EMPLOYMENT TRIBUNALS

Claimant: Ms A Portosi

Respondent: MacAusland Design Limited

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD: on CVP (London Central) **On: 26 & 27 April 2022**

Employment Judge: Employment Judge Henderson (sitting alone)
Members:

Appearances
For the claimant: Mr P Tomison (Counsel)
For the respondent: Mr F Hussain (Solicitor – Croner)

JUDGMENT

The claimant's claim for ordinary unfair dismissal is successful on procedural grounds for the reasons set out below.

There is no reduction on the basis of the Polkey principle

There shall be a 50% reduction of the amount of any compensatory award made to the claimant for the reasons set out below.

The claimant's claim for automatically unfair dismissal on the grounds of public interest disclosure does not succeed and is dismissed. The tribunal finds that the claimant did not make any relevant public interest disclosures for the reasons set out below.

There shall be a remedies hearing <u>on 21 July 2022</u> (using the Cloud Video Platform) for one day starting at 10am before EJ Henderson. <u>Directions for this hearing are given at the conclusion of the Reasons below (paragraphs 113-115)</u>

REASONS

Introduction

1. This was a claim presented by an ET1 dated 22 January 2021 (following early conciliation via ACAS from 8-23 December 2020) for unfair dismissal; automatic unfair dismissal following a public interest disclosure and for wrongful dismissal. The claimant was employed from 2 May 2017 as an architect, by the respondent (an architect and interior design company) until the termination of her employment with effect from 30 September 2020.
2. There was a Case Management Hearing on 9 August 2021: the hearing was originally listed for 2 days in October 2021, however, that hearing was postponed and the case was subsequently listed for a Full Merits Hearing (FMH) for 4 days commencing on 26 April 2022.

Conduct of the Hearing

3. Unfortunately, due to lack of judicial availability, only 2 days were available for the FMH. The parties agreed that the tribunal should consider liability only and that the evidence and submissions could be completed within that timeframe, with the tribunal reserving its judgment. Accordingly, at the end of the hearing a provisional date was agreed for a one-day remedies hearing on 21 July 2022. It was explained to the parties that if the judgment was not in the claimant's favour the remedies hearing date would be removed from the tribunal diary.
4. The hearing was conducted remotely using the Cloud Video Platform (CVP). The hearing generally proceeded without incident, save that there were some connection problems for the claimant during the giving of her evidence on the second day, however, these problems were quickly resolved.
5. The tribunal heard evidence from the claimant and on behalf of the respondent, from Mr MacAusland (the owner and sole director of the respondent). Both witnesses adopted their written statements as their evidence in chief. The tribunal was also presented with an electronic folder of documents totalling 318 pages (the bundle was submitted in several parts but was consolidated by the tribunal). Page references in these reasons are to that consolidated bundle.

6. Both parties' representatives made oral submissions. Mr Tomison had submitted an opening written skeleton argument but made no reference to this in his closing submissions.

The Issues

7. The parties confirmed that the issues for determination by the tribunal were as set out in the Case Management Order dated 9 August 2021. These were as follows:

   Unfair dismissal (s 98 Employment Rights Act 1996 ("ERA"))
   -What was the reason for the dismissal? The respondent said that the reason related to conduct which is a potentially fair reason for section 98(2) Employment Rights Act 1996. The respondent said that the claimant was guilty of gross misconduct which merited her summary dismissal. The claimant was allegedly dismissed for a) being abroad whilst on furlough, which was alleged to be an abuse of the furlough scheme b) refusing to obey a reasonable management request to complete training whilst on furlough and c) not completing a training test set by the respondent. (Letter terminating the claimant's employment dated 30 September 2020-page 228-230)

   -Has the respondent proved that it had a genuine belief in the misconduct and that this was the reason for dismissal?

   -Did the respondent hold that belief in the claimant's misconduct on reasonable grounds? The claimant's challenges to the fairness of the dismissal were as follows:

   a. The decision to dismiss was pre-determined;
   b. The investigation conducted by the respondent was not reasonable in the circumstances in that: the respondent failed properly to consider the concerns that the claimant had raised; and there was no reason why the claimant should not have left UK while on furlough.
   c. Dismissal was outside the range of reasonable responses available in the circumstances;

d. The claimant's work colleague, in similar circumstances to her, was not subject to disciplinary action. **This issue was not relied upon by the claimant at the final hearing.**

-Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?

-If the dismissal was unfair, did the claimant contribute to the dismissal by her own culpable conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

-Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?

*Automatic unfair dismissal (*ss 43B and 103A ERA*)*

The claimant relied on the following as protected disclosures:

- On 24 and 28 July 2020, as part of her informal and formal grievances respectively, the claimant asserted to the respondent that: (i) the respondent was requiring her to undertake work or provide a service whilst she was furloughed pursuant to the Corona Job Retention Scheme (CJRS)/Furlough Scheme; and (ii) that on 12 September 2019 the respondent had risked her health and safety when she was instructed to inspect/take measurements on the roof of 14 Chesterfield Street whilst on her own.

-Was this information disclosed which in the claimant's reasonable belief tended to show one of the following?

The respondent had failed to comply with a legal obligation to which it was subject; and/or

Her health or safety had been put at risk.

-Does this qualify as a protected disclosure?

-Did the claimant reasonably believe that the disclosure was made in the public interest?

-Was the making of any proven protected disclosure the principal reason for the dismissal?

-Has the claimant produced sufficient evidence to raise the question whether the reason for the dismissal was the protected disclosure?

-Has the respondent proved its reason for the dismissal, namely misconduct?

-If not, does the tribunal accept the reason put forward by the claimant or does it decide that there was a different reason for the dismissal?

Wrongful Dismissal

-It is not in dispute that the claimant's contractual entitlement was to one month's notice.

-Did the claimant fundamentally breach the contract of employment by an act of so-called gross misconduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the gross misconduct.

8. At the commencement of the hearing Mr Tomison confirmed that the claimant was not bringing any claims for race discrimination or race -related harassment. References in the claimant's statement to comments made by Mr MacAusland about "cultural differences" and her Italian nationality, were made by way of background and not as separate causes of action/complaints to the tribunal.

The Relevant Law

Unfair dismissal - liability

Section 98 ERA governs the fairness of a dismissal:

> *(1) 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 principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within 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.*
>
> *(2) A reason falls within this subsection if it –*
>
> *… (b) relates to the conduct of the employee, …*

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

9. In cases of misconduct, the three-stage test from **British Home Stores Ltd v Burchell [1980] ICR 303** applies, namely the employer must have had: a) a genuine belief in the misconduct; b) reasonable grounds for that belief; and c) formed its belief after reasonable investigation into the matter.

10. The tribunal's task is to determine whether the dismissal was within the band of reasonable responses: **Iceland Frozen Foods Ltd v Jones** [1983] ICR 17. The burden of proof lies with the employer to show the reason for the dismissal, whilst the burden of proof is "neutral" when considering the fairness of the dismissal.

Unfair dismissal - Polkey

11. The burden of proving that the employee would have been dismissed in any event is on the employer: **Britool v Roberts** [1993] IRLR 481 at [26]. The general principles were set out by the EAT in **Software 2000 Ltd v Andrews** [2007] ICR 825 at [54].

Unfair dismissal - contributory conduct (compensatory award)

12. Section 123(6) ERA provides that:

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

13. There are three factors which must be satisfied to make a reduction under this section: (1) the conduct must be culpable or blameworthy; (2) the conduct must have actually caused or contributed to the dismissal; and (3) it must be just and equitable to reduce the award by the proportion specified: see **Nelson v BBC (No 2)** [1980] ICR 110 at pp121-122.

Protected disclosure– qualifying disclosure

Section 43B of the ERA 1996 defines a 'qualifying disclosure':

> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
>
> *… (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject …*
>
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered…*

14. Mr Hussain did not dispute that there had been a disclosure of information however he disputed whether the claimant had a reasonable belief that the information tended to show a breach of a legal obligation (ie the breach of the Furlough Scheme). He accepted that the information as regards September 2019 did show a potential breach of health and safety issues. However, the respondent also disputed the claimant's reasonable belief that disclosure was made in the public interest.

15. As to the question of reasonable belief, the test is a mixed objective and subjective test. As explained by the EAT in **Korashi v Abertawe Bro Morgannwg University Local Health Board** [2012] IRLR 4 at [62], the question of reasonableness involves applying an objective standard to the personal circumstances of the discloser. This involves a two-stage test: first whether or not the employee believes the information disclosed meets the criteria set out in (one of more of) the sub-paragraphs of section 43B ERA and secondly objectively, whether or not that belief is reasonable (even if that belief

may be mistaken). (**Babula v Waltham Forest College [2007] EWCA Civ174; [2007] ICR 1026 at [81]):**

16. As to the question of the public interest: it is worth noting that the introduction of the this test was aimed at resolving the problem which arose following the EAT's decision in **Parkins v Sodexho Ltd** [2002] IRLR 109, namely, the use of the protected disclosure provisions in private employment disputes that did not engage the public interest. The question is whether, in the reasonable belief of the worker making the disclosure, the disclosure of information is in the public interest.

Automatic unfair dismissal

17. Section 103A of the ERA 1996 provides that:

    An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

    The principal reason is the reason that operated on the employer's mind at the time of the dismissal: **Abernethy v Mott, Hay and Anderson** [1974] ICR 323 at p329. It is a stricter test than the "material influence" test for detriment cases: **Fecitt and others v NHS Manchester (Public Concern at Work intervening)** [**2011] EWCA Civ 1190; [2012] ICR 372 at [38].**

Wrongful dismissal

18. The Respondent must show that summary dismissal was justified because of the Claimant's repudiatory breach of contract. This is a question of fact requiring the Respondent to show that the Claimant's conduct so undermined the trust and confidence which is inherent in the contract of employment that the Respondent should no longer be required to retain the Claimant in employment

Findings of Fact

19. The tribunal will only make such findings of fact as are necessary in order to determine the issues set out above.

Background

20. The claimant commenced her employment on 2 May 2017. She was one of three architects (including Mr MacAusland). The parties agreed that the respondent was a small organisation, with limited administrative resources.
21. Both the claimant and Mr MacAusland accepted that they did not have a good working relationship. In her witness statement, the claimant said she found Mr MacAusland's style of management to be unnecessarily "strict, hostile and rude-very controlling and dictatorial". Mr MacAusland's witness statement said that the claimant frequently reacted aggressively and unprofessionally when given instructions by him.
22. In his oral evidence, Mr MacAusland said that there had been problems since August 2019. He referred to giving the claimant a final warning in September 2019 (page 261). This referred to an incident where Mr MacAusland felt the claimant was not properly prioritising the areas on which she was working and that her response to his questions was unacceptable: "aggressive sarcasm and open direct unfounded criticism of me personally in front of another member of staff". In this email Mr MacAusland referred to numerous incidents when he felt the claimant had spoken to him inappropriately.
23. Mr MacAusland accepted that the reference to a "final warning" had not been the result of any formal disciplinary or performance management process. He said that he had regarded this as the final warning before commencing any such formal processes. The tribunal finds that this was not a final warning in any technical sense, but is evidence on the ongoing poor relationship between the claimant and the respondent.
24. In March 2020, prior to the first national lockdown, the respondent's staff began working from home on a regular basis. On 31 March 2020 the claimant (and her architect colleague) were put on furlough under the Government's scheme and the claimant accepted this in writing on 1 April (pages 85 and 86). The respondent's letter stated that her position was temporarily closed due to the

downturn in business as a result of the pandemic. The letter explained that salary would be paid under the Government scheme up to the maximum permitted (80% of salary up to £2500): this would be paid by the company and funded by the Government.

25. The letter also explained that during furlough, the claimant would not be involved in her usual work activities and would not be doing any paid work for the company; however, she was permitted to undertake voluntary work and carry out training.
26. It was the nature and extent of such training that formed the focus of dispute in this case. The claimant accepted that, in principle, training was allowed during furlough. However, she did not accept the method and extent of the training which she was asked to undertake.

Training/work during the Furlough Scheme

27. Mr MacAusland said that the bulk of the artistic and illustrative skills in the company lay with him and that he had agreed with the claimant that she should expand her knowledge of the Adobe Illustrator (software for creating graphics and illustrations) programme. He said this had been discussed when the staff commenced working from home in March 2020, prior to being put on furlough. He had suggested to the claimant that she undertake this training by using YouTube video tutorials. He said that he had learnt many of his skills in this way. He had not been prescriptive with regard to the number of hours which the claimant should spend on training, but he did expect her to improve her skills on the programme.
28. The claimant did not consider that the use of YouTube videos was an appropriate means of training and felt that she should be given access to a structured training scheme by an external provider which could properly assess her progress. However, this evidence was inconsistent with the claimant's objection that she should not be asked to spend significant amounts of what she regarded as her own time during furlough in carrying out training.
29. The claimant was taken in cross-examination to her response to a question at the disciplinary hearing (page 219) when she referred to spending "my personal time" doing training for "your company when the government is paying me". The

claimant accepted this was an accurate record of her response. She was asked what she had meant by her comments and said that although she wanted the company to progress she did not wish to feel that she was forced: she felt it should be her choice and was prepared to make herself available to do training.

30. The claimant's response both at the disciplinary hearing and in her oral evidence suggests that her view was that she was not expected to comply with her employer's instructions during furlough, but that it was very much her own time which she could use as she felt appropriate. In response to tribunal questions about the relationship of employer and employee during furlough the claimant said that the employer's obligation was to keep in touch with the employee and keep them up-to-date if anything new was happening. The employee's obligation was to keep the employer informed if they were not available to work.
31. On 7 May 2020 Mr MacAusland contacted the claimant to ask her to clarify an invoice-query raised by a client with regard the amount of time spent on a particular piece of work. Mr MacAusland also asked the claimant to present a site plan to demonstrate the skills she had learnt from her Adobe Illustrator training so far. Both parties agreed that the conversation had not gone well. Each party alleged that the other had been unreasonable and/or aggressive.
32. Mr MacAusland confirmed his requests as regards the invoice-query and the Adobe Illustrator site plan in a follow-up email on 7 May 2020 (page 87). He suggested that the claimant use the site plan for the Bulgarian project as a base to experiment with her presentation styles, but did say that she was welcome to use any other drawing of her choice providing it was a site plan. The claimant interpreted this as Mr MacAusland asking her to produce promotional material for the Bulgarian project, which she felt was income raising work. She, therefore, believed she was being asked to carry out work for the company, which was a breach of the furlough scheme. Mr MacAusland said in his evidence that the Bulgarian project had in fact been concluded and was not ongoing. The claimant did not specifically dispute this in her oral evidence.
33. In his email of 7 May, Mr MacAusland also made reference to his ambitions for the company and that there would be changes once the office reopened. He expected all staff to embrace the change but said "anyone who can't or won't

change will be of no use to me". The claimant interpreted this as a threat to her ongoing employment.

34. During May there was a further dispute between the parties with regards to the exact level of the claimant's furlough pay. Mr MacAusland believed that the claimant was annoyed that the company did not "top up" her pay to the full amount; the claimant denied that this was the case. The claimant said she had objected to a comment made by Mr MacAusland during the conversation on 7 May to the effect that she believed that she was on a holiday being paid for by the Government.
35. On 18 May 2020 (page 100-101) Mr MacAusland wrote to the claimant (having taken instructions from his HR consultants) that the company would pay the maximum £2500 under the furlough scheme. If the claimant did not accept this, then she must confirm that she preferred to be made redundant.
36. The letter also summarised the emerging Government guidance on permissible activities for an employee during furlough. It said: an employee should not do any paid work or work which would generate income for the company. However, the employer should keep in contact during the furlough period and was entitled to be able to make reasonable contact during normal working hours. The employer could also set training tasks to be completed during furlough and could monitor progress and require demonstration of progress and skills learnt. Tasks that did not generate income, such as requesting copies of work already carried out prior to furlough or clarification of work carried out was acceptable, such as queries raised on timesheet entries/invoice-queries.
37. The letter also contained a section on returning to work and reiterated the substance of Mr MacAusland's earlier email that upon return to work employees were expected to make "a fresh start" and to work in a positive manner. Negative attitudes would not be tolerated. He also noted that demonstration of training undertaken and skills learnt during furlough would also be required on return to the office.
38. Mr MacAusland asked for a written response from the claimant confirming that she had read and accepted the contents of the letter and stating that she agreed to return to the company on the basis set out in the letter. If she felt unable to do this she should confirm that she wished to be made redundant.

39. The claimant said that she replied to Mr MacAusland on 27 May (page 103) stating that she accepted being put on furlough in accordance with the government scheme (and attaching a link to that scheme). The claimant also asked if she could speak to the respondent's external HR advisers so that she could understand exactly what activities employees could engage in whilst on furlough.
40. Mr MacAusland said that it was not appropriate for the claimant to speak directly to the HR company but he asked her to put her specific questions in writing and he would forward this on. The claimant said she had chosen not to do so. The claimant also accepted in her oral evidence that she had not specified in her email of 27 May 2020 to the respondent exactly what her concerns were about the activity she was being asked to undertake. She accepted that she had not stated in that email that she believed what Mr MacAusland was asking her to do with regards to the Adobe Illustrator training was a breach of the furlough scheme.
41. On 1 June 2020 the claimant sent an example of her work on Adobe Illustrator to Mr MacAusland, believing that he would not pay her until she had produced an example of her training.
42. On 2 June 2020, Mr MacAusland responded saying that he had not received confirmation that she accepted the terms of his 18 May letter and further that he had not received funds from the government for the Furlough payment. His feedback on the claimant's work was negative and extremely critical. He noted that improving her skills was "critical to your continued employment". He felt that his trust in allowing her to learn the Adobe programme in the way that suited her best had been abused. He also said that she had placed him in a difficult position and he was taking advice from his HR adviser.
43. This was again an indication from Mr MacAusland that unless the claimant changed her attitude and improved her skills on Adobe Illustrator he would have to consider action which may result in the termination of her employment.
44. The claimant complained that in addition to his negativity, Mr MacAusland had given no constructive feedback or any indications as to how she could improve.
45. Mr MacAusland said that he had not received the claimant's email accepting the furlough terms until it was re-sent to him on 4 June 2020 (page 103). As he had not received confirmation he had not paid the claimant at the end of May in the

usual way, however, he did pay her in early June 2020. The claimant believed that Mr MacAusland had received the email but had deliberately withheld her pay until she had produced her training work. As that is not raised as a specific issue, the tribunal does not make any finding of fact on that matter.

46. In his email of 4 June 2020 Mr MacAusland recognised that during the summer, the claimant may be planning to go to Italy to visit family. He asked that if she was planning to take her annual leave during furlough she should confirm the dates as he was required to top up her salary to the full level during any holiday taken.
47. On 10 July 2020 (page 125/6) Mr MacAusland sent the claimant a task/test with regards to the Adobe Illustrator training, to be completed by 28 July 2020. He again suggested that she use the Bulgarian project site plan to produce 3 differing styles of site plans. Mr MacAusland gave various instructions as to the skills which he was expecting to be demonstrated in the test. He noted that in order to complete the training test, the claimant may need some images which she could find on Adobe Stock and he could assist in downloading those for her as he had an account. The claimant replied to Mr MacAusland on 21 July 2020 saying that she did not need any stock images at that time, but would get back to him shortly. There was no indication from the claimant at this stage that she regarded the test being set for her by Mr MacAusland as a breach of the terms of the furlough scheme or that she objected to completing the test.
48. On 24 July 2020 (pages 130-134) the claimant submitted her informal grievance containing (inter alia) the alleged protected disclosures. Mr MacAusland said that this was in an email sent at 16:50 on Friday when the claimant knew that he would already have stopped work prior to the weekend. He first saw the email on Monday 26 July and proceeded to take advice from his HR consultant, but had not had an opportunity to deal with this matter prior to the claimant submitting her formal grievance. The tribunal accepts Mr MacAusland's evidence that he did not have sufficient time to deal with the informal grievance.
49. On Tuesday, 27 July 2020 (page 135-145) ,the claimant submitted her formal grievance which repeated the allegations in her informal grievance with regard to the breach of the furlough scheme and the health and safety issue which she had raised in September 2019.

50. The claimant accepted in her oral evidence that this was the first time she had indicated to Mr MacAusland that she was refusing to carry out the training test because she believed it was a breach of the furlough rules. This was the day before her test was due to be submitted. The claimant (on her own evidence) had spoken to ACAS/RIBA as early as 27 May/1 June 2020 when she said she obtained advice that the furlough scheme was being breached; however, she had not mentioned this advice to the respondent until her grievances in July 2020.
51. I asked the claimant why she had not raised her concerns about breach of the furlough scheme earlier and she said she had been hoping to speak to the respondent's HR advisers. I did not find the claimant's evidence on this matter to be credible. The claimant's emails and general correspondence with Mr MacAusland do not demonstrate any hesitation on her part to raise concerns. Further, Mr MacAusland asked her to put her questions to the HR advisers in writing which she declined to do.
52. In her oral evidence, as to why she had not completed the test the claimant appeared to focus on her objections to the manner of her training (namely that there was no structured scheme available for her) and because she objected to the negative feedback given to her by Mr MacAusland on 2 June 2020 without any constructive suggestions as to how she might improve. Further, she did not regard Mr MacAusland as properly qualified to assess her work on the Adobe programme. This evidence is inconsistent with the content of her grievance which suggests that she refused to complete the test because she believed it breached the furlough scheme.
53. I also note that in the informal grievance the claimant raises her concerns with regard to whether the test will be used as a review of her employment. She also felt that Mr MacAusland was using the furlough scheme "as an excuse to ask her to produce work to assess her Adobe Illustrator knowledge". This was correct in that Mr MacAusland wish to assess/monitor the claimant's training. The claimant accepted this was not in itself a breach of the furlough scheme.
54. The claimant's comments in the informal grievance suggest that her main concern was that her test could be used as a means to terminate her employment. In any event the claimant did not submit the test on 28 July 2020.

Claimant being abroad

55. On 30 July 2020 Mr MacAusland became aware that the claimant was in France. She had not notified him of this and had not asked for annual leave. When this matter was raised with the claimant during the disciplinary hearing (page 222) the claimant said that being on Furlough did not prevent her from being abroad provided that she was available and could return to the UK within 48 hours if needed to resume work. The claimant said that this was the advice she had received from ACAS/RIBA.
56. In his oral evidence, Mr MacAusland accepted that it was not strictly necessary for the claimant to tell him that she was going abroad during her time on Furlough, but he explained that the respondent's sole project at Chesterfield Street could have resumed at any time and she would have been needed to attend on-site and therefore, to be present in the UK. The claimant did not dispute this but said that she would have made herself available and return to the UK as necessary. In fact, the claimant did make herself available for work in August 2020 for the office move, when she was requested to do so by Mr MacAusland.

The Grievance Process

57. The respondent held a grievance hearing (on Zoom) on 17 August 2020. The hearing was held by Mr MacAusland and the claimant was accompanied by Vince McCoy (Unite Union representative).
58. On the same day, the respondent invited the claimant to attend a disciplinary hearing (page 147) to consider allegations: (i) that she was abusing the furlough system by taking holidays abroad without prior arrangements with the respondent (ii) she had not completed her software training or the test as required by the respondent but instead had raised a grievance on the day prior to the deadline for the test.
59. In his oral evidence, Mr MacAusland accepted that he had not conducted any form of investigation prior to issuing the invitation to the disciplinary meeting other than collating the relevant emails. He said this was because he had been

directly aware of the claimant's alleged misconduct. He also spoke to his HR consultant advisers who presented him with various options.

60. Mr MacAusland accepted in his oral evidence that he was annoyed by the claimant's grievance and to some extent this triggered the issuing of the disciplinary meeting invitation. However, he said this was because he regarded the grievance as the claimant avoiding submitting her test and not because of any protected disclosures made in the grievances. The tribunal accepts Mr MacAusland's evidence on this point as honest and credible. This is especially so, given the claimant's acceptance that she had not previously told him she had any objection to completing the test because it was a breach of the furlough scheme, though she had raised concerns about the nature/method of the training.
61. The grievance outcome was sent to the claimant on 26 August 2020 - the claimant's grievances were not upheld. The claimant appealed against the outcome on 3 September 2020 (page 172). An appeal hearing was held (on Zoom) on 11 September 2020 before a third party consultant from an external company, Face2Face.
62. The consultant prepared a detailed report after further investigations dated 22 September 2020 (pages 187-215). The report did not uphold the claimant's grievances but did note that there was significant damage to the employer/employee relationship and recommended workplace mediation to build a more professional working relationship. The report was sent to the claimant on 30 September 2020 (page 231) the same day as the letter terminating her employment.
63. There was no explanation from the respondent as to why the report was not sent to the claimant earlier and why the recommendation for workplace mediation was not discussed with the claimant prior to her dismissal.

<u>The Disciplinary Process</u>

64. The disciplinary hearing was held on 23 September 2020. Minutes of that hearing were at pages 216-224. The hearing was held by Mr MacAusland and the claimant was accompanied by Mr McCoy her union representative. The structure of the meeting was that Mr MacAusland put a series of questions to

the claimant to which she had an opportunity to respond. She also had the opportunity to make any further statements which she deemed appropriate. Both parties accepted that the contents of the minutes were accurate.

65. On 30 September 2020 (page 228-230) Mr MacAusland wrote to the claimant with the outcome of the disciplinary hearing. He noted that central to the claimant's "defence" was her view that the company could not require her to carry out software training whilst on furlough. He repeated that this was not correct and the company were fully entitled to require her to carry out training work within the provisions of the furlough scheme.
66. The claimant had admitted at the disciplinary hearing to completing 20-25 hours of software training in the period 1 April 2020-20 August 2020 which equated to 3% of the available working hours during that period. Further, the claimant had not carried out the software training test as required by the respondent. The respondent also noted that the claimant had been abroad without leave during the furlough period at a time when she should have been working on completing the training test. The claimant had not provided any acceptable explanation nor shown any remorse for her actions.
67. Mr MacAusland concluded that the claimant's actions amounted to gross misconduct and serious insubordination. Accordingly, he summarily dismissed the claimant with effect from 23 September 2020 (which was in fact retrospective). The respondent accepted that the dismissal was with effect from 30 September 2020.
68. Mr MacAusland said in cross-examination that in his opinion the main issue which led to the finding of gross misconduct was the claimant refusing to carry out the software training and the test and failing to communicate her reasons for doing so. He said that he had not given equal weight to the 3 points raised in his termination letter: the training/test was the main issue for him. He felt that he had made his position clear with regard to the claimant's attitude to work and that she needed to be more positive and cooperative. Her approach to his request for training and not completing the test had reinforced his view that she was not prepared to change.
69. It was put to him that the reason for the dismissal were the allegations which the claimant had made in her grievances regarding breach of the furlough scheme and breach of health and safety rules. Mr MacAusland denied this. He

accepted that the timing of the invitation to the disciplinary meeting was unfortunate in that it was the same day as the grievance hearing but he said he had not been influenced by any alleged protected disclosures, but by his irritation that the claimant was avoiding completing the test.

70. The claimant was notified of her right to appeal the decision, which she duly did on 5 October 2020 (page 233-234).
71. The appeal against dismissal was held on 14 October 2020 (minutes at pages 236-245). The appeal was heard by Mr MacAusland and the claimant was accompanied by Mr McCoy her union representative. Mr MacAusland was asked in cross-examination why he felt it appropriate to hear the appeal himself. He said that there was no new information presented by the claimant on the appeal. He further said that using an external consultant for the grievance appeal had cost £1000 which was a significant amount for his business at that particular time, given that the business only had one active client.
72. The Tribunal recognises the nature and limited financial resources of the respondent's business, but given the history of the poor working relationship between the claimant and Mr MacAusland (as expressed in the external consultant's grievance appeal report) and given the subject matter of the dismissal decision, the tribunal finds that the failure to hold an independent appeal was not fair and reasonable in the circumstances. This would also be a potential breach of the ACAS Code of Practice on disciplinary and grievance procedures (2015) paragraph 27 which states that an appeal should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case.
73. As mentioned above, given Mr MacAusland's previous involvement in the disciplinary process and his poor working relationship with the claimant, the tribunal finds that it was unlikely he could have been impartial in the hearing of the appeal.

<u>Claimant's advice from ACAS and RIBA</u>

74. As a result of her concerns about a potential breach of the furlough scheme, the claimant sought advice from ACAS and also from an employment law consultant to whom she had access via her membership of RIBA.

75. The claimant's call logs showed that she had contacted ACAS on 27, 29 May and 6 July 2020 (page 269-270) and the RIBA consultant on 1 June and 13 July 2020 (page 271).
76. The claimant was asked in cross-examination exactly what information she had given to ACAS and RIBA about the nature of the training she was being asked to undertake. The claimant was referred to paragraph 30 of her witness statement in which she said that the RIBA consultant told her that producing "promotional material" for her employer would be considered as work and therefore a breach of the furlough scheme. She was asked whether she had told the RIBA consultant that she had been asked to prepare "promotional material" (allegedly for the Bulgarian project).
77. The claimant was vague and unclear in her answers and I did not find her evidence on this matter to be credible. The claimant had acknowledged in her oral evidence she had not believed that she was being asked to prepare actual promotional material which would be a source of income for the respondent. On a balance of probabilities, I find that it is unlikely that the RIBA consultant would refer to promotional material unless the claimant had indicated that this was the nature of the request from her employer, under the guise of training. If this were the case, then the consultant's advice would be based on incorrect information.
78. The claimant said in response to tribunal questions that she had made notes of the advice given to her by ACAS and the RIBA consultant. She had not produced those notes at the disciplinary or grievance hearings or the appeals (although they were available at the time). The claimant said this was because she had not been asked to do so. This was a disingenuous response, given the subject matter of both those processes and given that the claimant had the benefit of being accompanied by her union representative at both the grievance and disciplinary process and appeals.
79. Further, I note that the claimant's grievances were raised after she said she received the relevant advice from her various consultations with ACAS/RIBA. It would be a reasonable expectation, therefore, that she would produce the notes of her advice for the purposes of backing up her grievances.
80. I asked why the notes had not been made available in the Tribunal bundle. The claimant said that she had lost the notes during a house move in December 2021. However, I note that tribunal proceedings were commenced in January

2021 and that the claimant had legal advice from Thompsons from the commencement of those proceedings (page 10). I would expect the claimant to have received advice from her solicitors that she should take care to retain any documents relevant to the case, which she would be required to produce in due course.

81. I also note that the Case Management Order of 9 August 2021 ordered disclosure on 31 August 2021, with a final bundle to be agreed by 14 September 2021. Therefore, on the basis of the claimant's own evidence, she would have had the notes of the advice given to her by ACAS and RIBA available at the time of disclosure. There was no explanation given as to why such notes were not produced for inclusion in the Tribunal bundle. Given these facts, I did not find the claimant's evidence on this matter to be credible. This in turn casts doubt on the credibility of the claimant's evidence with regard to the content of the advice given to her by ACAS/RIBA and therefore on her reasonable belief as to such advice.

Conclusions

Protected disclosure

82. The tribunal will deal first with the issue of whether the claimant made any protected disclosures.
83. The respondent accepted that both disclosures namely (i) of a breach of obligation with regard to the Furlough rules and (ii) putting the claimant's health and safety at risk were disclosures of information which were potentially qualifying disclosures.
84. However the respondent challenged whether the claimant had a reasonable belief in those disclosures and whether the disclosures were made in the public interest. In considering this question the tribunal applied the mixed objective and subjective test explained by the EAT in **Korashi** and **Babula.**
85. Dealing first with the disclosure regarding the claimant's health and safety. This was clearly a qualifying disclosure and the claimant would have had a reasonable belief that it did put her health and safety at risk. I find that as regards this disclosure both elements of the two stage test are met.

86. However, considering the personal circumstances of the claimant, the incident had occurred in September 2019 but she had not made a disclosure of this matter until late July 2020. I asked the claimant why this was the case, but she gave no satisfactory answer other than to say that she "did not want to get into that".
87. I find that if the claimant had a reasonable belief that such disclosure was in the public interest she could have made that disclosure at any time. The fact that she waited until a few days before the deadline for the submission of her training test before making that disclosure, indicates on a balance of probabilities that the disclosure was not made in the public interest but for her own personal considerations. The tribunal finds that this was not a public interest disclosure.
88. Turning to the disclosure regarding breach of the furlough scheme, and again applying the mixed objective and subjective test in **Korashi**, the tribunal finds that the claimant has not shown that she had a reasonable belief that the respondent's conduct with regard to training tended to show that it had breached its legal obligations under the furlough scheme.
89. This is based on the finding of the claimant's lack of credibility in her evidence concerning the advice she was given by ACAS/RIBA and the information she gave to those organisations in order to elicit the advice. It is also based on the fact that the claimant said she had made notes recording that advice but had never produced them at either the grievance or the disciplinary hearings and had not been able to produce them for the purposes of the tribunal hearing (see findings of fact above).
90. Further, the disclosure relating to the furlough scheme was made a few days before the deadline for the test submission, when on the claimant's own evidence she had been taking advice from ACAS/RIBA from the end of May/early June. The tribunal finds that the disclosure was not made in the public interest but for the claimant's own personal considerations. This was not a protected disclosure.

Unfair Dismissal – section 98 ERA

91. The tribunal accepts Mr MacAusland's evidence that the main reason for the claimant's dismissal was her failure to properly engage in the training process and to submit the test by the deadline of 28 July 2020 (or at all).
92. Mr MacAusland accepted in his oral evidence that there was no reason why the claimant should not have left the UK whilst on furlough providing that she could make herself available at short notice to return to work. It was not reasonable for the respondent to regard this as misconduct.
93. Turning to the **BHS v Burchell** test; Mr MacAusland did have a genuine and reasonable belief in the misconduct as regards the claimant's failure to complete training/the training test. Indeed, the claimant's oral evidence at Tribunal supported that belief in that she accepted that she had viewed 8-12 YouTube videos of around 30 minutes- 1 hour each, which at best would have resulted in 12 hours training. The claimant also accepted that she had not completed the test set by Mr MacAusland.
94. However, as Mr MacAusland accepted in his evidence, no investigation had been carried out prior to commencing the disciplinary process. The tribunal heard that Mr MacAusland was himself directly aware of the specific allegations as regards the training etc. However, as conceded in his own evidence, Mr MacAusland issued the invitation to the disciplinary hearing because he felt the claimant was avoiding completing the test by raising her grievance and not as a result of any specific investigation.
95. The disciplinary hearing had taken the form of questions put to the claimant. The tribunal observes that it would have been better if this had formed the investigation process prior to proceeding to a disciplinary hearing. The tribunal finds that no proper or reasonable investigation process was conducted by the respondent- which is a factor in rendering the dismissal unfair.
96. Was the decision to dismiss within the reasonable range of responses open to a reasonable employer? The tribunal finds that based on the evidence presented to it, the decision to dismiss was within the reasonable range of responses. The claimant had failed to carry out the training requested of her, which was a legal and proper requirement within the furlough scheme, and had failed to complete the test requested by her employer and had not provided any explanation or

warning that she did not intend to do so until very shortly before the relevant deadline of 28 July 2020. The tribunal also notes the well-established line of case law which does not permit the tribunal to substitutes its own opinion as to whether dismissal was the appropriate sanction.

97. However, when considering the overall fairness of the dismissal under section 98 (4), the respondent's failure to carry out an investigation and the fact that Mr MacAusland heard the appeal himself must render the dismissal procedurally unfair in all the circumstances.

98. The tribunal has taken into account the size and administrative resources of the respondent's business in reaching this decision. The respondent had secured the services of an HR advisor and arranged for an external company to carry out the grievance appeal and could have done so on the dismissal appeal. The tribunal accepts that £1000 was a significant expense for the respondent at the relevant time; however, the respondent has had to incur significantly higher costs and been required to spend considerable amounts of management time as a consequence of saving that money.

99. The tribunal also notes the inadequate managing of the claimant's alleged poor performance. References were made to a "final warning" given in September 2019 but this was not the result of any form of proper process and was in any event never followed up with any disciplinary action until August 2020 (for completely different reasons).

100. The claimant's dismissal for was unfair on procedural grounds.

Polkey

101. The tribunal finds that the respondent has not shown that adopting a fair procedure would have resulted in the claimant's fair dismissal in any event. Mr MacAusland and the claimant's history of a poor working relationship had a significant influence on his decision to dismiss her. There was no evidence presented to the tribunal to show that an independent decision –maker on the appeal would have reached the same conclusion. Accordingly, the tribunal makes no reduction on the **Polkey** principle.

Contributory Conduct – section 123 (6) ERA

102. The tribunal has found that the claimant's conduct in this matter was culpable/blameworthy. The claimant carried out minimal training whilst on furlough and refused to carry out the test set by Mr MacAusland.

103. The claimant said in her grievance that her refusal to carry out the training and the test was because she believed that this was a breach of the furlough scheme. The tribunal have not accepted that explanation and have not accepted that she had a reasonable belief in the information relating to the furlough scheme raised in in her grievances and that this was not done in the public interest. The claimant's evidence in tribunal was that the key reason for not completing the test was because she objected to the manner of the training offered and the lack of constructive feedback offered by the respondent.

104. The tribunal finds that the claimant may have had a genuine struggle with the training via YouTube videos but that her poor working relationship with Mr MacAusland meant that she could not communicate this to him. He had raised on several occasions in his correspondence the fact that a failure to change and to present the skills he required would result in the termination of her employment. The claimant was concerned that the test would be regarded as a review of her skills and that she may not meet the required standard set by Mr MacAusland and so, was reluctant to complete the test. This was why she requested a structured training course and an independent assessment. However, she did refuse to carry out the test and she did not communicate her intention not to do so or her reasons for that until she raised her grievance.

105. As a result, the claimant contributed to her dismissal. If she had given details of the advice she had received (or even had raised the content of that advice in writing to the respondent's HR advisers) the outcome may have been different. Or if it had not been different, the claimant would have done all she could to avoid dismissal. However, the claimant chose not to communicate with the respondent, other than by her grievance and the alleged protected disclosures (which the tribunal has not accepted).

106. The tribunal finds it just and equitable to order a reduction of 50% to any award payable to her by the respondent. This is a case where there was fault on both sides. Unfortunately, the poor relationship between the claimant and Mr

MacAusland meant that neither party was prepared to make any concessions with regard to their position or to consider the other's point of view, which resulted in misunderstandings and a lack of proper communication.

Automatically Unfair Dismissal (section 103A ERA)

107. As the tribunal have found that there were no protected disclosures made, it is not strictly need to go on to consider this issue.

108. However, even if the tribunal were to be wrong on the finding with regard to protected disclosures, it would in any event find that the principal reason operating on Mr MacAusland's mind at the time of dismissal was the claimant's refusal to carry out training/the test and not the making of the alleged protected disclosures.

109. The tribunal has accepted Mr MacAusland's evidence that the timing of the invitation to a disciplinary hearing and the grievance hearing was because he felt that she was avoiding completion of the test. The tribunal notes the history of the poor working relationship between the claimant and Mr MacAusland and also notes Mr MacAusland's repeated references to the need for change, failing which the claimant's employment would be terminated. These comments were made prior to the claimant's alleged disclosures on 24 and 28 July 2020.

110. If it needed to consider the issue of automatically unfair dismissal, the tribunal would find that there was no causal connection between the dismissal and any protected disclosures which may have been made. The claim for automatically unfair dismissal does not succeed and is dismissed.

Wrongful dismissal

111. The tribunal has accepted Mr MacAusland's evidence that the main reason for the dismissal was what he described as the claimant's "serious insubordination", namely her refusal to carry out training/the test. The tribunal has also accepted that dismissal for this reason would have been within a reasonable range of responses had the procedural failings not rendered the dismissal unfair.

112. The tribunal therefore find that respondent has shown that summary dismissal was justified in the circumstances due to the claimant's gross

misconduct. The claim for wrongful dismissal does not succeed and is dismissed.

Remedies hearing

113. As agreed in tribunal, there will be a one day remedies hearing on 21 July 2022 to assess the level of compensation payable by the respondent to the claimant in the light of the tribunal's findings as set out above. This shall include any uplift for breach of the ACAS Code of Practice.

114. The parties shall ensure that a bundle of any relevant documents necessary for that hearing is agreed and sent to the tribunal **no later than 11 July 2022**. The bundle shall be in electronic form as a PDF folder. Any witness statements from either party shall also be sent to the tribunal **no later than 11 July 2022** in PDF form.

115. The tribunal encourages the parties to reach an agreement with regard to the level of compensation payable to avoid the need for a further tribunal hearing.

Employment Judge Henderson

JUDGMENT SIGNED ON: 11 May 2022

JUDGMENT SENT TO THE PARTIES ON 11/05/2022

FOR THE SECRETARY OF THE TRIBUNALS