with the submissions made by Mr Hoyle that the claimant in this case acted in a way which was wholly inappropriate. However experienced the claimant was and is as a medical secretary, she is not medically qualified. She could not and should not have made a decision to change patient's clinical pathway without GP approval. She had no basis to countermand Dr Moore's explicit instructions. Whilst I accepted the claimant's evidence that she had spoken to Ms Robinson about contacting the community midwives about the patient in question, that does not explain why the claimant did not make the referral which Dr Moore had instructed without reference to her. Whilst I do not doubt the claimant acted with good intentions nevertheless her actions went outside procedures which are in place to ensure patient safety. That had potentially serious consequences for the patient and the outcome could easily have been significantly worse. The failure to send the referral here only came to light because of the patient's tenacity and action of this sort, that is the changing of clinical care decisions without a doctor's knowledge, could even have put a patient's life in danger. The fact that the claimant did not act with malice does not change that. That must be the most serious sort of contributory fault at tribunal is likely to encounter. For that reason I also conclude that it would be just and equitable to reduce the compensation to nil in this case because of the claimant's contributory fault.

72. For all of these reasons I find that the claimant was unfairly dismissed but no award of compensation should be made.

73. Finally I turned to the question of the claimant's wrongful dismissal. I am satisfied that the claimant had committed a fundamental breach of her contract of employment which entitled the respondent to dismiss her without notice and the claimant's claim for damages for breach of contract therefore fails.

Employment Judge Cookson

22 April 2022

REASONS SENT TO THE PARTIES ON

3 May 2022

FOR THE TRIBUNAL OFFICE