



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Miss S Hewitt

AND

Respondents

Dorset County Hospital
NHS Foundation Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT SOUTHAMPTON

ON

17 to 20 May 2022

Before: Employment Judge Gray

Representation

For the Claimant: In person
with the assistance of Mr T O'Shea (Lay representative)

For the Respondent: Miss R Owusu - Agyei (Counsel)

JUDGMENT

The judgment of the tribunal is that the Claimant's complaints of unfair dismissal and wrongful dismissal fail and are dismissed.

1. After oral judgment was given on the 20 May 2022 the Claimant requested full written reasons, so these are also provided.

REASONS

2. This is a claim for unfair dismissal and wrongful dismissal. It benefits from a detailed list of issues that were agreed at the case management hearing before Employment Judge Dawson on the 14 December 2020. These were confirmed at the start of this hearing and are set out in the paragraphs below.

3. For this hearing the Respondent presented electronic copies of:
 - a. An agreed hearing bundle (where it was agreed at the start of this hearing that pages 479 to 482 could be added), with separate index.
 - b. A witness statement bundle, containing four witness statements on behalf of the Respondent and the Claimant's statement.
 - c. A cast list and chronology which were confirmed as agreed by the Claimant at the start of this hearing.
 - d. A key documents list.
4. I was also provided with a supplemental bundle from the Claimant running to 59 pages with the latest remedy documents attached behind.
5. The timetable was agreed in line with that in the Case Management Order of Employment Judge Dawson as set out below:
 - a. Day 1 Until midday Tribunal reading and preliminary matters
Until 4pm Respondent's evidence
 - b. Day 2 Until 4pm Respondent's evidence
 - c. Day 3 Until 1pm Claimant's evidence
Until 3pm Closing Submissions
Tribunal Deliberations
 - d. Day 4 Until 1pm Tribunal Deliberations & Judgment
Until 4pm Dealing with compensation or other remedies if appropriate
6. The agreed issues:

1. Unfair dismissal

1.1 Was the claimant dismissed? The respondent admits dismissing the claimant.

1.2 What was the reason for dismissal? The respondent asserts that it was a reason related to conduct, which is a potentially fair reason for dismissal under s. 98 (2) of the Employment Rights Act 1996. The respondent says that the claimant was guilty of misuse of its resources by accessing the Internet excessively during work hours.

1.3 Did the respondent hold a genuine belief in the claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances? The burden of proof is neutral here but it helps to know the claimant's challenges to the fairness of the dismissal in advance and they are identified as follows;

Genuine Belief

1.3.1 The claimant says

1.3.1.1 that there were no issues with her work, she had been the victim of bullying by colleagues

1.3.1.2 she had been subjected to investigations in 3 years, the first one lasting 303 days and the 2nd lasting 110 days,

1.3.1.3 in 2017, 2018 and 2019 she was not given any appraisal,

1.3.1.4 the decision to dismiss the claimant was the culmination of 3 years of harassment and bullying and, itself, an act of bullying rather than because of the alleged misconduct.

1.3.1.5 The outcome of the disciplinary process was pre-judged.

Reasonable Grounds for a Belief

1.3.2 The claimant says there were no reasonable grounds for a belief in her misconduct and, in particular, relies upon the following:

1.3.2.1 the IT department did not identify excessive internet use on the part of the claimant,

1.3.2.2 3 colleagues had given statements to say that they did not witness the claimant on the Internet,

1.3.2.3 within the allegations made against the claimant were 17 allegations relating to occasions when the claimant was not in the building.

Procedural Defects

1.3.3 The claimant says that the investigation was inadequate/there were procedural defects because

1.3.3.1 the respondent failed to define the allegations against the claimant

1.3.3.2 there was a significant delay, including 70 days from the date of the allegations to the date of the hearing.

1.4 Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

1.5 Did the respondent adopt a fair procedure? The claimant challenges the fairness of the procedure as set out above.

1.6 If it did not use a fair procedure, would the claimant have been fairly dismissed in any event and/or to what extent and when?

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

2. Wrongful dismissal; notice pay

2.1 What was the claimant's notice period?

2.2 Was the claimant paid for that notice period?

2.3 If not, was the claimant guilty of gross misconduct or did they do something so serious that the respondent was entitled to dismiss without notice?

3. Remedy

Unfair dismissal

3.1 Should the Tribunal order reinstatement? The Tribunal will consider, in particular, whether such an order is practicable and, if the claimant caused or contributed to the dismissal, whether it would be just to make it and upon what terms it ought to be made.

3.2 What basic award is payable to the claimant, if any?

3.3 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

3.4 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.4.1 What financial losses has the dismissal caused the claimant?

3.4.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

3.4.3 If not, for what period of loss should the claimant be compensated?

3.4.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

3.4.5 If so, should the claimant's compensation be reduced? By how much?

3.4.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the respondent or the claimant unreasonably fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the claimant and, if so, by what proportion up to 25%?

3.4.7 If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce her compensatory award? By what proportion?

3.4.8 Does the statutory cap of fifty-two weeks' pay apply?

7. On these matters I heard evidence from the following witnesses who had all provided written witness statements:

- a. Anita Thomas (AT) (for the Respondent)
- b. Lynn Cottrell (LC) (for the Respondent)
- c. Catherine Aberly-Williams (CAW) (for the Respondent)
- d. Inese Robotham (IR) (for the Respondent)
- e. Claimant

8. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after considering the factual and legal submissions made by and on behalf of the respective parties.

The Facts

9. On the 3 June 2002 the Claimant started work for the Respondent (see page 51 of the hearing bundle).

10. It is not in dispute that Claimant is summarily dismissed on the 8 January 2020 by the Respondent.

11. The Claimant's terms and conditions are included in the hearing bundle at pages 54 to 59.
12. From these the Respondent relies upon clause 3.1 to have dismissed the Claimant without notice which reads "3.1 The period of notice to be given in writing by the Trust to terminate your employment (after you have been continuously employed for 4 weeks), is either 4 weeks or one week for every completed year of continuous employment up to a maximum of 12 weeks, whichever is greater, provided that nothing in this clause shall preclude the Trust from terminating your employment without notice in appropriate circumstances as detailed in the Trust's disciplinary procedure available on the Trust intranet..".
13. A copy of the disciplinary procedure is at pages 401 to 442 of the hearing bundle.
14. The Respondent relies upon paragraph 17.3.4 of that ... "You may be dismissed following an act of gross misconduct or where there has been repetition of offences already the subject of current warning(s). If you commit an act of gross misconduct, you will normally be dismissed without notice or payment in lieu of notice." (page 422).
15. The Respondent says the Claimant committed an act of gross misconduct as defined in paragraph 17.5 of the policy (page 423) being a ... "Misuse of the Trusts time, property or name", in that the Claimant continued to misuse Trust resources by accessing the internet at numerous times during the working day for matters not relating to her work despite it previously having been raised with her most recently on the 28 May 2019.
16. It is not in dispute that on the 24 June 2015 the Claimant is issued with a 12-month First Formal Warning which remained live on the Claimant's file for 12 months. There had been a disciplinary hearing which considered three allegations including unacceptable personal use of the internet during work time (see pages 60 to 61). The letter records ... "In relation to inappropriate use of the internet, I said that having reviewed the reports and taken into consideration your statement that you do not have access to Facebook or Twitter I was still concerned by the number of non-work-related sites accessed and therefore upheld this allegation..".
17. In her witness statement the Claimant states ... "I was unfairly dismissed from my employment at Dorset County Hospital Trust, as a culmination of an approximate three year pre meditated, systemic and constructive campaign to "get me out", at all costs..".

18. The Claimant details in her statement matters following her redeployment to the position of Hand Therapy Department Administrator in August 2017 that she is aggrieved by. Her case is that this evidences the trajectory to get rid of her, culminating in her dismissal.
19. This is the Claimant challenging the reason for her dismissal and the Respondent's genuine belief in the reason it asserts, namely her misconduct.
20. It is for the Respondent to prove on the balance of probabilities, the sole or principal reason for dismissal. In considering fairness the burden is neutral.
21. It is recorded in the agreed chronology that on the 28 May 2019 the Claimant was given a verbal warning by AT regarding internet usage at work. Reference is then made to pages 94 to 98 of the bundle, which is an email dated 3 June 2019 sending a letter confirming matters to the Claimant.
22. Matters concerning the verbal warning are detailed in the letter at page 96:

“I made you aware of a concern that had been raised with regard to your internet usage. Catherine showed you the report which spanned the latter part of your time on Ilchester and some of the trial period.

You said that others used the computer in the reception area when you were logged in. Chris reiterated that you must not let others use the computer under your own login, that this was a potential breach in itself and that you were responsible for any usage linked to your login details. I highlighted that not only was this potentially a mis-use of Trust time, you had just raised concern about being sat for prolonged period yet by you own choice you were remaining in a seated position for personal internet usage. You accepted all that was said and confirmed this would not happen again. You were advised to log off at all times when moving away from your desk and to utilise your breaks for personal matters.”
23. Despite this being recorded in the agreed chronology a considerable amount of time was spent in oral evidence about it.
24. The Claimant maintained that she had never received the email dated 3 June 2019. The Claimant also seemed to assert in her witness statement (see page 11) and her oral evidence that no warning at all was given to her.
25. During cross examination of the Claimant she did agree that the matters recorded in page 96 (as quoted above) were accurate save that she did not accept it was highlighted to her it was a misuse of Trust time and she did not accept she had said it would not happen again.

26. This is contrary to the evidence of AT which explains that she met with the Claimant on the 28 May 2019 to have a formal redeployment meeting, which is not in dispute, and during that meeting issued an informal warning in accordance with paragraph 9.1 of the disciplinary procedure.
27. Paragraph 9.1 states ... "In minor cases of misconduct your Line Manager will try to resolve the matter informally. This will involve informal discussions. Your Manager will write to you to confirm these discussions and a copy will be kept on your personal file. If there is no further incidence of misconduct, this record will be disregarded after 6 months. If these informal steps fail to bring about an improvement in your conduct, the formal procedure will be implemented" (see page 417).
28. The Claimant accepted that concerns over her internet usage had been raised. She explained in her oral evidence that this was explained by her at the time and her explanation accepted. There is no detail of this aspect in the Claimant's witness statement, nor of it being raised by the Claimant during the subsequent disciplinary process.
29. During oral evidence the Respondent witnesses were referred to a copy of an email at page 57 of the Claimant's supplemental bundle. Of the Respondent's witnesses, only AT was sent the email and saw the email at the time.
30. It is an email dated 11 November 2019 from Mr Savin the head of Patient Access and Performance at that time who is described in the agreed cast list as the Claimant's line manager and who CAW replaced as the disciplining officer in this matter.
31. The email says the Claimant claims she never received the email dated 3 June 2019 with the letter attached. It asks the recipients of the email to search their inboxes and find evidence that they received it. It also asks for a statement whether the letter does or does not reflect the content of the meeting.
32. The email concludes ... "Sarah [which is Sarah Stickland a HR Manager] – She won't let it go, I think this is now the only way forward."
33. AT confirmed in oral evidence that she did not recall replying to this email. AT confirmed that she understood it to be a request for confirmation the email dated the 3 June 2019 had been sent to the Claimant. With reference to this email at page 94 of the bundle it is clear that it was addressed to the Claimant. Also, as confirmed by AT in her oral evidence a request is included to her PA to add it to the Claimant's file. This is in accordance with paragraph 9.1 of the disciplinary policy.
34. AT's evidence is consistent with the documents and the agreed chronology, I therefore accept her evidence on this matter, that an informal warning was

issued to the Claimant about her internet usage at the meeting on the 28 May 2019.

35. It is then recorded in the agreed chronology that on the 16 October 2019 there was an incident in which the Occupational Therapy department were unable to access an editable version of the 'Christmas Leave' spreadsheet due to the Claimant accessing it (see pages 153 and 154). This subsequently forms the first of the two allegations of misconduct raised with the Claimant.
36. On the 24 October 2019 Sarah Stickland requests an internet activity report for Claimant from the IT department (see page 147). It was highlighted in evidence that this is something permitted under the internet acceptable use policy, which is at pages 443 to 454 of the bundle, in particular paragraph 12 (page 449) ... "Where internet use by a particular member of staff is deemed to be excessive, the ICT Department will notify the appropriate line manager for further investigation. Managers may also request detailed internet usage reports from the ICT Department."
37. On the 4 November 2019 the Internet usage report is produced for October 2019 (this is at pages 99 to 146). The report shows the sites accessed and the times for the Claimant's user log in during October. It can be seen from reviewing the report that all the entries are within the Claimant's working day (8am to 2pm).
38. About the working day the Claimant confirmed that she would work the 6 hrs apart from toilet breaks only.
39. The report contains yellow highlighting of the websites that are not work related. There are a large number of such entries, including facebook, Instagram, Ebay, Amazon and Next.
40. The Claimant's main proposition as maintained at this hearing about this report is, she believes it has been fabricated. This is because it is the Claimant's assertion that she did not use the internet for personal use.
41. On the 6 November 2019 Mr Savin meets with the Claimant to notify her of two disciplinary allegations. There is a letter dated 7 November 2019 at pages 148 to 150 that records this and what was said, including that the Claimant was shown the internet usage report.
42. The two allegations are set out for the Claimant in the letter (page 148):

"1. On 16 October 2019 you accessed a file (Christmas Leave Spreadsheet) on the Hand Therapy part of the shared network despite not working in the department for over 12 months and therefore having no operational reason to

access it. This prevented team members from the department being able to open an editable version of the file.

2. You are continuing to misuse Trust resources by accessing the internet at numerous times during the working day for matters not relating to her work – despite this previously being raised with you; most recently on 28 May 2019 in a meeting with Anita Thomas, Divisional Manager, Catherine Youers, Deputy Director of HR and Chris Gover UNISON Representative.”

43. The Claimant when asked what she did not understand about the allegations made, explained that it was the way they were referred to in the invitation to the disciplinary letter.
44. The invitation to disciplinary letter is at page 233 of the bundle and the Claimant was then taken to this. It was noted that the allegations are the same.
45. About the invitation letter the Claimant referred to the phrase “there is evidence to support aspects of the allegations...” in that letter as what she did not understand, however that is not the allegations themselves. The Claimant then went on to clarify that what about the allegations she did not understand was what was meant by the word “misuse”. The Claimant was asked if she would understand what was meant when someone said misuse of drugs, she said she would not.
46. The Claimant agreed in cross examination that the explanation she provided at the 6 November 2019 meeting (and as recorded in the letter dated the 7 November 2019) was that it was not her and someone else had used her log in. It is clear that the Claimant has understood the allegations in order to raise this explanation.
47. There is an investigation into the matter by LC. This includes on the 11 November 2019 a disciplinary investigation meeting with the Claimant (see pages 170 to 176). The Claimant had union representation at this meeting.
48. On the 24 November 2019 an investigation report is produced (pages 223 – 232), it concludes (as LC describes in paragraphs 14 and 15 of her witness statement) ... “In terms of the spreadsheet allegation, I concluded that the Claimant had accessed the spreadsheet and recommended that she undertake a Trust induction again [227]. This was so the Claimant could be reminded of Trust requirements around information governance i.e. not accessing spreadsheets and documents from other departments... In respect of the internet usage allegation, I concluded that the Claimant had engaged in excessive internet usage, based on the compelling IT evidence and the inconsistency of the Claimant’s evidence [230 – 231]. I recommended a period of internet monitoring for 12 months. This recommendation was ‘as a minimum’.”.

49. LC does not recommend dismissal, but this was as LC confirms a matter for the subsequent disciplinary hearing if deemed appropriate.
50. It is accepted by the Claimant that save for reference to being allowed access to AOL and jobs for job searches as part of the redeployment process (which the Respondent says concluded in July 2019 in any event, see page 97) being raised in her defence at the disciplinary hearing (see page 319) no alternative position was put to the Respondent.
51. It was at this hearing for the first time in her oral evidence that the Claimant sought to explain that some of the sites in the October internet report, e.g. Dorset Echo and AOL were to confirm bus travel issues for patients or look up details of pharmacies for patients. This was not raised with the Respondent at the time and is also not referenced in her witness statement for this hearing.
52. The Claimant has concerns with a second internet report (pages 159 to 168) that is then produced at the investigation stage following a request by the Claimant's union representative to look at the wider usage as the initial report was only for October 2019 (see page 173).
53. The Claimant identifies that there are less entries for October in the second report (see page 167 compared to page 99 for example). LC did not know why there is a discrepancy between the internet reports. However, CAW clarified in her oral evidence that she thought the October dates in the second report were condensed. This makes sense as the entries for the other months in the second report are fuller in the form of the October only report.
54. Further, the Claimant alleges that within the allegations made against the Claimant were 17 allegations relating to occasions when she was not in the building. The Claimant confirmed in cross examination that there are no such entries in the October only report. Only 4 were identified in the other report (see pages 160 and 161) which were all linked to the same web site which the Respondent asserts is a connection site if the computer remains logged on, and the Claimant accepted she did forget to log off. There is also reference to when the Claimant says she attended an internet safety course in person in a lecture theatre with colleagues where they were not permitted computers. The specifics of this as to the exact times are vague by the Claimant (see page 304). There is also reference to the Claimant attending a fire safety course at some point. These matters were considered as part of the disciplinary process (see pages 301 and 304) and are far from there being 17 disputed allegations. They also have no bearing on the October only report, which the Claimant asserts is fabricated.
55. The Claimant accepted in cross examination that when she did give an explanation about internet usage, it was, it is not me and others have not seen

me. The Claimant confirmed that she was not going to admit it as she didn't do it. The Claimant agreed that what CAW had to consider at the disciplinary is the evidence CAW had heard and seen against the Claimant's categorical denial of it, to then see if what the Claimant told the Respondent is credible.

56. The agreed chronology records that on the 18 December 2019 the Claimant submits a grievance regarding the disciplinary investigation (see pages 235 to 237), it also complains about Mr Savin.
57. The agreed chronology then records that on the 20 December 2019 a response is provided by Catherine Youers to the Claimant's grievance (see pages 238 to 242).
58. Of relevance from this grievance process are the conclusions that as LC is not a decision maker there is no issue of concern identified.
59. About the concerns raised LC states in paragraph 4 of her witness statement ... "Once I knew that the allegations were against the Claimant, I told either Kelly or Sarah Stickland (HR Manager) that there was a 'link outside work' to the Claimant through my sister-in-law, as described above [from paragraph 3 of her statement ... I am aware that the Claimant has a swimming business outside of work. Although I cannot recall specifically when, my sister-in-law Rebecca Cottrell worked for the Claimant's business before the events of 2019 and 2020 described in this statement], albeit my view was that this would not compromise the fairness of the investigation. I cannot recall when but Kelly or Sarah came back to me and confirmed that Emma Hallett (Deputy Director of HR) was content that there was no conflict of interest."
60. The Claimant was unable to explain when asked about this matter in cross examination why, as she described in her oral evidence, she considered LC doing the investigation was unprofessional, nor why it was to her disadvantage.
61. Further, the conclusion of the grievance outcome letter states ... "Whilst your grievance is in part entitled 'Formal Grievance about Adam Savin (Head of Access), many of the points are not related to him solely. Adam has been confirmed as the disciplining officer for your forthcoming hearing scheduled to take place on 8 January 2020. Please confirm to me by no later than 30 December 2019 if you are formally objecting to Adam fulfilling this role. If that is the case, an alternative Disciplining Officer will be found however the date and time will remain unchanged."
62. CAW is then appointed in Mr Savin's stead. As CAW confirms in her statement at paragraph 3 ... "In late December 2019, Sarah Stickland (HR Manager) contacted me by telephone to ask if I was available to chair a disciplinary hearing on 8 January 2020. I confirmed that I was. I don't believe I was given any details about the case at that point." Then at paragraph 4 ... "At some point

after my call with Sarah Stickland, I was informed that I was a replacement for Adam Savin (Head of Patient Access Services) as the subject of the disciplinary hearing – the Claimant – opposed Adam being the disciplining officer. Hearing bundle pages 252 to 256 (specifically 252) show the Claimant being informed on 30 December 2019 that I was the new disciplining officer.”.

63. It was put to CAW, with reference to the email at page 57 of the Claimant's bundle (detailed above) that she was not independent. CAW maintained that she was independent in the process, that she had not seen the email at page 57 of the Claimant's bundle and stood by paragraph 3 of her witness statement. There is no evidence to dispute this and I accept what CAW says.
64. It is then on the 8 January 2020 that the disciplinary hearing is held, chaired by CAW and the Claimant is dismissed by CAW for the second allegation (the minutes for this meeting are at pages 291 to 323).
65. The minutes confirm that the Claimant was represented at this hearing by her union (see page 291).
66. It is then by letter dated 9 January 2020 to the Claimant that the outcome of disciplinary hearing is confirmed by CAW (see pages 324 to 325).
67. The relevant part of the letter reads:

“2. You continued to misuse Trust resources by accessing the internet at numerous times during the working day for matters not relating to your work - despite this previously being raised with you; most recently on 28 May 2019 in a meeting with Anita Thomas, Divisional Manager, Catherine Youers, Deputy Director of HR and Chris Gover UNISON Representative

In relation to allegation two, you denied this allegation. You explained that you are too busy to 'play/scroll on the internet' and have offered the explanation that the internet has been accessed by someone else. You confirmed that you always lock your computer when not using it, so the only explanation is that your login has been accessed remotely and/or hacked illegally.

I explained to you that I do not believe this to be the case. There is no internet usage when you are not at work, i.e. on holiday or sick. Internet usage on your login also ceased when this most recent investigation commenced. The internet report shows regular access from your workstation (the ENT reception computer) under your login. The internet usage is for short periods of time and predominantly during your working hours. Although your witnesses commented that they have not seen you on the internet, they also confirmed that there are times of the day where you are on your own. The types of internet sites being accessed include AOL, Facebook, Dorset Echo, Barclays, Instagram, EasyJet, Amazon and Yodel and are not work related.

I stated that it is my reasonable belief that you have accessed these internet sites whilst at work and that your internet access has been excessive. I have taken into consideration the meeting held on 28 May at which your internet usage was raised informally with you. I noted that you have said you did not receive the outcome letter from this meeting, but you have confirmed you were in attendance. I explained I am therefore disappointed that your practice did not change following this meeting.

I explained to you that excessive internet access during work time is a misuse of the Trusts time and property, an action defined as gross misconduct in the Trust Disciplinary Procedure. On this basis, I informed you of my decision to dismiss you from the Trust with immediate effect.”

68. The letter confirms that the Claimant has a right of appeal.

69. CAW sets out her position on why she found the Claimant guilty of the alleged misconduct at paragraphs 11 to 13 of her witness statement.

“11. In terms of the allegation regarding internet usage, the Claimant made a number of different points during the hearing but her main argument was that she had not used the internet excessively and that someone else had been using her work user login to access the internet. I did not find this to be a credible argument. Both the internet usage reports that the Trust IT team had provided showed repeated internet access throughout working days of the Claimant to websites such as Facebook, EasyJet, Amazon and Instagram. Such access was from her own user login which I believe was “HEWS”. As part of the investigation, the internet usage had been reviewed and it showed that when the Claimant was off sick or on holiday, there was no internet usage from the Claimant’s user login. I believed that the internet usage reports were strong evidence that proved the allegation against the Claimant.

12. I did give some consideration to the evidence from Sarah Diaz and Tiffany Armour-Haylor that they had not witnessed the Claimant on the internet. However, just because they had not witnessed it, did not mean it did not happen and so I did not attach significant weight to their evidence. The Claimant could just have ‘minimised’ the internet on her screen when they were around. As Health Care Assistants, they would have been in clinic rooms during their working day more than they would have been around the Claimant’s reception desk. I found the internet usage reports to be more reliable as evidence.

13. I concluded that the Claimant had misused Trust time and resources by engaging in excessive personal internet use...”.

70. CAW explains her consideration of sanctions at paragraphs 13 to 15 of her witness statement, as well as clarifying matters in her oral evidence. In short,

the explanation of the Claimant was just not credible against the evidence she relied upon.

“... I therefore had to consider what the sanction would be, and discussed this with Emma Hallett. It concerned me that the Claimant had already been verbally warned about her internet use by Anita Thomas [94 – 98] in May 2019 and yet she had carried on doing it – and then continued to deny that she had done so, despite clear evidence from IT to the contrary. This showed a failure to learn and a failure to recognise wrongdoing – so I was not reassured that the Claimant would stop engaging in excessive personal internet use if I gave her a written warning, for example. Similarly, Lynn Cottrell’s investigation report had recommended a 12-month period of random internet monitoring but I did not feel that it would be appropriate as the Claimant had already had the opportunity to stop, after being warned that internet use was monitored - and yet she had carried on.”

“14. Demotion or a move to a different role or department was not a practical option because the Claimant was employed in an administrative role and her experience was in administration, so any job she could do would be on a computer and the risk of her accessing the internet for personal use would remain.

15. I concluded that dismissal was the appropriate, fair and reasonable sanction. The allegation against the Claimant was serious, she had ignored a previous warning about her actions and the alternatives to dismissal were not appropriate. Misuse of the Trust’s time and property is listed as gross misconduct in the Trust’s disciplinary policy [423] and so it was reasonable for the Claimant to be dismissed without notice or payment in lieu of notice [422].”

71. CAW confirmed in her oral evidence that with reference to the disciplinary policy the stage the Claimant was at with the May warning was the lowest, informal. From that it went to a Gross Misconduct summary dismissal. CAW explained the reason why was she would have expected the conduct to change. There was also no learning option as the Claimant was not acknowledging that she had used internet and shouldn’t have done. Further, the fact that the Claimant had told her that she had changed her log in 7 times when she had only changed it twice. CAW explained that she had a lack of trust, she was not reassured that the Claimant’s conduct would change. CAW confirmed that the explanation given by the Claimant was a significant factor as to why she had dismissed.
72. This explanation by CAW included for example the Claimant saying that she had changed her password on 7 occasions which was not supported by IT.
73. During the cross examination of the Claimant there was confusion expressed by her over passwords for her computer log in and the Patient Administrative

System (PAS) log in, with the Claimant seeming to suggest in her oral evidence that it was the PAS password she had changed and it was that password that was needed to access the internet. However, the Claimant then clarified that was not the case and the internet could be accessed after just using the computer login password and that she believed the reason for what she said at the disciplinary hearing was down to confusion on her part not that she was lying.

74. Following her dismissal, the Claimant exercised her right of appeal and by letter dated 12 January 2020 submitted the grounds of her appeal against her dismissal (see pages 326 to 349).
75. On the 21 February 2020 the disciplinary appeal hearing is held, chaired by IR (see pages 355 to 375).
76. By letter dated 26 February 2020 to the Claimant from IR, IR confirms that the original disciplinary outcome is upheld (see pages 376 to 380).
77. It can be seen from the appeal outcome letter that IR addresses all the points raised by the Claimant. The Claimant does not appear to have an issue with the appeal process as it was not put to IR by the Claimant that IR had not considered something (or for that matter properly/fully considered something) the Claimant had raised in her appeal.
78. When IR was asked in cross examination whether she thought it was fair to go from informal to gross misconduct, IR confirmed that it was actually from informal to a disciplinary and then the disciplinary decided it was gross misconduct.
79. As to the Claimant's concerns about delay in the process, LC sets out in her witness statement (see in particular paragraph 21 i) that ... "... there was some very minor delay in concluding my investigation between 20 November 2019 and 24 November 2019, due to my sickness. My investigation started on 7 November and concluded on 24 November so I don't agree with any suggestion that it took too long. In any case, I am aware that the disciplinary hearing was postponed on more than one occasion because of the Claimant's own unavailability – so it is disingenuous for her to now say that delay was an issue. The disciplinary hearing was held on 8 January 2020. Approximately two months from a complex investigation commencing to the disciplinary hearing concluding is, in my experience, relatively quick anyway.". The Claimant did not challenge this evidence.
80. It was also highlighted by Respondent's Counsel in her closing oral submissions that the Claimant had misquoted the disciplinary process in her evidence. The disciplinary policy actually says the investigation, not the whole process, will be completed as soon as possible, ideally within 10 working days

(see paragraph 11.1.1 at page 417). The investigation commenced on 7 November 2019 running to the 24 November 2019 a period of 12 working days, including LC completing matters on a Sunday. Respondent's Counsel asserted this is the opposite to delay and was quick for an investigation of this size. This was not challenged by the Claimant.

The Law

81. Unfair dismissal (sections 94 and 98 Employment Rights Act 1996)

82. Pursuant to section 94 Employment Rights Act 1996 ('ERA 1996') an employee has the right not to be unfairly dismissed by their employer. Whether or not an employee has been unfairly dismissed is determined in accordance with section 98 ERA 1996:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal,

and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it...

...(b) relates to the conduct of the employee, ...

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

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

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

83. It is for the Respondent to prove on the balance of probabilities, the sole or principal reason for dismissal. In considering fairness the burden is neutral.

84. In conduct cases, when considering whether or not the dismissal was reasonable the Tribunal must have regard to whether, at the time of dismissal, the employer:
- a. genuinely believed that the employee was guilty of misconduct;
 - b. had reasonable grounds on which to base that belief;
 - c. at the time it had carried out as much investigation as was reasonable in the circumstances (**British Home Stores Ltd v Burchell [1978] IRLR 379**).
85. The Tribunal must be careful not to substitute its view for that of the employer and should consider instead whether the employer acted within the range of responses available to a reasonable employer when considering both whether dismissal was reasonable and all other aspects of fairness, for example whether the investigation was reasonable (**Sainsbury PLC v Hitt [2003] ICR 111** and **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439**).
86. I was also referred by the Claimant to the ET decision of Scarlett and another - v- Gloucester case ET/1401395/12, which the parties agreed was not binding upon me.
87. I was not presented a copy of the decision, but a summary was provided by both parties and from that it appears that the facts are different because in that case there was an informal custom to use the internet outside of core hours and such usage was not hidden. In this case it is alleged the Claimant is using it in her working hours, and she denies doing so.
88. I have also considered the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code"). The ACAS Code confirms at paragraph 3 that ... "Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case. Employment tribunals will take the size and resources of an employer into account when deciding on relevant cases and it may sometimes not be practicable for all employers to take all of the steps set out in this Code."
89. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the ERA 1996.
90. Potential reductions to the basic award are dealt with in section 122. Section 122(2) provides: "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce the amount accordingly."

91. The compensatory award is dealt with in section 123. Under section 123(1) "the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".
92. Potential reductions to the compensatory award are dealt with in section 123. Section 123(6) provides: "where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."
93. With reference to ***Polkey v A E Dayton Services Ltd [1988] ICR 142 HL***, whether an employer dismisses for redundancy, misconduct, incapability or for another permissible reason, it will not be able to elude a finding of unfair dismissal by pleading that a failure of procedure made no difference to the outcome of the dismissal process. But in all such cases, tribunals will be entitled, when assessing the compensatory award payable in respect of the unfair dismissal, to consider whether a reduction should be made on the ground that the lack of a fair procedure made no practical difference to the decision to dismiss.

94. Wrongful dismissal

95. The Claimant's claim for breach of contract is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the claim was outstanding on the termination of employment.
96. The Tribunal must determine whether, there is a contractual power to dismiss without notice that applies to the Claimant and/or on the balance of probabilities, the Claimant acted in repudiatory breach of the contract as alleged.

The Decision

97. The Respondent admits dismissing the Claimant.
98. What was the reason for dismissal?
99. The Respondent asserts that it was a reason related to conduct, saying that the Claimant was guilty of misuse of its resources by accessing the internet at numerous times during the working day for matters not relating to her work despite it previously having been raised with her most recently on the 28 May 2019.

100. It relies upon the definition of gross misconduct in its disciplinary policy being ... "Misuse of the Trusts time, property or name" ... (see page 423).
101. CAW, the dismissing officer at the Respondent, states in the letter of dismissal her reasons (as quoted in the fact find set out above).
102. CAW maintained this was her reason in her evidence to this Tribunal.
103. The Claimant's case seems to be that it was a false reason. This overlaps with her challenge to the Respondent's genuine belief.
104. Did the Respondent hold a genuine belief in the Claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances?
105. The Claimant challenges the Respondent's genuine belief on the following grounds:
 - a. That there were no issues with her work, she had been the victim of bullying by colleagues,
 - b. she had been subjected to investigations in 3 years, the first one lasting 303 days and the 2nd lasting 110 days,
 - c. in 2017, 2018 and 2019 she was not given any appraisal,
 - d. the decision to dismiss the claimant was the culmination of 3 years of harassment and bullying and, itself, an act of bullying rather than because of the alleged misconduct,
 - e. The outcome of the disciplinary process was pre-judged.
106. About these matters I accept the evidence of CAW as to the reason, namely the Claimant's misconduct. The Claimant has not proven on the balance of probability that any of her challenges to genuine belief had an influence on or were the cause of CAW's decision.
107. The Claimant challenges the Respondent's reasonable grounds for that belief in her misconduct on the following grounds:
 - a. the IT department did not identify excessive internet use on the part of the claimant,
 - b. 3 colleagues had given statements to say that they did not witness the claimant on the Internet,

- c. within the allegations made against the Claimant were 17 allegations relating to occasions when the claimant was not in the building.
108. About these allegations I find that CAW did have reasonable grounds. What CAW articulates in the letter of dismissal has not been disproved by the Claimant. The Claimant has not proven on the balance of probability that the internet reports were fabricated.
109. The Claimant challenges the procedure saying that the investigation was inadequate/there were procedural defects because
 - a. the Respondent failed to define the allegations against the Claimant
 - b. there was a significant delay, including 70 days from the date of the allegations to the date of the hearing.
110. The Claimant has not proven this on the balance of probability and has not evidenced what would amount to a breach of the ACAS code.
111. The Claimant had a warning from 2015 and an informal one from May 2019 that would have given ample context to the allegations raised and what "misuse" related to. The Claimant provided an explanation when the allegation was raised which she has maintained in the main to this hearing. The Claimant could not have done that if she did not understand the allegation raised.
112. I find the dismissal to be procedurally fair in all the circumstances of this case.
113. Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?
114. I accept that it was. CAW genuinely believed on reasonable grounds after a reasonable investigation that the Claimant had committed an act of gross misconduct. The Claimant adopted an all or nothing argument in defence, it is not me it is someone else. CAW had a reasonable basis for concluding this was not a credible position for the Claimant to adopt, and without such a recognition on the part of the Claimant, the sanction was the harshest. In my view it is within the range for these reasons.
115. As to the complaint of wrongful dismissal for notice pay. It is not in dispute that the Claimant's notice pay claim is for 12 weeks as she was summarily dismissed without notice.
116. The Respondent submits it had a contractual power to dismiss summarily in reliance on clause 3.1 of the Claimant's terms and conditions of

employment which link to the disciplinary policy and if not that then because the Claimant had breached the implied term of trust and confidence.

117. Clause 3.1 reads "... nothing in this clause shall preclude the Trust from terminating your employment without notice in appropriate circumstances as detailed in the Trust's disciplinary procedure available on the Trust intranet."

118. The Respondent relies upon paragraph 17.3.4 of that ... "You may be dismissed following an act of gross misconduct or where there has been repetition of offences already the subject of current warning(s). If you commit an act of gross misconduct, you will normally be dismissed without notice or payment in lieu of notice." (page 422).

119. The Respondent says the Claimant committed an act of gross misconduct as defined in paragraph 17.5 of the policy (page 423) being a ... "Misuse of the Trusts time, property or name", in that the Claimant continued to misuse Trust resources by accessing the internet at numerous times during the working day for matters not relating to her work despite it previously having been raised with her most recently on the 28 May 2019.

120. This has been evidenced by the Respondent, so it was entitled to dismiss without notice.

121. For all these reasons the complaints of Unfair Dismissal and Wrongful Dismissal fail and are dismissed.

122. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 6; the findings of fact made in relation to those issues are at paragraphs 9 to 80; a concise identification of the relevant law is at paragraphs 81 to 96; how that law has been applied to those findings in order to decide the issues is at paragraphs 97 to 121.

Employment Judge Gray
Dated 23 May 2022

Judgment sent to Parties on
13 June 2022 By Mr J McCormick

For the Tribunal Office