EMPLOYMENT TRIBUNALS

Claimant: **Mr D Foster**

Respondent: **South Yorkshire Housing Association**

Heard at Sheffield **On: 9, 10 and 11 February 2022**
1 April 2022
24 May 2022

Before: **Employment Judge Brain**

Representation

Claimant: **Mr T Grindley, Friend**
Respondent: **Mr J Heard, Counsel**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant's complaint brought pursuant to the Employment Rights Act 1996 that he was unfairly dismissed fails and stands dismissed.
2. The claimant's complaint of wrongful dismissal fails and stands dismissed.

REASONS

1. Following the fifth day of the hearing of this matter held on 24 May 2022, the Tribunal reserved judgment. The Tribunal now gives reasons for the judgment reached.

Introduction and preliminaries

2. The claimant presented his claim form on 12 August 2020. The matter was listed for hearing on 9 December 2020. Upon receipt of the respondent's response to the claim (received by the Tribunal on 14 September 2020) the listing of this case for hearing on 9 December 2020 was vacated upon the basis that one day would not be enough time for it to be heard. The case then benefited from a case management preliminary hearing which came before Employment Judge Wade on 8

September 2021. (Between December 2020 and September 2021, the matter had been listed for case management hearings which had to be postponed for various reasons).

3. Employment Judge Wade identified that the claimant was bringing complaints of unfair dismissal (pursuant to the Employment Rights Act 1996) and wrongful dismissal. In the annex to her Order (sent out to the parties on 9 September 2021) she identified the issues. I shall set these out later in these reasons. She also gave case management directions.

4. The case was listed with a time allocation of three days. It was heard on 9, 10 and 11 February 2022. Unfortunately, the progress of this case was interrupted by late disclosure of documents by the respondent. During the course of the hearing, it transpired that the respondent had failed to give disclosure of documents in their possession consisting of emails sent by Dee Hiley (who is an employee of the respondent in the capacity of project co-ordinator) to her own email account and also to Joanne Hill, a former employee. As we shall see, these were of relevance to one of the issues in the case and disclosure of them was necessary to the determination of the case. Pursuant to an Order which I made on 11 February 2022 (and which was sent to the parties on 18 February 2022) the respondent was required to serve upon the claimant copies of all emails between Dee Hiley, her personal email account and Joanne Hill for the calendar years 2018, 2019 and 2020.

5. Accordingly, the case was adjourned and re-listed to commence on 1 April 2022. At the commencement of the hearing that day, Mr Heard informed the Tribunal that a further 404 pages of documents had been disclosed to the claimant very late the previous evening. These documents lay behind a report prepared by Helen Garside who is employed by the respondent as a people partner. This report is at page 504 of the main hearing bundle. I shall refer to this report in due course.

6. Upon the first day of the hearing, the respondent had produced a bundle of documents which formed the basis of a report prepared by Natalie Newman who is employed by the respondent as head of development and asset strategy. I shall refer to Natalie Newman's report later in these reasons. The claimant did not make any application to adjourn the hearing notwithstanding the late disclosure of these documents. However, understandably, he took a different view about the late disclosure of the material late in the evening of 31 March 2022. This necessitated a further adjournment.

7. Following the abortive hearing of 1 April 2022, I prepared a further Order which was sent to the parties on 6 April 2022. The respondent was given permission to include the documents disclosed late on 31 March 2022 and to adduce further evidence. The claimant was permitted to prepare a supplemental witness statement. He had no questions for any of the respondent's witnesses arising out of the late disclosed documents other than for Juliann Hall. She is employed by the respondent as director of care, health and well-being. She was the decision maker at the disciplinary hearing at which the claimant was dismissed.

8. At the outset of the hearing on 9 February 2022, the Tribunal was presented with a hearing bundle which runs to 512 pages and a bundle of

witness statements. The unfortunate late disclosure of documents on the part of the respondent as the matter has gone along led to the production of two further hearing bundles. The first of these (being the third bundle in the case produced on 9 February 2022) became known as the "*confidential documents"* bundle. This runs to 105 pages. There was then a fourth file which became known as *'Dee Hiley bundle."* It was comprised of the emails between Dee Hiley, her personal email account and Joanne Hill and the 404 pages disclosed to the claimant late on 31 March 2022. The latter had been paginated to run consecutively with the Dee Hiley documents. It is convenient therefore simply to refer to all of those documents as being in the *'Dee Hiley bundle'.* This runs to 479 pages.

9. The Tribunal heard evidence from the claimant. Evidence was given on his behalf by Christine Davies. She is a former employee of the respondent who held the role of project co-ordinator. As a matter of fact, she is Mr Grindley's wife.

10. On behalf of the respondent, the Tribunal heard evidence from:-

10.1. Miranda Plowden. She is employed by the respondent as the business development director.

10.2. Natalie Newman. She is employed by the respondent as the head of development and asset strategy.

10.3. Juliann Hall. She is employed by the respondent as the director of care, health and well-being.

10.4. Rebecca White. She is employed by the respondent as human resources manager heading up the people services team.

10.5. Angie Tinker. She is employed by the respondent as a people partner in the HR team.

10.6. Richard Ross. He is employed by the respondent as a people partner.

10.7. Charlotte Murray. She is employed by the respondent as a director of care, health and well-being.

11. The Tribunal will now make findings of fact. The issues in the case shall then be set out together with a summary of the relevant law. The Tribunal will then set out the conclusions reached by application of the relevant law to the factual findings in order to reach a determination of the issues in the case. Many of the relevant facts are not in dispute. Where it is necessary to resolve a dispute of fact, the Tribunal will indicate how the dispute has been resolved.

Findings of fact

12. The claimant worked for the respondent between 22 August 1994 and 17 June 2020. At the time of his dismissal, he held the role of development project co-ordinator. He held this role from June 2012. His role fell within the development and asset management team.

13. Between May 2017 and 3 May 2019, the claimant's line manager was Karl Drabble. Mr Drabble now works as the area development manager (North of England) at Legal and General Affordable Homes. It is common ground that Legal and General Affordable Homes are a competitor of the

respondent. Upon Mr Drabble's departure, Natalie Newman became the claimant's interim line manager. With effect from 8 July 2019, John Walker took over that role.

14. The respondent is a provider of social housing based in Sheffield. This involves the acquisition of land upon which to build social housing and the buying housing stock for the same purpose. One source of funding is through Homes England with which the respondent has a contract. Grant payments may be dependent upon the commencement of development by a given date.

15. In September 2018, the respondent agreed to purchase a piece of land in Sheffield in order to develop homes that would meet their contractual obligations to Homes England. In order to secure the Homes England grant, a *"start on site"* (as it was put by Mrs Plowden in paragraph 5 of her witness statement) had to be achieved by the end of March 2019.

16. The acquisition of the site was complicated by asbestos contamination. In paragraph 6 of her witness statement, Mrs Plowden says that *"It was agreed to proceed with letting the contract [for development] and at the same time to apply for a grant from the Sheffield City Region Infrastructure Fund ("SCRIF") to cover the contamination costs. [The claimant] as the project co-ordinator for the … scheme, was tasked with submitting a bid for the grant. [The claimant] did not at any time indicate that he was unhappy to undertake this role."*

17. In paragraphs 7 to 11 of her witness statement, Mrs Plowden goes into some detail about concerns which she had around the claimant's performance upon the SCRIF bid. It is not necessary to go into detail about this. It is not in dispute that Mrs Plowden held concerns about the quality of the work undertaken by the claimant which led to tensions between them. The claimant does not dispute that he did not perform to the optimum when working upon the SCRIF bid. In his witness statement, he says that he *"was tasked with applying for a grant for the sum of £350,000. This was to bridge a gap in funding that appeared because of the poor decisions made by Miranda Plowden. I believed this was morally and professionally wrong and so dragged my heels when conducting this piece of work."*

18. The claimant complained to Natalie Newman about his treatment at the hands of Miranda Plowden. Mrs Plowden acknowledges speaking to the claimant about the SCRIF bid in an open plan office and that this may have been overheard by others. Mrs Newman told Mrs Plowden that the claimant had complained about her. This prompted Mrs Plowden to meet with the claimant on 16 July 2019. Mrs Plowden's account (in paragraph 13 of her witness statement) is that the claimant acknowledged shortcomings in his performance while she, for her part, accepted that it would have been better not to have expressed her concerns about the bid in an open plan environment.

19. The Tribunal accepts Mrs Plowden's account of the meeting of 16 July 2019. Mr Grindley did not ask Mrs Plowden any questions about it when he had the opportunity of cross-examining her. While other parts of Mrs Plowden's witness statement were challenged, this part was not. There is no note of the meeting of 16 July 2019 (at any rate, I was not taken to any

such note). The claimant makes no mention of the meeting in his witness statements.

20. Mrs Plowden's concession that she could have handled matters better herself persuades the Tribunal that upon this issue her account is credible. Given that there were concessions from each, I accept her account that the meeting was amicable.

21. During her interim tenure as line manager of the claimant, Mrs Newman began to have cause for concern through July 2019. In paragraph 6 of her witness statement, she says that she and others had noted that the claimant was spending a lot of time speaking to Mr Drabble. Then, she was approached by a member of the team who told her that the claimant had requested the location of an electronic file containing highly confidential information. Mrs Newman could not understand why the claimant would need that file as it was not one of his projects. Finally, she says that she received an email from Homes England *"questioning the rationale of our approach to our "deal" with the develop on the same site to the documentation that [the claimant] had been requesting*." She raised her concerns with Mrs White.

22. Mrs White asked Mrs Newman to investigate whether the claimant had been sharing commercially sensitive information with Mr Drabble. A meeting was therefore arranged for 23 July 2019.

23. The minutes of the meeting are at page 201 of the hearing bundle. The notes are brief and it is worth setting out the record in full:

"NN … I want to establish some facts. I overhead that it's possible that you might be sending SYHA documents outside the organisation. Are you sending documents to non-SYHA.co.uk accounts?

DF [the claimant]: no.

NN: If I look at your emails, will I see any unusual email traffic? Or things that might look odd?

DF: No.

NN: Do you send information outside of SYHA?

DF: No. Well only, to myself to read.

NN: Why would you do that when you [have] a laptop you can use at home?

DF: No response.

NN: I'm worried you might be sending information.

DF: I have not sent any commercially sensitive information. I have nothing to gain from it.

NN went on to explain that it would be remiss of her not to look into this. If nothing comes back from IT there will be no further cause for concern, if there is unusual email traffic it will need to be looked into.

DF: I have not done anything.

NN: My concern is that you have shared information about [a project] to Karl Drabble.

DF: I've not shared any commercially sensitive information.

24. The project which she asked the claimant about was the development upon the electronic file and the subject of the email from Homes England. These were the matters which caused Mrs Newman's concern as described in paragraph 6 of her witness statement.

25. In evidence given under cross-examination, the claimant accepted that the note at page 201 was a fair reflection of the discussion between him and Natalie Newman. It was suggested to the claimant by Mr Heard that the claimant was *"closed".* The claimant explained that *"It was not a nice experience. The way it was conducted wasn't great. I had a bad feeling about the scheme with Homes England, she went digging."* The claimant accepted that it was reasonable for Natalie Newman to investigate her concerns. *"Any manager would"* was how the claimant put it. It was suggested that the claimant gave untrue accounts about sending information to non-SYHA.co.uk accounts. He explained that he may have misunderstood the question. When it was suggested that the question was clear, he explained, "*they've suddenly come at you"* and that he may *"not have clocked what she was asking me."*

26. Natalie Newman reported back to Rebecca White. They were not satisfied with the claimant's explanations and decided to escalate matters to a formal investigation in line with the respondent's disciplinary procedure. This is in the bundle commencing at page 64. The provision for a fact find may be found at pages 70 to 72.

27. Mrs Newman requested the respondent's IT department to investigate any unusual email activity on the respondent's account. She was informed that over the last five years the claimant had sent only six documents to his own email address whereas in July 2019, 11 documents were sent over a period of three days. This was of sufficient concern to persuade Mrs Newman of the need to investigate matters further.

28. Accordingly, on 25 July 2019 the claimant was invited to an investigation meeting. Initially, this was arranged for 29 July 2019 but was then postponed to 6 August 2019 (pages 202 and 203).

29. The notes of the meeting of 6 August 2019 are at pages 204 to 212 of the bundle. By way of contrast with his position upon the minutes of the meeting of 23 July 2019, the claimant in evidence was somewhat equivocal as to the accuracy of the notes. He said he was unable to say whether they were an accurate reflection of what had transpired. However, they were sent to him for his approval and he did not draw the attention of the respondent to any inaccuracy. He said in evidence that he did not read the notes in any detail and *"just skimmed"* them. There is nothing in his witness statement to the effect that he takes issue with the accuracy of the notes. Given all of these factors, I find that the notes at pages 204 to 212 are accurate.

30. I do not propose to set out the note *verbatim* here. The parties are familiar with them. I will simply refer to those parts of the notes to which my attention was drawn during the course of the hearing:

(1) It was drawn to the claimant's attention that there was an unusual spike of activity in sending work related attachments to himself over the course of three days in July 2019.

(2) The claimant accepted that he had been issued with a work laptop (the respondent's point being that there was no reason for him to send emails to his home computer). The claimant defended his position by saying that *"being agile"* is fairly recent and he didn't see this *"as unusual behaviour for himself."*

(3) The claimant was asked if he had sent himself heads of terms for three projects (being those at pages 80 to 85, 94 to 100 and 101 to 102 of the confidential documents bundle). He was also asked if he had sent to himself those at pages 1 and 2, 78 to 79 and 86 to 87 of the same bundle. The claimant accepted that he had done so.

(4) Following some discussion, the claimant *"concluded the information is confidential to the development and asset strategy team."* (I presume that the word *"concluded"* should read *"conceded"* in this passage of the notes).

(5) The claimant then raised that he had been singled out and that others had sent information out. The claimant was invited to elaborate but declined so to do (at this stage).

(6) There was then some discussion as to whether the claimant had sent some or all of these documents on to Mr Drabble. The claimant accepted having sent some documents to him. Mrs Newman asked him if he could forward to her the full email(s) together with the attachments whereupon the claimant said that he *"could not remember what action he took."* The claimant was invited to log in to his own email address there and then and show her what had been sent. The claimant refused to do so. It is recorded that he *"raised his voice and stated that he was being pushed a little far."*

(7) Mrs Newman summarises the matter in paragraph 14 of her witness statement that the claimant's *"response to the allegations changed several times in the meeting. He initially denied sharing confidential information, then admitted to sharing information but disputed that it was confidential or commercially sensitive, then he alleged that others shared confidential information outside of SYHA. When I asked Derek to provide the names of others who had done this in order for me to investigate further he refused to name anyone."* She then mentions other investigations which she carried out to which I shall return shortly.

31. On 14 August 2019, the claimant commenced a lengthy period of sickness absence. He was certified by his GP as unfit to work due to stress at work. The GP's certification was in four fit notes covering the period from 14 August 2019 to 26 February 2020 (pages 214, 216, 250 and 325). He was then signed off as unfit to work after the latter date for a further 12 weeks (page 374).

32. Natalie Newman prepared a disciplinary investigation report (pages 217 to 225). This is dated 9 September 2019. The report contained 10 appendices. Appendix 3 corresponds to the bundle of confidential documents before the Tribunal. Appendix 4 was the note of the fact find meeting of 23 July 2019. Appendix 5 was the note of the investigation meeting of 6 August 2019. The other appendices (save for appendix 3) are to be found in pages 226 to 240 of the bundle. She recommended that matters proceed to a disciplinary hearing.

33. On 12 September 2019 Victoria Briers-Bott, senior people partner, wrote to the claimant to invite him to attend a disciplinary hearing to be held on 19 September 2019 (page 245). In the event, this was postponed due to claimant's absence from work through ill health.

34. The claimant was informed that *"The purpose of the disciplinary hearing will be to consider the allegations that were discussed during both investigation meetings (of 23 July and 6 August 2019). The allegations were:*

Allegation 1 – that you breached the acceptable use policy, data protection policy by disclosing via email information which might be confidential to the association or its partners and customers.

Allegation 2 – that you breached the security policy by using a third party email system to duplicate and store confidential SYHA documents and also by then forwarding these documents to a third party email account.

Allegation 3 – that you breached the SYHA behaviours policy in particular, honesty and integrity by not being transparent in your interactions with others."

35. The letter went on to say that *"Due to the nature of the allegations this is being considered a serious/gross misconduct which can lead to disciplinary action in accordance with the association's disciplinary policy which could result in summary dismissal."*

36. A copy of the respondent's disciplinary procedure was sent to the claimant along with Natalie Newman's investigation report and "*the full investigation pack".* It is not in fact in dispute that the claimant was not sent the documents within the confidential documents bundle (being appendix 3 of the disciplinary investigation report). It was submitted by Mr Heard on behalf of the respondent that the claimant had these documents in any case as he had sent them to himself. He was therefore familiar with them.

37. The acceptable use policy is in the bundle commencing at page 122. It is referred to in paragraph 31 of the claimant's contract of employment. This is in the bundle commencing at page 53. The salient clause (numbered 31) is at page 58. This says, *"Our acceptable use policy is set out in the employment handbook. You must comply with it at all times."*

38. The relevant provisions of the acceptable use policy to which the Tribunal was taken are:

(1) That the policy defines the practices with which employees must comply when using the respondent's IT systems or other equipment.

(2) That authorised users who breach the policy may be subject to the respondent's disciplinary procedures.

(3) That information created, saved or distributed upon the respondent's IT systems and equipment belongs to the respondent.

(4) That the employee must not *"outside the course of your job"* disclose information which might be confidential by posting online or sending through email.

(5) That reference should be made to the respondent's data protection policy regarding the employee's obligations and responsibilities.

39. The IT security policy is at page 129. Amongst other things, this provides (in clauses 3.6.2 and 3.6.3) that users must not use third party email systems to conduct business, create any binding agreements or to duplicate, store or retain email on behalf of the respondent and must not forward confidential information to their personal third party email accounts.

40. The respondent's behaviours policy is in the bundle commencing at page 93. This sets out the respondent's policy on conduct and exhorts employees to behave with care, commitment, honesty and integrity and respect. By clause 3 it is provided that the behaviours policy *"underpins everything we do and sets out our basic standards for how we expect all our staff to behave."*

41. The data protection policy is in the bundle commencing at page 109. The Tribunal was not taken to this during the course of the hearing.

42. We have noted that there is a specific contractual provision incorporating the acceptable use policy within the claimant's contract of employment. Although the Tribunal was not taken to it, it is noted that by clause 27 of the contract, *"The employment handbook contains further details, policies, procedures and practices which applies to this contract of employment."*

43. The claimant was also drawn to clause 23 of the contract of employment. This concerns confidential information. There is an obligation upon the claimant not (during employment or after its termination) to disclose to any person except to those authorised to know any trade secrets or confidential information. Such information must also not be used for the employee's own purposes. Trade secrets and confidential information includes *"lists of details for clients, tenants, contractors, working partners or customers of [the respondent] (both current and those who were within the previous 12 months) all information relating to the working or any processes or invention carried out on or in respect of which [the respondent] is bound by an obligation of confidence to a third party or by any statutory obligation of confidence."* The restrictions are said to end should such knowledge or information become available to the public generally. No issue arises that much of the documentation in the confidential documents bundle is confidential information within the meaning of clause 23.

44. The disciplinary hearing scheduled for 19 September 2019 did not proceed due to the claimant's ill health absence. An absence review meeting was held on 12 November 2019 (pages 271 to 276). The claimant was sent a

letter reconvening the disciplinary hearing for 20 November 2019. The invite letter dated 14 November 2019 is at pages 277 and 278.

45. On 17 November 2019 the claimant emailed Rebecca White (pages 280 and 281). This contained a grievance raised by the claimant against Miranda Plowden and Natalie Newman. The grievance against Mrs Plowden was in connection with the project referred to in paragraphs 15-17 above and the claimant's perception that he had been publicly berated by her. His complaint against Natalie Newman was that based on no more than *"gut feeling"* she conducted a *"deeply flawed"* investigation. He alleged that she was not impartial.

46. The claimant said in his grievance that, "*During a meeting with Natalie Newman and Victoria Briers-Bott [this being the meeting of 6 August 2019] I stated on seven occasions that it is common practice within the development and asset management team to share information. I categorically know of three people that have recently sent information to Joanne Hill. These are Karl Drabble, Amelia Bullock and Dee Hiley."* He goes on to say that *"I have since been told that there is no evidence that this has occurred. I can evidence this so can only assume that either this investigation was not carried out or that the findings are being covered up or ignored to further victimise me."*

47. Rebecca White appointed Sharon Dyett to lead the grievance hearing. A grievance meeting was held on 25 November 2019. The claimant was accompanied by his trade union representative Richard Hart. Sharon Dyett was accompanied by Mr Ross. The notes of the meeting are at pages 287 to 293. They have been signed by the claimant as an accurate record. Amongst other things, the claimant again mentioned that he was aware of others within his team who were sent emails outside of the respondent and whom he named in his grievance email.

48. Sharon Dyett and Richard Ross interviewed Miranda Plowden on 26 November 2019 (pages 294 to 299) and Natalie Newman on 4 December 2019 (pages 300 to 303).

49. A further absence review meeting was held on 5 December 2019. The notes for this are at pages 310 to 313. A further absence review meeting was then held on 15 January 2020 (pages 337 to 340).

50. On 16 January 2020 Sharon Dyett sent the grievance outcome to the claimant (pages 341 to 346). She rejected the claimant's case that Miranda Plowden had berated and humiliated him. She did acknowledge that the exchanges between them were uncomfortable and awkward. Mrs Plowden acknowledged that it may have been better to conduct part of the conversation around the project in private. This corroborates my earlier findings in paragraph 20 above. The claimant's other grievances against Miranda Plowden were not upheld.

51. Sharon Dyett also did not uphold the claimant's grievance against Natalie Newman. During the grievance process, the claimant accused her of a witch hunt against him. As Sharon Dyett observed, *"the allegation of a witch hunt is a serious allegation"* to make. She held that the investigation carried out by Natalie Newman was a proportionate and reasonable response. It would have been *"negligent"* for her to have

ignored a potential breach of confidentiality and disclosures from members of the team around the claimant's dealings with Homes England. Sharon Dyett also pointed out that Natalie Newman was not vested with power to make a decision about the claimant's future with the respondent. Her role was to make a recommendation as to whether to proceed to a disciplinary hearing. It would be for the disciplinary officer to make any decision following a disciplinary hearing.

52. On 30 January 2020, the claimant appealed against the grievance outcome. The appeal is at pages 347 to 354. Amongst other things, the claimant drew attention to the fact that there had been no investigation into his allegation that the sharing of information with others was common practice within the department. There is merit in the claimant's case that this aspect of the matter was not investigated by Sharon Dyett. Indeed, as we shall see, this issue was raised in claimant's second grievance and was upheld when the matter was later considered by Mrs Hall.

53. A further absence review meeting was held on 13 February 2020. The notes are at pages 365 to 369.

54. The claimant's grievance appeal hearing (upon his first grievance) was held on 26 February 2020. The notes are at pages 377 to 383. The claimant was again accompanied by Mr Hart. The appeal hearing was chaired by Rob Young, finance director. He was accompanied by Mrs Tinker who was providing HR support. The grievance appeal outcome was sent to the claimant on 13 March 2020 (pages 384 to 386).

55. The claimant's appeal against Sharon Dyett's findings upon the claimant's dealings with Miranda Plowden was rejected. Again, for the reasons given earlier in these reasons, I find that Mr Young's conclusions upon this issue were reasonable. It was accepted that some of these dealings would have been better conducted in private. As Mr Young put it, *"there are lessons to be learnt in the way in which matters are dealt with in an open plan office layout."*

56. Mr Young found there to be no unfairness in Natalie Newman's dealings with the claimant. In my judgment, Sharon Dyett and Rob Young reached reasonable decisions upon this issue. It was reasonable for Natalie Newman to have acted upon her concerns. Indeed, she would have been putting her own position in jeopardy had she failed to do so. Further, the claimant appeared to recognise this to be the case (see paragraph 25 above). She fulfilled her remit by making a recommendation for matters be taken to a disciplinary hearing. It was for others to decide whether so to do. It would then be for the decision maker to reach a decision upon the evidence presented at a disciplinary hearing.

57. Mr Young failed to address the claimant's point that it was common practice within the department to share information outside of the organisation. The flaw in Sharon Dyett''s grievance investigation was therefore compounded by Mr Young. As has been said, this was picked up by Juliann Hall later.

58. A further absence review meeting was held on 24 March 2020. The minutes are at pages 396 to 399. It is noted at page 399 that following the expiry of the sick notes mentioned earlier on 26 February 2020 the

claimant had been signed off as unfit for work because of stress from 27 February 2020 until 18 May 2020.

59. The disciplinary hearing was finally held on 12 May 2020. It was chaired by Mrs Hall who was supported by Helen Garside, people partner. The claimant's trade union representative at the disciplinary hearing was Mark Jessop. Due to the impact of the pandemic, the disciplinary hearing was conducted over Teams. Natalie Newman presented the respondent's case.

60. The day before the disciplinary hearing, Mr Drabble emailed Helen Garside (pages 400 and 401). This was done at the instigation of the claimant. Mr Drabble explained that he was progressing a scheme for his new employer. He considered that the matters would be expedited by the use of templates of which he had experience while working for the respondent. Mr Drabble therefore says that "*I requested that Derrick provide me with a template of a letter, heads of terms, L&AD calculator, programme and budget monitoring template."* (L&AD stands for *'liquidated and ascertained damages'*).

61. Mr Drabble goes on to say that *"All of these were documents I had created during my time at SYHA and could be replicated using information freely available on the internet and in other associated industry guidance. However I thought that rather than reinvent the wheel I could save an hour or two of my time by using these templates."* Mr Drabble says that he suggested to the claimant that the templates associated with two of the projects upon which he had worked while with the respondent be used for this purpose. Mr Drabble did not consider this to be commercially sensitive information as he was seeking the templates only. He also says that *"I was aware that similar documentation had been provided to other recently departed members of the team without any issue."* He records that the claimant sent to him some sample templates but not those for one of the projects which Mr Drabble had suggested may be used, given that it was *"still in negotiation".*

62. Mrs Davies also sent an email to Miss Garside on 11 May 2022. This is at page 402. This in fact is in the same form as the witness statement which she provided to the Tribunal when she gave evidence.

63. She says that *"As a long standing member of the asset strategy and development team who has only recently moved on I can recall instances when colleagues were approached by past members of the team to send on to them some documentation to assist them in their new roles elsewhere. I can recall Joanne Hill approaching both myself and one other to send her some of her old proformas/documents that Joanne had created when working in the team and which would aid her in her new organisation – I cannot quantify what these were now, or even whether I was able to locate and send them to her. I would put it in the same context as when Tony Stacey [chief executive] asked Joanne to try and remember some very old scheme work to aid him with something he was trying to resolve surrounding it, and at the same time I had Joanne phone me from her new job, trying to talk me through where certain documents may be in our team folders, and send them on to her to review, in order to assist Tony."*

64. The disciplinary hearing notes are pages 403 to 416.

65. It is not necessary to go through the disciplinary notes in detail. In summary, Natalie Newman presented her case. It was suggested by Mr Jessop that it may have been beneficial for her to have interviewed Mr Drabble. He also pointed out that the claimant had provided the names of others who had shared information outside the organisation. Mrs Newman said that she had not received such information. Confusingly, she then seemed to indicate that the claimant's allegation that this was common practice within the department had been investigated. Mr Jenkins said that there was no evidence of such an investigation within the disciplinary hearing pack.

66. At page 409, we can see that the claimant named others whom he alleged had shared information outside the organisation. Towards the end of page 409 is recorded a discussion about the documentation sent by the claimant to Mr Drabble. The note records that the claimant said that the templates sent by him to Mr Drabble were around contractors on a completed scheme, that such information may be found upon the internet and therefore he did not consider the information to be sensitive. The respondent records that the claimant at this point said that the information in the documents was not confidential information. The claimant corrected that record and said that he did not believe that he said that the information did not have the quality of confidence about it. It is to the claimant's credit that he made a correction which was in fact against his case about the sensitivity of the documents sent by him to Mr Drabble.

67. In paragraph 14 of her witness statement, Mrs Hall says that *"When conducting the initial investigation, Natalie [Newman] had searched emails that had been sent and received by Karl Drabble and Derrick."* Given the information furnished by the claimant during the course of the disciplinary hearing (about Joanne Hill and others) she decided to conduct a wider investigation prior to reaching any decision. She therefore commissioned Helen Garside to undertake a wider search of every member of the team past and present from 17 September 2018. She also interviewed Karl Drabble and Dee Hiley. (Of those named by the claimant, she was the only one who remained in the respondent's employment. Dee Hiley remains employed by the respondent to this day). She did this with the assistance of Mr Ross. The documents produced by the search are those at pages 73 to 479 of the Dee Hiley bundle. These documents were not seen by Mrs Hall or sent to the claimant.

68. A record of Juliann's Hall's interview with Karl Drabble of 14 May 2020 is at pages 417 and 418. Mr Drabble confirmed that he had sent information to Joanne Hill. He confirmed that documentation had been sent to him by the claimant. Mrs Hill then asked Mr Drabble to *"share his view on the general practice on the team with regard to sending documentation to colleagues that have left SYHA."* Mr Drabble said that *"whether we sent a document would really depend on the nature of a document, however sensitive and whether sharing it could potentially damage SYHA. Sharing documentation to help an old colleague out (as long as it didn't damage SYHA) is a departmental norm."*

69. On 11 June 2020, Mrs Hall interviewed Dee Hiley (page 428). She was asked about the practice within the team of sharing documents with outside parties. Miss Hiley said that *"she believed it was absolutely*

understood that information should not be shared." There was then mention of a leak of information which had occurred during a project carried out in 2015. Miss Hiley said, *"following the [2015] incident Joanne Hill communicated with all the team to remind them of their contractual responsibilities on the handling of the information and confidentiality."* No copy of Joanne Hill's email was within the bundle. That said, the claimant accepted in evidence given during cross-examination that he was aware of it.

70. During the course of the interview with Juliann Hall, Miss Hiley went on to say that *"there had been examples when people leave the business of them getting in touch to request information."* She gave an example of having been contacted by an ex-employee and refusing to furnish information to him. Miss Hiley was asked whether Joanne Hill or Karl Drabble had been in touch with her. She said that *"Joanne had made a number of requests and that [I] felt that it was wrong to share commercially sensitive documentation as it may give an advantage to [Joanne Hill's new employer]."* She went on to say that she had *"on one occasion … sent Joanne Hill a generic project plan template as this was not commercially sensitive and prior to sharing it she got approval from her line manager Karl Drabble."*

71. Helen Garside prepared a spreadsheet of emails to and from Joanne Hill on the one hand and Karl Drabble, Christine Davies, Dee Hiley, Amelia Bullock, Aimee Proctor and Claire Oliffe on the other. The spreadsheet is at page 504. It also records emails sent to their personal emails. Amelia Bullock, Aimee Proctor and Claire Oliffe were those named by the claimant as being party to the practice of sending information outside the organisation. As I have said, the emails which lie behind this spreadsheet are in the Dee Hiley bundle at pages 73 to 479. (These are the emails produced by the respondent on 31 March 2022 as recited above). Although these emails had been examined by Helen Garside in order to prepare her spreadsheet, they were not seen by Juliann Hall or by the claimant during the course of the disciplinary investigation.

72. The Dee Hiley emails (at pages 1 to 72 of the Dee Hiley bundle) were not examined by the respondent at the time of the disciplinary investigation. Copies of them were produced for the benefit of the Tribunal and the parties following the Tribunal's Order of 1 April 2022 (as recited above).

73. On 18 May 2020 the claimant raised a second grievance against Natalie Newman. This is at pages 419 and 420. The grievance followed on from what Natalie Newman had said during the course of the disciplinary hearing held on 12 May 2020. The claimant relied upon advice given to him by Mr Jessop to the effect that Natalie Newman should not have been involved in the matter as the *"the person who initially had the gut feeling should not have been the investigator."* He also said that Natalie Newman had breached the ACAS Code of Practice on disciplinary and grievance procedures in that she had failed to seek out exculpatory as well as incriminating evidence against the claimant. In particular, she had not spoken with Mr Drabble and had not taken on board the claimant's point that Joanne Hill who had managed the department for around 15 years was aware of the practice of information sharing. The claimant also referred to the supportive evidence obtained by him from Karl Drabble

and Christine Davies and that this practice of information sharing extended to the chief executive sharing information with Joanne Hill (who by that stage was a former employee).

74. Upon receipt of the claimant's grievance, Rebecca White wrote to the claimant on 22 May 2020 (page 422). She took the view that the contents of the claimant's grievance were linked to the ongoing disciplinary process. She therefore proposed that Juliann Hall investigate the claimant's grievance and deal with them concurrently. The claimant strongly objected to this course of action (page 421). Amongst other things, the claimant considered that Juliann Hall and Natalie Newman were over familiar as Mrs Hall referred to Mrs Newman as *"Nat".*

75. In an email sent to the claimant on 28 May 2020 (page 423A) Mrs White maintained her position that it was appropriate for the claimant's second grievance to be considered by Juliann Hall and Helen Garside. She rejected the claimant's allegation of overfamiliarity and pointed out that Mrs Newman was known as *"Nat"* throughout the organisation.

76. Juliann Hall therefore met with the claimant on 9 June 2020 to discuss his second grievance. There appear to be no notes of this meeting. Mrs Hall makes no reference to them within the salient parts of her witness statement.

77. On 17 June 2020 Mrs Hall sent to the claimant her decision letter upon the grievance and disciplinary issues. The letter is at pages 429 to 445.

78. Upon the first page of her letter, Mrs Hall refers to the claimant presenting *"a significant point of mitigation, namely that others in your team had also sent confidential information outside of SYHA."* She said that she had adjourned her disciplinary hearing in order to conduct a further investigation into his mitigation.

79. She recorded that it had been decided that the second grievance and the disciplinary process were inextricably linked and that it was appropriate for Mrs Hall to deal with both. She then noted the meeting of 9 June 2020.

80. Mrs Hall then dealt with the three disciplinary allegations in turn. She dealt firstly with the alleged breach of the acceptable use policy and data protection policy. She recorded that it had been difficult, during the course of the investigation meetings of 23 July and 6 August 2019, to establish exactly which documents had been sent to Mr Drabble. She mentioned her interview with Mr Drabble of 14 May 2020. She had failed to get clarity from him as to what had been sent.

81. Having regard to what had been ascertained in the course of her investigation by Natalie Newman, she concluded *"that a range of documents were shared by you with Karl and that these were the intellectual property of SYHA and were commercially sensitive. They should not have been shared with a third party and I believe that in sending them to Karl Drabble you breached the acceptable use policy outlined above."*

82. She then turned to the second allegation which was the alleged breach of the security policy. She said that the evidence upon this issue was conclusive as 11 SYHA documents had been sent by the claimant to his

personal email account. She also recorded that some of these had been sent to Mr Drabble from his personal account.

83. She then turned to the third allegation which was breach of the respondent's behaviours policy. She said that the documents were the property of the respondent and that the claimant had not taken care of the respondent's property within the respondent's behaviours policy to act with honesty and integrity. Within the policy (at page 95) is an obligation (under the heading *"honesty and integrity")* to take care of the respondent's property and to comply with the respondent's internal controls. Mrs Hall concluded that the claimant had failed to comply *"with a number of SYHA's internal controls, namely the processes to enforce the acceptable use, data protection and security policy."* She also concluded that the claimant had not acted in a trustworthy manner in accordance with the honesty and integrity section of the behaviours policy. In particular, there was a lack of transparency upon the part of the claimant in his dealings with Mr Drabble.

84. Mrs Hall then dealt with the claimant's mitigation in some detail at pages 436 to 438. The key conclusion is at page 437. Here she says "*Our deeper investigation of email activity highlighted that four staff members from the 10 we tracked had forwarded information which was commercially sensitive. This activity appears to be limited to a very specific group of people on the team. All four of these individuals no longer work for SYHA. Two of these people provided supporting statements for you at the disciplinary hearing. Until you raise the issue of document sharing being common practice at the disciplinary hearing, we had no reason at all to believe that other people were involved. All of the other people involved in sending documents externally left SYHA some time ago. Had their sharing a documentation been identified when they were still in the employment of SYHA they would be subject to disciplinary investigation also."* She then made mention of "*one member of the existing team [sharing] a generic document which was not commercially sensitive. Prior to sending the document they had sought advice and approval to do so from their line manager. This same member of the team had also refused a number of requests for documentation to be sent externally on other occasions."* This was a reference to Dee Hiley. She then summarised her interview with Miss Hiley.

85. Juliann Hall concluded that, "*based on this evidence ... there are some examples of documents being sent externally by former members of the team, and that most members of the team know not to send confidential information externally. This bad practice is limited to a small number of individuals. This chimes with a point that you made in your grievance hearing that newer members of the team don't share documentation – the evidence confirms this."*

86. The Tribunal is disadvantaged by there being no notes of the grievance meeting of 9 June 2020. However, it appears that the claimant accepted that he had made this point about the conduct of the new members of the team.

87. Mrs Hall went on to conclude upon this issue that, *"The fact that a small number of the team members shared documents does not justify the practice or make it right. In all cases where this occurred these staff*

members placed personal interest or the relationship with an ex-employee above that of SYHA. As they have left the business we are unable to establish whether they sought approval from their line manager before sharing documents. In taking the steps they did, without seeking clearance from their line manager (if this was the case) they breached SYHA policies and would have been subject to disciplinary investigation had they remained in our employment."

88. Juliann Hall then dealt with the second grievance raised by the claimant. She concluded that Natalie Newman had reasonable grounds to instigate an investigation and that for her to have ignored concerns would have been to neglect her management responsibility. For the reasons already given, the Tribunal considers that Juliann Halls' conclusion upon this issue was sound and reasonable.

89. She also rejected the claimant's grievance about Natalie Newman involving herself in the matter further by investigating the issues of which she had become aware. Juliann Hall concluded that it was reasonable for Natalie Newman to undertake the investigation as Mr Walker was new in post.

90. As has already been said, Juliann Hall upheld the claimant's grievance that there was an insufficient investigation by the respondent into the claimant's allegation that information sharing was commonplace within the organisation. She observed however that the respondent had *"taken significant steps to rectify this [omission] by undertaking a further investigation following your disciplinary hearing."*

91. She concluded that the claimant was guilty of gross misconduct. She refers to the definition of gross misconduct within the respondent's disciplinary procedure (at page 66) as including *"a serious breach of contract and includes misconduct which, in the Associations opinion, is likely to prejudice our business and reputation or irreparably damage the working relationship and trust between us."* She said that commercially sensitive information had been sent to Mr Drabble who at that point worked for a competitor and the claimant was not honest when initially questioned about the disciplinary issues. She concluded that issuing a final written warning would not cause him to change his behaviour and to dismiss him with immediate effect. The claimant was afforded a right of appeal.

92. The claimant exercised his right to appeal against both the second grievance outcome and the decision to dismiss him. The appeal upon the grievance is in the bundle commencing at page 447. The appeal against the decision to dismiss him commences at page 457. The appeals officer for both was Charlotte Murray.

93. The appeal meeting took place on 1 July 2020. Mrs Tinker provided HR support for Mrs Murray. The claimant was represented by Steve Clarke, a trade union representative. The notes are at pages 468 to 474.

94. Mrs Murray noted that the issue of document sharing between Tony Stacey and Joanne Hill had not been investigated. She therefore commissioned an investigation of this point. She also spoke to Mr Stacey and Miranda Plowden.

95. She concluded that *"the sharing of information was transparent in line with SYHA policies and in the best interests of SYHA."* She gave an explanation of this aspect of matters in her decision letter of 6 July 2020 (at pages 477 to 497). In particular at page 489, she said that her investigation revealed that the sharing of the documents with Joanne Hill was essential "*to ensure business gains for SYHA".* Further, Mr Stacey had sought clearance from the director of business development for him to make contact with Joanne Hill and for the relevant documents to be shared with her. She said that transparency, clearance and authorisation were used throughout their process.

96. Mrs Murray went through the claimant's five points raised in his grievance appeal. The claimant's case that Juliann Hall and Helen Garside were not impartial in the process was rejected. The only evidence advanced by the claimant in support of this case was that Mrs Newman was referred to as *"Nat"* by Mrs Hall and Ms Garside. On any view, Mrs Murray reached a reasonable conclusion upon this issue given that Mrs Newman is known as *"Nat"* throughout the organisation.

97. Mrs Murray rejected the claimant's case that Mrs Newman's investigation should have stopped once concerns about one of the projects mentioned to Mrs Newman in July 2019 proved unfounded. Mrs Murray, reasonably in my judgment, rejected the claimant's grievance upon this point. There was no suggestion that Mrs Newman's investigation was limited to that particular project.

98. Mrs Murray also rejected the claimant's case that Mrs Newman acted on gut feeling and had changed her story or lied during the course of the investigation. The first aspect of this is really to revisit a point that the claimant had raised both in his first and second grievances about the reasons for Mrs Newman launching an investigation in the first place. It was reasonable for Mrs Murray to conclude that it would have been remiss of Mrs Newman not to have investigated further. Indeed, a failure so to do may have left her vulnerable to action at the behest of the respondent. There was no evidence to suggest that Mrs Newman had been untruthful or changed her story. Mrs Murray reasonably concluded that there was no evidence from the claimant in support of this aspect of his allegation.

99. Mrs Murray rejected the claimant's case that seven out of 10 members of the department were sending documents externally. The investigation showed that four of the 10 members of the department were doing so. Mrs Murray said that what they were all doing was wrong. She said that had those other members of the department still been with the respondent then they too would have been dismissed.

100. She rejected the claimant's case that Dee Hiley had sent commercially sensitive information outside of the organisation. This was a reasonable conclusion to reach based upon the evidence before the Tribunal in the Dee Hiley bundle and based upon what Dee Hiley told Juliann Hall in the interview of 11 June 2020. Mrs Murray concluded that the bad practice of sending information externally was limited to "*a small cohort of ex-employees."*

101. Mrs Murray then addressed the claimant's grievance that Mrs Newman should not have instigated the fact find meeting or conducted the

investigation or made recommendations as contrary to the ACAS Code of Practice. She pointed out that the ACAS Code provides that where possible a different person should handle each stage of the process. Mrs Murray correctly said there is no legal requirement *"for the fact find and investigation to be carried out by different people."* This conclusion is difficult to understand as the fact find and the investigation are in fact the same thing. Mrs Murray was on somewhat stronger ground when she said that Mrs Newman's role was to undertake the initial fact find to establish whether to instigate a full investigation. She decided to undertake such but then it was for others to decide whether to take the matter further and if so to hear the disciplinary case.

102. I then turn to Mrs Murray's conclusions upon the disciplinary appeal. She rejected the claimant's case that there was sufficient mitigation in information being shared with others outside the organisation. She determined that the claimant was not transparent at the start of the process when asked about matters on 23 July and 6 August 2019. She concluded that the other four members of staff involved in information sharing would have been liable to disciplinary action had they remained in the respondent's employment.

103. She therefore decided to reject the claimant's appeals against the disciplinary outcome and against the grievance outcome. There was no further right of appeal against Mrs Murray's decision.

104. The following evidence was given in the course of the claimant's cross-examination:-

(1) The claimant enjoyed a good relationship with Natalie Newman prior to July 2019.

(2) The claimant accepted that the documents at 3A, 3B, 3C, 3E and 3F of the index to the confidential documents bundle were confidential and commercially sensitive.

(3) The claimant accepted that the email activity in July 2019 represented an unusual *"spike". "I take that on board"* was how the claimant put it.

(4) The claimant could have accessed the claimant's server at home from the laptop which the respondent had issued to him.

(5) The claimant accepted that the IT security policy was clear in that confidential information should not be sent to personal email accounts.

(6) The emails sent by the claimant to Karl Drabble were no longer available. He had deleted them from his personal computer and they are now irretrievable.

(7) It was put to the claimant that he showed no contrition during the meeting of 6 August 2019. The claimant said that he had nothing to apologise for.

(8) The claimant maintained that it was common practice to send documents outside the organisation. I asked whether this was done with the knowledge of management to which the claimant replied that he *"couldn't say."*

(9) The claimant was asked why he had not produced email evidence to demonstrate conclusively what he had sent to Karl Drabble during the course of the disciplinary hearing. The claimant said that the process *"was flawed and was so one sided. I had no confidence in it. Why would I?"* It was suggested to him by Mr Heard that an inference may be drawn against him to which the claimant replied that the respondent *"had already decided".*

105. During the course of her cross-examination, Juliann Hall gave evidence that she had not seen any of the material within the confidential documents bundle. She had relied entirely upon Natalie Newman's report. She accepted that the claimant had raised the point during the course of the disciplinary process that he too had not been furnished with appendix 3 of Natalie Newman's report. She also said that had the claimant only sent the documents to himself (and not on to Mr Drabble) then such would be a breach of the IT security policy but would not be classed as gross misconduct.

106. Like Mrs Hall, Mrs Murray did not see the material in the confidential documents bundle when she took the appeal decision. She too relied upon Mrs Newman's report. Neither Mrs Hall nor Mrs Murray saw the documents in the Dee Hiley bundle.

107. This concludes the Tribunal's findings of fact.

The relevant law

108. I now turn to a consideration of the relevant law. I shall start with the consideration of the claimant's unfair dismissal complaint brought under the 1996 Act. There is no dispute in this case that the claimant was dismissed by the respondent. Accordingly, the burden is upon the respondent to show a permitted reason for dismissal. The reason for the dismissal will be the set of facts known to the employer or the beliefs held by them and which caused them to dismiss the employee.

109. The relevant permitted statutory reason relied upon by the respondent in this case relates to the claimant's conduct. The claimant will appreciate that in conduct unfair dismissal cases, the employer does not have to prove the misconduct. What matters is that the employer genuinely believes on reasonable grounds that employee was guilty of the misconduct in question.

110. Mr Heard referred the Tribunal to the well-known case of **British Home Stores v Burchell** [1980] ICR 3030, EAT. There, it was held that a three-fold test applies. The employer must show that they believed the employee to be guilty of misconduct. The Tribunal must then be satisfied that the employer had in mind reasonable grounds upon which to sustain that belief and at the stage at which the belief was formed on those grounds, the employer had carried out as much investigation into the matter as was reasonable in the circumstances. This means that the employer need not have conclusive direct proof of the employee's misconduct. A genuine and reasonable belief, reasonably tested, will suffice. While there is a burden upon the employer to show a genuine belief of misconduct there is no burden of proof upon the issue of reasonableness. It is for the Tribunal to satisfy itself that there were

reasonable grounds upon which to sustain the employer's belief after carrying out reasonable enquiry.

111. If the Tribunal is so satisfied, then the Tribunal must decide whether the dismissal of the claimant was one which fell within the range of reasonable responses of the reasonable employer in accordance with the equity and substantial merits of the case. The range of reasonable responses test applies in a conduct case both to the decision to dismiss and the procedure by which that decision was reached. The Tribunal must not substitute its own view for that of the employer. Provided the employer's actions (looked at over the entirety of the disciplinary process) fell within the range of reasonable managerial prerogative such will suffice as a defence to the unfair dismissal complaint. Any unfairness in the process may be cured at appeal stage. When considering the reasonableness of the employer's conduct, the size and administrative resources of the employer must be considered as must the equity and substantial merits of the case.

112. The question of consistency of treatment is material to the equity and substantial merits of the case. Mr Heard helpfully drew the Tribunal's attention to the case of **Hadjioannou v Coral Casinos Limited** [1981] IRLR 352, EAT. It was held that an argument by a dismissed employee based upon disparity may arise where employees have been led by an employer to believe that certain categories of conduct will be overlooked or at least will not be dealt with by the sanction of dismissal and where others have been more leniently dealt with. Another category of case where issues of justice and equity may be relevant are those where there are truly parallel circumstances where it would not be reasonable to visit one employee's conduct with a harsher penalty than others in the same circumstances. Mr Heard drew me to the relevant passage in the *IDS Handbook on Unfair Dismissal* where the principle was put succinctly that a dismissal may be unfair in accordance with the equity and merits of the case in circumstances where employees have been led into a false sense of security.

113. Mr Heard took the Tribunal to **Wilcox v Humphreys and Glasgow Limited** [1975] IRLR 211. This was a case in which a gas engineer was summarily dismissed for failing to follow prescribed safety precautions. He claimed this to be unfair because safety precautions were generally ignored throughout the company. The matter was in fact remitted to a fresh Tribunal for a re-hearing upon the basis that the Employment Tribunal in that case had erred in law in refusing a disclosure application made by the employee for documents which he said were supportive of his position. However, Phillips J said that "*It would not be right to say merely … 'there has been a breach of an important safety regulation and therefore instant dismissal is justified'… if this requirement had been ignored for ages to everyone's knowledge."* In such circumstances, he said, *"it would not be right, without some kind of warning, to dismiss the first person to break it after the employers took it into their heads to enforce it."*

114. I was then taken by Mr Heard to **Ashraf v The Metropolitan Police Authority**: [UK EAT/0205/08]. In this case, the employee had been dismissed from his post as an administrative officer with the Metropolitan Police Service after having accepted a written caution following the

commission of a common assault. He argued that others had not been dismissed where they had accepted such a caution. He therefore argued inconsistency of treatment.

115. The **Wilcox** case was referred to in paragraph 12 of the judgment of HHJ Bean in **Ashraf.** He observed that **Wilcox** was not in fact a case about disparity of treatment between one disciplinary decision and another but rather was a case of condonation of undesirable or unsafe behaviour. HHJ Bean said that "*in a case of condonation it seems to us clear that where senior management as a whole are unaware of a practice going on, they cannot be said to have condoned it. Mr Wilcox's case was that senior management as a whole knew very well what was going on and there was, therefore, a case of condonation."* In the event, Mr Ashraf's appeal was dismissed upon the basis that the comparator cases cited by him were not truly parallel circumstances such that it was not reasonable for the employer to dismiss him and not others. **Ashraf** was not a condonation case.

116. Where the Tribunal is satisfied that the dismissal of the employee was outside the band of reasonable responses and unfair the Tribunal will go on to consider issues of remedy. It was directed at the outset of the hearing that remedy issues would not be dealt with save for those which arise from the application of the principles in **Polkey v A E Dayton Services Limited** [1988] ICR 142 and issues arising out of the claimant's conduct.

117. When considering remedy upon a successful unfair dismissal complaint, the Tribunal must firstly consider the re-engagement or re-instatement of an employee. The claimant has said that he is not interested in any form of re-employment. In such a case, the Tribunal will consider a monetary award.

118. This will take the form of a basic award (which is broadly the equivalent of a redundancy payment) and a compensatory award. Both the basic award and the compensatory award may be reduced in circumstances where it is just and equitable so to do on account of the claimant's conduct. In the case of the compensatory award (but not the basic award) a reduction on account of conduct may only be made where the dismissal was to any extent caused or contributed to by the actions of the employee.

119. Upon a consideration of conduct, the Tribunal must make primary findings of fact upon the question of the complainants' conduct and then determine whether it is just and equitable to reduce the monetary awards accordingly. The Tribunal must determine whether there has been culpable or blameworthy conduct upon the part of the employee. The culpable or blameworthy conduct must be acts in breach of a legal obligation or acts which may be considered to be foolish, perverse or bloody minded. The Tribunal must be satisfied that it is just and equitable to reduce the awards accordingly.

120. The **Polkey** principal, broadly stated, is concerned with the issue of what it is just and equitable to award the complainant in all the circumstances having regard to the losses sustained in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. The Tribunal can therefore consider the likely longevity of the employment

regardless of any unfairness. Of particular relevance in this case is the issue of whether any procedural irregularity made any difference to the decision to dismiss. If the Tribunal finds there to be procedural irregularity then the question that will arise is whether this particular employer acting within the range of reasonable responses may fairly have dismissed the employee in any case at some future date.

121. Upon the wrongful dismissal complaint, summary dismissal (as occurred in this case) will amount to wrongful dismissal unless the employer can show that the dismissal was justified by a repudiatory breach of contract by the claimant. In other words, a contract may only be brought to an end lawfully with notice and will be wrongful if notice is not given. However, notice need not be given to the employee where they have acted in fundamental breach of contract entitling the employer to terminate the contract there and then.

122. Whether the employee was guilty of repudiatory conduct is a question of fact. It is for the Tribunal to make its own determination as to whether objectively the employer was in repudiatory breach entitling the employer to bring the contract to an end summarily. Upon the wrongful dismissal complaint therefore the Tribunal may substitute its view for that of the employer.

123. What is meant by a repudiatory breach? There has been extensive case law upon this issue and the test has been expressed in a number of different ways. The essence of matters however is that there must be conduct inimical to trust and confidence or a deliberate flouting of the essential contractual conditions or which is sufficiently serious and injurious to the relationship such as to lead to a conclusion that the defaulting party no longer intends to be bound by the contract.

124. The matter is put rather well in the case of **British Heart Foundation v Roy** [UK EAT/0049/15]. There, at paragraph 7, Langstaff P said that "*In a claim for wrongful dismissal the legal question is whether the employer dismissed the claimant in breach of contract. Dismissal without notice will be such a breach unless the employer is entitled to dismissal summarily. An employer will only be in that position if the employee is herself in breach of contract and that breach is repudiatory – that is, in the modern expression of the phrase … whether she 'abandons and altogether refuses to perform' the contract."*

The issues in the case

125. As I said earlier within these reasons, this matter benefited from a case management preliminary hearing which came before Employment Judge Wade on 8 September 2021. I shall now set out the annex to her Order in which she lays out the issues that arise:

'Wrongful dismissal

Does the respondent prove that:

1. *The claimant's sending of documents to his personal email address was wilful and deliberate very serious misconduct indicating he considered himself no longer bound by the terms of his contract (gross misconduct);*

2. *Remedy: if the claim succeeds damages are limited to the financial losses in the notice period (whether 12 weeks or a greater contract provision).*

3. *The respondent may allege a failure to mitigate but it must set out what steps the claimant should have taken which if he had taken them would have resulted in reduced losses.* [I interpose here to say that the Tribunal is not concerned with remedy issues upon the wrongful dismissal complaint at this stage].

Unfair dismissal

4. *The claimant does not accept that the emailing was the principal reason and says that the real reason was Mrs Plowden's antipathy towards him. He says many people emailed documents to personal email addresses (the evidence basis for this will need to be explored).*

5. *Did the respondent have a genuine belief based on reasonable grounds following a reasonable investigation that the claimant had engaged in the conduct above?*

6. *Did it act reasonably in treating that conduct as sufficient reason to dismiss in all the circumstances of the case?*

7. *Remedies: whether to reinstate or re-engage – the claimant indicated today that is not desired at this stage but he will confirm?* [The claimant did confirm that this remains his position].

8. *What Basic Award applies and what financial losses/compensatory award to make (capped at 52 weeks' salary and employer pension contributions).*

9. *Whether there are to be deductions from any of the awards above for blameworthy conduct?'*

126. I note that the act of gross misconduct recorded by Employment Judge Wade refers to the claimant sending documents to his personal email address without mention of them being forwarded on to Mr Drabble. It is plain however from the respondent's pleading (in particular at paragraph 21 on page 46 of the bundle) that the dismissal for gross misconduct was for disclosure of confidential information and the forwarding of documents to a third party (that being Mr Drabble). It would therefore be wrong to confine the parameters of the alleged gross misconduct simply to the claimant emailing documents to his personal email account. This is important as Mrs Hall said that had the claimant simply sent the documents to himself then he would not be liable to dismissal for gross misconduct.

Discussion and conclusions

127. I shall start with the unfair dismissal complaint. I shall apply to the facts of the case the three fold test in **British Homes Limited v Burchell**. The first question is whether the employer believed the claimant to be guilty of gross misconduct.

128. I agree with Mr Heard that it is abundantly clear on the evidence that the respondent believed the claimant to be guilty of gross misconduct. Both Juliann Hall and Charlotte Murray were clear in their decision letters that they took the view that the claimant had sent confidential documents to

himself and then had forwarded at least some of them on to Mr Drabble. The documents in question had the necessary quality of confidentiality about them. This was not disputed by the claimant.

129. The second question is whether there were reasonable grounds upon which for the respondent to sustain that belief. I agree with Mr Heard that there were reasonable grounds so to do.

130. The claimant did not dispute that the 11 documents had been sent by him to his home email address. He also did not dispute that he had forwarded at least some of those documents on to Mr Drabble. Mr Drabble himself confirmed that to be the case in the email of 11 May 2020 (at page 400) and in the interview of 14 May 2020 (pages 417 and 418). The claimant did not dispute their confidential nature.

131. The respondent faced difficulty in trying to pin down exactly which documents had been sent by the claimant to Mr Drabble. The respondent never got to the bottom of this, but this was a product of the claimant's lack of co-operation. In my judgment, therefore, the respondent acted reasonably in drawing an adverse inference against the claimant. The claimant could simply have resolved matters by showing to the respondent which documents have been sent from his email account to Mr Drabble.

132. Within the investigation meeting held on 6 August 2019, the claimant accepted having sent some documents to Mr Drabble, denied sending others and then said he could not recall about still more documents. The claimant also was unable to satisfactorily explain why he had found it necessary to send the documents to his home email address first. During the course of the disciplinary hearing before Juliann Hall, the claimant did not dispute that confidential information had been sent to Mr Drabble.

133. Therefore, I find that the respondent did have reasonable grounds to believe the claimant had committed the acts of misconduct alleged against him. It was reasonable to conclude that the claimant acted in breach of the acceptable use policy, in particular the obligation not to disclose information which might be confidential to the respondent by sending through emails. This is precisely what the claimant did.

134. It was also reasonable to conclude that the claimant breached the IT security policy. It was very clear that this obliges employees not to use third party email systems or to send material to them. Again, this is precisely what the claimant did. Juliann Hall and Charlotte Murphy were entitled to make a finding that he had so acted.

135. In my judgment, they were also entitled to conclude that the claimant had breached the respondent's behaviour policy. He had failed to act with integrity and was not transparent with Natalie Newman about his dealings with Karl Drabble when interviewed by her on 23 July and 6 August 2019.

136. The claimant's contract of employment made reference to the policies in clauses 27 and 31. The claimant therefore acted in breach of his contractual obligations.

137. The third limb of the **Burchell** test is to ask whether at the time that the decisions were made, the respondent formed a reasonable belief after having carried out a reasonable investigation. As I have said, the range

of reasonable responses test applies as much to the issue of procedure and investigation as it does to the substantive decisions themselves.

138. The claimant has made a number of criticisms of the process carried out by the respondent. The first issue concerns the involvement of Natalie Newman. I do not accept that it fell outside the range of reasonable managerial prerogative to vest her with charge of the investigations. She was no longer the claimant's line manager as at 23 July 2019. Some employers may have vested the investigation responsibility in the new line manager Mr Walker. However, plainly it fell within the range of reasonable managerial prerogative not to burden a new line manager with such task very early on in his career with the respondent. Further, the claimant's evidence was that until July 2019 he had enjoyed a good relationship with Natalie Newman and indeed had confided in her about his concerns around Miranda Plowden's conduct. There was nothing to suggest to the respondent that she had an *animus* towards the claimant which would render her investigation unsafe by reason of bias. Further, Mrs Newman was not going to be the final decision maker in any case. It would be for others whether to accept her recommendation to progress matters to a disciplinary hearing. She was not going to be making the decisions about the claimant's future employment with the respondent. That too would be for others. This was an important procedural safeguard for the claimant.

139. I do not accept that the respondent's decision to allow Juliann Hall and Helen Garside to conduct the disciplinary and (second) grievance hearing and the subsequent investigations fell outside the range of reasonable responses. That they refer to Natalie Newman as *"Nat"* is a very small peg upon which for the claimant to hang the heavy coat of procedural impropriety against Juliann Hall and Helen Garside. It is commonplace for individuals to refer to one another by their given names and for those to be shortened. In my judgment, Juliann Hall was impartial. She took on board the claimant's point that there had been no adequate investigation into his allegation that sharing confidential information externally was commonplace within the respondent and undertook reasonable investigations upon that issue. She commissioned interviews with Dee Hiley and with Karl Drabble and asked Helen Garside to look into email traffic to and from Joanne Hill and others. She upheld part of the claimant's second grievance upon this issue.

140. Perhaps of more concern procedurally was that Juliann Hall and Charlotte Murray did not have before them the documents which lie behind appendix 3 of Natalie Newman's report within the confidential documents bundle. The claimant was also not furnished with them either. They also did not have the Dee Hiley documents (at pages 1 to 72 of the Dee Hiley bundle) or the documents which lay behind the Helen Garside report at page 504 (at pages 73 to 479 of the Dee Hiley bundle).

141. I do not accept that the respondent and the claimant not having appendix 3 of the documents which lie behind the Natalie Newman report takes the process outside the range of reasonable responses. Firstly, Juliann Hall and Charlotte Murray were heavily dependant upon Natalie Newman's expertise as to whether or not the documents in appendix 3 were confidential in nature. I accept that some employers would have sent those underlying documents to the decision makers and the claimant.

However, that this employer did not does not take matters outside the ambit of reasonable managerial prerogative. In the final analysis, Juliann Hall and Charlotte Murray were not in a position to evaluate the material without Natalie Newman's input in any case. I do not accept there to be procedural unfairness such as to take the matter outside the bands of reasonableness in failing to provide the documents behind appendix 3 to the claimant. He had them in his possession in any case and was able to comment upon them. The respondent's disciplinary procedure requires copies of evidence collected by the investigation manager to be sent to the employee: clause 3.4.4 of at page 73. However, although strictly a breach of this requirement, it fell within the range of reasonable responses for these in appendix 3 not to be sent to him as the claimant had them in any case. This failure resulted in no material unfairness.

142. I also take the view that it was not outside the range of reasonable responses for the claimant and the decision maker not to have before them the documents (from page 73 onwards) in the Dee Hiley bundle. Helen Garside analysed them. Her analysis was accurate. Dee Hiley was interviewed. There was no cause to go behind what Dee Hiley told Juliann Hall or need to second guess what she had said by analysing the documents at page 1 to 72 of the Dee Hiley bundle. The claimant did not take issue with the accuracy of Dee Hiley's statement (at page 428 summarised accurately by Mrs Hall at page 437) or Helen Garside's report during the appeal process. There was no suggestion of any misreporting or inaccuracy on the part of Juliann Hall, Helen Garside or Dee Hiley made by the claimant or Mr Grindley before the Tribunal.

143. The respondent's disciplinary procedure provides (at clause 3.4.12) that where further investigation is required, then the employee will be given an opportunity to comment, and the disciplinary hearing should then be reconvened. This process was not followed by Juliann Hall. The claimant was not given the chance to comment upon her findings upon the mitigation issue nor was the disciplinary hearing reconvened. However, any unfairness arising from this flaw in the process was cured at appeal stage as the claimant had the opportunity then to make representations upon Mrs Hall's findings.

144. In my judgment, the respondent's conduct of the disciplinary and appeal process was one which fell within the range of reasonable responses. Adjournments were permitted of the disciplinary process to accommodate the claimant's ill health. He was permitted to be accompanied by trade union representatives at every stage. Juliann Hall investigated potentially exculpatory evidence when the issue of a common practice of information sharing was raised by the claimant. The investigation was done fairly and accurately. He was afforded a right of appeal which he exercised.

145. I do not accept that vesting Juliann Hall with conduct of the second grievance appeal was procedurally unfair. I agree with the respondent that in reality the issues were inexplicably linked. Again, I can accept that some employers would have hived off the second grievance on the one hand and the disciplinary issue on the other. However, that this respondent vested the decision making in both with one officer does not take matters outside the band of reasonableness where in essence the second grievance constituted much of the claimant's defence to the disciplinary

allegations. There was a large cross-over in the issues raised in both appeals. It was logical for the same officer to deal with both matters.

146. I do not accept that there was a conspiracy or witch hunt against the claimant. I do accept there to have been an extant dispute between the claimant and Miranda Plowden over the project in which they were both involved. However, there was simply no evidence that Miranda Plowden orchestrated the claimant's dismissal as a consequence. As Mr Heard says, for me to make such a finding would be to accept that Miranda Plowden, Natalie Newman, Juliann Hall and Charlotte Murray conspired together to bring about the claimant's downfall. That Miranda Plowden conspired with the other three was a point not put to her or them during cross-examination. It is difficult to understand why the respondent would have embarked upon such a conspiracy against a long serving employee. Natalie Newman had come across credible information and concerns sufficient to warrant initiating and investigation into the claimant's conduct. There was reasonable cause to do so.

147. I can accept that subjectively the claimant was upset by Miranda Plowden's behaviour, in particular in discussing matters with him in the open. The respondent has taken this on board (as Mr Young said) as has Mrs Plowden herself. Regrettably, the claimant's unhappiness about Miranda Plowden's conduct appears to have influenced the way in which he has interpreted the respondent's investigations into the matters with which the Tribunal has been concerned. Objectively, however, there is simply no evidence of conspiracy.

148. Upon the Tribunal being satisfied that the respondent reasonably concluded the claimant to have committed the acts of misconduct alleged against him and reached that conclusion after carrying out a reasonable investigation, I turn to the question of whether the dismissal of the claimant was one that fell within the range of reasonable management responses. In my judgment, this is the crux of the entire case.

149. It is the claimant's case that his conduct was no different to that of others and was condoned by his line manager Karl Drabble. In his supplemental witness statement following the late disclosed documents in the Dee Hiley bundle, the claimant rightly draws the Tribunal's attention to a very serious breach of the obligation of confidentiality on the part of Amelia Bullock. He refers to pages 462 to 470. When she was re-called to give evidence on 24 May 2022, Mrs Hall properly and fairly accepted this to be a serious breach. A further egregious example may be found at pages 475 to 479 of the Dee Hiley bundle upon the part of Amy Proctor. Again, this was accepted by Mrs Hall. These breaches were not something which Mrs Hall shied away from in her decision letter having seen Helen Garside's report: see page 437.

150. Had it been the case that these individuals escaped censure in circumstances where the claimant was dismissed, then I would agree with him that it would be unfair and inequitable to single him out. The difficulty for the claimant of course is that Amelia Bullock and Amy Proctor (and indeed Karl Drabble and Joanne Hill) had left the respondent's employment before these matters had been discovered. The respondent

cannot of course take disciplinary action against individuals who are no longer in their employment. Therefore, there is no disparity of treatment.

151. The real issue in this case is the question of Karl Drabble's involvement in matters. The question is whether Mr Drabble's conduct as his line manager amounts to condonation of the claimant's conduct such that it would be inequitable for the respondent to dismiss the claimant.

152. When she had the opportunity of asking him about matters, Karl Drabble told Juliann Hall on 14 May 2020 that whether a document would be sent would *"depend on the nature of a document, how sensitive it was and whether sharing it could potentially damage SYHA."* When she gave evidence before the Tribunal, Christine Davies said that it would have been wrong to send, for example, documents numbered 1 and 2 in the confidential bundles document populated with details but that such may be sent as a blank template. When asked about the heads of terms (at documents 9 to 12) she gave similar evidence to the effect that it would not be unusual to send out a template to others but not populated with information.

153. It follows from this that the evidence from Karl Drabble and Christine Davies falls short of establishing there to be a custom and practice within the respondent (or even within the claimant's department within the respondent) of disseminating documents containing confidential organisation outside of the organisation. I accept that from time to time template documents were asked to be sent out to others. Had that been the limit of the claimant's conduct, then the view that I take of matters would have been very different.

154. There is, in my judgment, sufficient evidence of a condoned practice of sending former employees documents in the nature of templates and the like. This was the evidence of Christine Davies and Karl Drabble. That there is contact with former employees and a culture of assisting one another is corroborated by the chief executive Mr Stacey having made contact with Joanne Hill. Mr Stacey had sought clearance from the director of business development for contact to be made with Joanne Hill and for relevant documents to be shared with her to confirm that the correct documents were being traced.

155. Mr Heard submitted that there was insufficient evidence of condonation across senior management as a whole. He relied upon the *dicta* in paragraph 12 of the case report in **Ashraf** in support of the proposition that senior management as a whole has to be aware of a practice in order for it to be condoned. This gave rise to a debate as to what was meant by the expression *"senior management as a whole".*

156. I cannot accept that this phrase means literally everybody in senior management. Such would place an employee in an impossible position of having to check the instruction of their line manager with others in order to corroborate that their instruction is indeed one condoned by everybody in senior management. Going over a line manager's head in this way would place an employee in an uncomfortable position.

157. I note that **Ashraf** was not about the issue of condonation (in contrast to **Wilcox**) but rather was about consistency of treatment in any case. In my

judgment, in order to establish condonation, it is sufficient for an employee to demonstrate through evidence that a practice is condoned by a significant proportion or section of management without necessarily having to prove that all managers were aware of it. In this case, in my judgment, the claimant has established there to be a practice of sharing of non-confidential information. There is evidence that this was undertaken by Joanne Hill, Tony Stacey (with authorisation), Karl Drabble and Christine Davies all of whom were in positions of seniority within the respondent so as to amount to condonation of the practice.

158. What has not been established upon the evidence is condonation of the practice of sharing confidential information. Indeed, Christine Davies disavowed the notion that populated templates were routinely shared. This is not therefore a case where the claimant was afforded a false sense of security that by sharing confidential information with Karl Drabble he was behaving in a way condoned by management such that, without prior warning, it would be unfair to dismiss him. I conclude accordingly that it fell within the range of reasonable management responses to dismiss the claimant for the misconduct as found. The unfair dismissal claim therefore fails.

159. That being the case, I need not go on to consider the remedy issues arising out of the application of **Polkey** or issues arising out of the claimant's conduct. There was some procedural unfairness in Juliann Hall failing to give the claimant the opportunity of a further hearing upon her investigations but that was cured by the claimant being given that opportunity at appeal stage. There was no material unfairness to the claimant in the process viewed as a whole.

160. I now turn to the wrongful dismissal claim. My factual finding is that the claimant, by sharing the information with Karl Drabble, imparted information to him which was confidential to the respondent. This was aggravated by the fact that Mr Drabble had gone to work for one of the respondent's competitors. Further, the claimant had not given a full and frank account to Natalie Newman on 23 July and 6 August 2019.

161. In those circumstances, I find that by his conduct the claimant had abandoned and refused to perform his contractual obligations pursuant to the relevant policies. He had conducted himself in such a way that the respondent could no longer be expected to put up with such behaviour. He had conducted himself in a manner such as to seriously damage if not destroy all together trust and confidence. The respondent according was entitled to accept the claimant's repudiatory breaches and treat themselves as discharged from the contract.

162. It follows therefore that the complaints of unfair dismissal and wrongful dismissal fail and stand dismissed.

163. Finally, within the bundle is some material pertaining to the claimant's post-dismissal conduct. These are not relevant to the wrongful dismissal claim. The conduct did not arise during the course of employment and therefore cannot be used by the respondent to defend the wrongful dismissal case. An employer may defend a wrongful dismissal complaint upon the basis of information of which they became aware only after dismissal but such

evidence must be of conduct which took place during the course of the employment contract. This is not the case here.

164. An employee's conduct post-dismissal may be relevant upon a **Polkey** assessment upon the issue of the longevity of employment. Given the failure of the unfair dismissal case, this does not arise as a consideration here in any case. It is also not relevant to the respondent's decision to dismiss the claimant as it relates to post-dismissal conduct and was not part of the set of facts which caused them to dismiss the claimant.

Employment Judge Brain

Date: 7 June 2022