



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs P Cunliffe

**Respondent:** Wigan Borough Council

**HELD AT:** Manchester

**ON:** 10, 11 and 12 August  
2022

**BEFORE:** Employment Judge Johnson

## REPRESENTATION:

**Claimant:** Mr Birchall  
(friend of the claimant)

**Respondent:** Ms  
Knowles (counsel)

# JUDGMENT

The judgment of the Tribunal is that:

- (1) The claimant's complaint of unfair dismissal is not well founded and is dismissed. This means that the claimant was fairly dismissed by the respondent by reason of her conduct.

## REASONS

### Introduction

1. These proceedings arise from the claimant's employment as (at the date of her dismissal) a Complex Dependency Key Worker from 1 October 2010 (the respondent says 8 November 2008) until her dismissal on 9 November 2020.
2. She presented a claim form to the Tribunal on 2 March 2021 following a period of early conciliation from 2 February 2021 to 26 February 2021 and brought a complaint of unfair dismissal.

3. The respondent presented a response resisting the claim in time by 4 October 2021 and argued that the claimant was fairly dismissed by reason of her conduct.

**The issues**

4. A draft list of issues was included within the hearing bundle and these were taken into account together with the standard issues used in by the Tribunal in relation to unfair dismissal complaints and which are as below, (in relation to dismissals where conduct is asserted by the respondent as a potentially fair reason).

Unfair dismissal

*Dismissal*

5. Can the claimant prove that there was a dismissal?

*Reason*

6. Has the respondent shown the reason or principal reason for dismissal? The respondent relies upon conduct as the reason for the dismissal.
7. Was it a potentially fair reason under section 98 Employment Rights Act 1996?

*Fairness*

8. If so, applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?
9. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
  - i. The respondent genuinely believed the claimant had committed misconduct
  - ii. there were reasonable grounds for that belief;
  - iii. at the time the belief was formed the respondent had carried out a reasonable investigation;
  - iv. the respondent followed a reasonably fair procedure;
  - v. dismissal was within the band of reasonable responses.
10. Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

*Remedy for unfair dismissal*

11. Does the claimant wish to be reinstated to their previous employment?
12. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

13. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
14. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
15. What should the terms of the re-engagement order be?
16. What basic award is payable to the claimant, if any?
17. 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?
18. If there is a compensatory award, how much should it be? The Tribunal will decide:
  - i. What financial losses has the dismissal caused the claimant?
  - ii. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
  - iii. If not, for what period of loss should the claimant be compensated?
  - iv. 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?
  - v. If so, should the claimant's compensation be reduced? By how much?
19. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
20. Did the respondent or the claimant unreasonably fail to comply with?
21. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
22. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
23. Does the statutory cap of fifty-two weeks' pay or apply?
24. What basic award is payable to the claimant, if any?
25. 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?

### **Evidence used**

26. Being a claim, which relied solely upon unfair dismissal (and where the question of dismissal was not in dispute), the respondent called its witnesses first to give evidence. I had an opportunity to read the witness statements and relevant documents within the hearing bundle and the respondent called the following witnesses in order:

- a) Ms Terri Byrne (disciplinary investigating officer)
- b) Ms Emma Stubbs (disciplinary hearing dismissing officer)
- c) Ms Sharon Barber (appeal hearing officer)

27. The claimant then gave oral witness evidence and did not call any other witnesses.
28. There was an agreed core bundle which included the pleadings, the respondent's policies and procedures which are relevant to this case and other document including the disciplinary investigation notes, relevant disciplinary proceedings correspondence, the disciplinary hearing and appeal hearing notes.
29. There was also a supplemental bundle containing which included additional documents disclosed later in the proceedings and outside the case management order time limits provided by the Tribunal, but which were agreed by the parties as being available for use during the hearing.
30. The claimant wanted to rely upon several additional documents relating to statements which I understood to be given by neighbours of the service user relevant to this case and which I understood supported the claimant's actions. They appeared to be statements produced by family members and neighbours of the claimant and the relevant service user, (described as 'GC').
31. These documents and statements did not deal with the question of the claimant's conduct within the workplace, but with her care and compassion for GC as a relative and vulnerable adult. While this information was very positive towards the claimant, it did not actually address her actions which gave rise to the disciplinary investigation. I did not think they were relevant to the issues being considered and at best dealt with mitigation. I agreed to keep the matter open during the hearing and would revisit it if either party wished to apply for their inclusion. As the case proceeded, it was not necessary to hear this evidence.
32. Another issue was the naming of the relevant service user GC in this case. It was agreed that they would continue to be called 'GC' as it was not necessary to name the person in question and it was not in the interests of justice to provide additional information concerning this person. I did confirm that I would revisit any potential issues relating to confidentiality and possible orders that might be made under Rule 50, should any observers attend the hearing who were not connected with the case. As it happened, none of these observers attended and no further orders were required before the hearing concluded.
33. I was aware that Mr Birchall while acting as the claimant's representative was not legally qualified, although he had experience of observing Tribunal hearing in a teaching role. I explained the relevant principles behind the overriding objective and at times found it appropriate to intervene during his cross examination of some of the respondent's witnesses' evidence, when I felt it was in the interests of justice to do so. Accordingly, I felt that both parties and their witnesses were able properly contribute to this 3-day hearing and my approach was in accordance with the overriding objective and the relevant provisions of the Equal Treatment Bench Book concerning unrepresented parties, which in this case included representatives who were not legally qualified as was the case with Mr Birchall.

34. I would, however, say that I felt both parties and their representatives approached this case in a cooperative and non-confrontational way and would like to thank them for the sensible way in which they conducted themselves in a sensible way.

## Findings of fact

### The respondent

35. The respondent Wigan Borough Council ('the Council'), is a metropolitan borough council in Greater Manchester and has responsibility for the provision of adult services in the Wigan area. It is a large public employer with access to considerable Human Resources and legal advice. It is understood that many policies and procedures are in place including those relating to officer conduct, the handling of data and disciplinary investigation and action. Many officers and employees are members of trade unions and it is understood that management are used to dealing with employee representatives on a regular basis.

36. There was an Employee Code of Conduct which applied to all the respondent's employees and which employees were expected to read and to inform their line manager or HR if anything was unclear to them and to inform management of any concerns that they identified relating to conduct within the Council. The Code included a reminder that it was important to protect data and that IT should be used in an acceptable way. There was also reference made to a Whistleblowing policy and its protections to employees who raised issues.

37. Another important issue included within the Code was the importance of avoiding conflicts of interest and I was taken to the following responsibility:

*'you are required to identify and disclose any actual or potential personal, financial, business or other close personal relationship which might reasonably be perceived as a conflict of interest. If you are unsure of whether an interest or personal relationship should be declared, you should in the first instance speak with your manager'.*

Employees were therefore placed on 'alert' as to the need to be aware of matters which might involve conflicts of interest and this would include the claimant.

38. The Council also provided an *Acceptable Use of IT policy* and which reminded employees whose job involved the use of the Council's ICT systems of their responsibility to use these systems in accordance with the Council's procedures. This meant that use of ICT systems by employees, should take account of the other policies and procedures as relevant and in particular, the relevant principles within the Code of Conduct. Inappropriate or unauthorised use was determined as a breach of the Code of Conduct, which could give rise to disciplinary action and that where appropriate, it could be considered gross misconduct with the risk of dismissal being imposed upon the offending employee.

39. A particular forbidden use under the policy included using a privileged user account applying to online systems *'where there is no specific business reason to do so'*.

40. A further relevant policy was the Council's Data Protection Policy which required all employees to exercise individual responsibility for complying with this Policy, only accessing personal data when it was necessary and stressing that:

*'...staff cannot use personal data obtained at work for their own purposes'.*

This requirement was reinforced by the Policy explaining that if employees knowingly accessed, disclosed, or misused Council data for their own purposes, or knowingly ignored the requirements of the Policy, a disciplinary investigation and if necessary, action, could result.

#### The claimant

41. The claimant ('Mrs Cunliffe'), was employed by Wigan for many years and commenced her employment on 8 November 2008 and at the time of her dismissal, she was employed as a Complex Dependency Key Worker, which was a grade 8 post using the Council's pay grade structure, (with 1 being the lowest grade). It is worth providing a brief outline of how her role operated within the Council.
42. Mrs Cunliffe explained that her role was created when local authorities were required to operate within the Multi-Agency Safeguarding Hub (known as the 'MASH') and required additional employees to help move service users into the appropriate areas of support and to free up the limited numbers of social workers so that they could access other tasks. She said that some service users had mental health problems, drug and alcohol problems, housing and homelessness and other challenging issues which made it difficult for those individuals to access the relevant support. Mrs Cunliffe dealt with vulnerable adults.
43. Her role was not a social worker post and I understood that her qualification for the role as Key Worker was relevant local authority experience, of which she had many years in both Wigan and Lancashire County Council.
44. As part of her duties, it is understood that Mrs Cunliffe was responsible for vulnerable adult service users as a *Live Well Key Worker* in the Complex Dependency team. She was permitted access to Wigan's 'Mosaic' database, which was understood to be an electronic system of recording details of Council service users, many of whom are vulnerable adults and who receive support with particular needs that they have. Wigan is subject to the GDPR in managing data and I accept that Mrs Cunliffe was trained in the policies and procedures relating to data and which were referred to above, particularly in relation to unacceptable use and the potential consequences which could arise in terms of disciplinary action.
45. There was a service user, who was referred to as 'GC' during the hearing and who was known to Mrs Cunliffe. On more than 10 occasions, she accessed Mosaic to look at the records relating to GC, initially to obtain the name of that person's social worker, rather than making enquiries using the Council's internal systems such as its staff intranet. It is not clear why the access took place more than once, but it is reasonable to conclude that Mrs Cunliffe may have been able to read case notes relating to GC which would have contained personal confidential data, which she did not need to read and which she had not been given express authority to access either by GC, his representatives or by her line management.

Disciplinary investigation

46. On 29 May 2020, Mike Watson (social worker in the adult social care team), raised concerns about the information that Mrs Cunliffe was accessing on Mosaic. He raised these concerns with his line manager, Ms Pamela Leyland (who is an advanced practitioner). He said that Mrs Cunliffe had made comments about accessing information on Mosaic relating to GC, who was her relation.
47. Mrs Cunliffe's manager, Daniel Blackledge was then notified in turn and he reported them to Terri Byrne, (Public Service Reform Business Manager) and upon raising her concerns to Emma Stubbs (Service Manager) and she appointed Ms Byrne as an investigator into these matters.
48. I am satisfied that Ms Byrne had previous knowledge of how to conduct disciplinary processes and on 3 June 2020. She decided to suspend Mrs Cunliffe, having first concluded that it was appropriate to do so, following discussions with HR and noting that Mosaic was integral part of her role and she had already admitted to her line manager that she had been *'naïve'* and a result of having safeguarding concerns regarding GC, she had become *'carried away with trying to support him'*. Ms Byrne explained that had Mrs Cunliffe not been suspended, she would have continued to require Mosaic access (whether in her substantive role or temporarily redeployed role) and with remote working during Covid, oversight of her Mosaic use would have been difficult. This presented an understandable difficulty for Ms Byrne and her decision to suspend during the investigation, while not take lightly, was a reasonable one to take. Mrs Cunliffe was informed on 3 June 2020 at a meeting of her suspension, and this was supported by a letter sent to her the same day.
49. Ms Byrne then began her investigation and interviewed Mrs Cunliffe and four other officers working for the Council and considered relevant documents such as records of her access to Mosaic, her flexi sheets, training records and emails with family members relating to GC. The meetings took place from 18 June 2020 beginning with Mr Watson who explained he had been called by Mrs Cunliffe on 14 May 2020 who identified herself as a local authority employee, a relative of GC, that she had concerns about him and that she had used Mosaic to identify him as the allocated social worker. She wanted to meet with him at GC's home that day. It appeared that Mr Watson was initially not too troubled by the way in which Mrs Cunliffe had used Mosaic to contact him on what was clearly a personal matter.
50. Ms Byrne then interviewed Mr Blackledge on 22 June 2020, and he confirmed that he was aware that she was related to a service user GC, but as his case had not been allocated to her, he did not believe (or know), that any conflict of interest had arisen.
51. Mrs Cunliffe was interviewed later that day and was permitted to be accompanied by her union representative from Unison, Kay Winnard. During the interview, she confirmed that GC was the uncle of her husband and while she had previously had little contact with him, she had been approached by her sister-in-law who felt there were potential safeguarding concerns regarding GC's ability to look after himself. Sammie Corcoran (social worker), was appointed to look into GC's needs but because he had refused support called Mrs Cunliffe on 16 March 2020, to say that

there was nothing more that could be done. It is understood that at this time GC had capacity and was entitled to refuse assistance if he wanted to without further intervention from the Council's adult services team.

52. Mrs Cunliffe became concerned as the Covid pandemic in the UK entered its first lockdown and she used the Mosaic system to find out Mr Watson's details. While this might have been the case, she also accepted that she had used the system to look at the progress of GC's case. She was unwilling to accept when questioned by Ms Byrne during this interview that she had done anything wrong at the time.
53. Ms Byrne interviewed Mr Brown who was the social worker on 25 June 2020 who originally dealt with GC's case in January 2020 before Ms Corcoran. He acknowledged that GC was not coping when he visited him at his home and some support was provided. She then interviewed Ms Corcoran on 9 July 2020, and she confirmed that there were no significant risks present in GC's home and that the case had to be closed because he refused assistance. He said that during a conversation with Mr Blackledge and him in January 2020, Mrs Cunliffe was given a management instruction not to get involved with GC because of the conflict of interest that arose.
54. Mrs Cunliffe was then interviewed a further time by Ms Byrne on 7 September 2020 and I accept that this delay during the summer arose from annual leave commitments. Again, she attended with Ms Winnard from Unison. She conceded during the interview that she felt she needed to do something in relation to GC, even when it was put to her that some of the access to Mosaic had taken place before the Covid lockdown began. Mrs Cunliffe maintained her belief that she had done the right thing even though she acknowledged it was contrary to the Council's policies and procedures relating to conflicts of interest and IT use of personal data. In relation to a query regarding her time recording and the absence of time sheets since 29 November 2019, she said she was not good with IT, but her line managers was aware of the problem. Despite her assertions that she had raised her difficulties with management and IT, having gained access to the relevant IT records including Mrs Cunliffe's Outlook account, she was unable to see any evidence that such complaints had been raised. Of particular importance to Ms Byrne was that Mrs Cunliffe failed to record when she was using work time to attend meetings relating to the personal matter of GC.
55. Having considered the evidence that she had obtained concerning the alleged conduct of Mrs Cunliffe, Ms Byrne produced an investigation report which identified a case to answer. The six allegations which she identified and which had triggered the investigation, were as follows:
- a) *"the claimant abused her position and fundamentally breached confidentiality by accessing confidential records on a number of occasions via the Respondent's Mosaic system, relating to a service user for whom she was acting as a relative in respect of care proceedings.*
  - b) *The claimant abused her position by initially accessing the system to obtain the name of the social worker connected to this personal matter in order to contact them directly, rather than following the usual protocol as a service user and making contact with the duty team in the first instance.*



- c) *The claimant subsequently abused her position by repeatedly accessing the system to review social worker case notes in regards of this personal matter, such information she have otherwise not been privy to in this way and would have instead been required to obtain via the assigned social worker themselves.*
- d) *The claimant failed to follow a reasonable management instruction from DB this relating to her conflict of interest and maintaining a distance from this case when fulfilling your role as a Wigan Council employee.*
- e) *The claimant attended personal care related meeting, during works time and failed to request via her manager authorised leave, neither did she record the time taken on her flexi sheet.*
- f) *The claimant failed to record working time in accordance with the expectations set out in the respondent's flexi time policy for a considerable number of months."*

Allegations (a) to (d) related to the substance of the investigation, namely inappropriate use of confidential records without permission of the subject GC, whereas (e) and (f) related to time recording matters arising from this investigation. The motivation for Ms Byrne deciding that there was a case to answer was that there were breaches of the duty of confidentiality and use of time undermining the expectations of trust placed on her by the Council.

56. Ms Byrne also explained that she concluded further allegations should be considered at the disciplinary hearing following her enquiries into Mrs Cunliffe's actions during the investigation:

- g) *"The claimant breached her duty of confidentiality and the GDPR Regulations.*
- h) *The claimant misappropriated time.*
- i) *The claimant failed to maintain the high standards of conduct expected of a Wigan Council employee which could have brought the respondent into disrepute.*
- j) *The claimant breached the fundamental relationship of mutual trust and confidence between an employer and employee".*

57. She noted that Mrs Cunliffe had accessed the Mosaic system on 12 occasions (on 8 separate dates) and despite acknowledging her enquiries too place in a professional capacity involving a personal relationship, she failed to inform Mr Blackledge, knowing there was a conflict of interest. She also noted that Mrs Cunliffe had been employed by the Council for 32 years and knew what she was doing was wrong. Ms Byrne arranged for the investigation to proceed to a disciplinary hearing and on 16 October 2020, a letter was sent to Mrs Cunliffe inviting her to a hearing on 9 November 2020 and confirming relevant documentation that would be used at this hearing would be sent shortly before it took place and that the hearing would be heard by Emma Stubbs.

#### Disciplinary hearing

58. The hearing took place as planned on 9 November 2020 and Ms Stubbs described the report as 'comprehensive' in terms of its content. She said that Mrs Cunliffe was supported at the hearing by Ms Winnard of Unison, Ms Byrne presented the

management case and was supported by Sharon Taylor from HR. There was also a further HR officer present, Claire Williams, who supported Ms Stubbs.

59. She confirmed that although Mrs Cunliffe did not make a request, taking into account the seriousness of the alleged conduct, she could have asked for witnesses to attend as she wanted them present at the disciplinary hearing. She acknowledged that the suspension period was lengthy before the disciplinary hearing took place, but she understood the reasons behind the amount of time elapsed and noted it was not appropriate for her to intervene in the investigation as the appointed disciplinary hearing officer.
60. Ms Stubbs confirmed that Ms Byrne presented the management case and referred to the investigation papers provided for the final hearing. It was then Mrs Cunliffe's turn to present her case and she argued that there was no fundamental breach because she had access to Mosaic, she accessed GC's records because of concerns regarding his welfare, she was not told by management not to access the records and that the problems with her flexi time recording were known to management. She described herself when questioned by Ms Stubbs as being at the end of her 'tether' regarding GC.
61. Ms Stubbs acknowledged that Mrs Cunliffe was an experienced member of staff when asked about her previous good conduct. However, she noted that by having more than 30 years' service, Mrs Cunliffe could be expected to be fully experienced of GDPR, she had received formal training of the Council's policies and procedures and should have known that when dealing with issues relating to service user GC, it was necessary to raise issues through the Council's duty line and not access the Mosaic system.
62. Ms Cunliffe was clear that Mrs Cunliffe was a senior officer, a public servant, who had a duty to serve the people of Wigan. She had no reason that her line manager should have to repeatedly warn her not to access confidential data which she was not permitted to access when she had been trained to do so. She also called a co-worker Nina Whittle to give evidence concerning the assistance she provided Mrs Cunliffe with her IT and that she ask another colleague about advice concerning time sheets.
63. Both sides then summarised their respective cases. Mrs Cunliffe concluded by saying that she had an unblemished and long career with the Council and that while she felt her actions were wrong in relation to accessing the Mosaic system for GC's records, she had no choice and just wanted to help GC.

#### Disciplinary hearing decision

64. Ms Stubbs adjourned the hearing in order to deliberate and following a period of about 2 hours, returned to confirm that her decision was to summarily dismiss Mrs Cunliffe, primarily because she had breached client confidentiality and had *'demonstrated an inability to draw a line between acting in a personal and professional capacity which was a fundamental aspect of her role as a Key Worker'*. All 6 allegations were found to have been proven. Allegations (a), (b), (c) and (d) all related to the inappropriate behaviour in relation to GC. Ms Stubbs was satisfied in relation to allegation (d) that Mrs Cunliffe's and Mr Brown's evidence demonstrated

that he had cautioned her that working on GC's case would amount to a conflict and this amounted to a management instruction.

65. In relation to allegations (e) and (f) involving flexi time breaches, Ms Stubbs' was clear that Mrs Cunliffe was sufficiently experienced to know how to complete flexi time sheets correctly and not record time against dealing with a personal matter involving GC. She did acknowledge that management did not however, appear to be monitoring time recording sufficiently and asked that the relevant Service Manager would ensure that this was carried out in future. I understood however, that this was not a sufficient matter to undermine the overall findings against Mrs Cunliffe which convinced Ms Stubbs that she should dismiss.
66. In relation to the additional allegations identified by Ms Byrne (g), (h), (i) and (j), Ms Stubbs determined that Mrs Cunliffe had failed to comply with GDPR despite having received training, she failed to complete her flexi time sheets in accordance with the Council's procedures, that she failed to maintain the Council's high standards and finally, that breached the fundamental relationship of trust and confidence between employer and employee.
67. When questioned by Mr Birchall about whether or not she had considered mitigating circumstances, Ms Stubbs said that she took into account all of the circumstances surrounding the case and Mrs Cunliffe's previous record, advising that it was *'a decision that I took more seriously than any decision made before'*. But ultimately, she said that based upon the allegations as a whole and she had no option but to dismiss by reason of her misconduct. While GC might have been vulnerable, she said that he continued to have *'...capacity and the fundamental human right to make decisions regarding his care.'*
68. As a consequence, I understood that Ms Stubbs believed Mrs Cunliffe had deprived GC of these rights by accessing his personal data without seeking his express permission. During this part of the hearing, it was necessary for me to intervene because it appeared that Mr Birchall's cross examination had moved from an exploration of the relevant issues relating to the fairness of the dismissal to a *'moral discussion of adult social care rather than employment law.'* It was therefore necessary to ask Mr Birchall to move on to another theme within his cross examination. What was clear to me, was that Ms Stubbs was concerned about Mrs Cunliffe's failure fully acknowledge the seriousness of what she had done and this affected the confidence that she had in Ms Cunliffe's ability to make appropriate decisions in future.
69. Ms Stubbs confirmed that she approached the hearing with an open mind and understood all of the issues under consideration and I find on balance of probabilities that she behaved reasonably in how she approached the disciplinary hearing and how she reached her decision. She sent a letter to Mrs Cunliffe on 18 November 2020 which confirmed her decision and set out the reasons why that decision had been reached. Her final date of employment was given as 9 November 2020 and she was notified of her right of appeal.

#### The appeal

70. As provided by her letter of dismissal and in accordance with Wigan's disciplinary procedure, Mrs Cunliffe was able to exercise her right of appeal against Ms Stubbs' decision to dismiss her. The appeal was conducted as a re-hearing and there was evidence that she was permitted to attend with an appropriate representative and could fully participate in the hearing providing an explanation of her grounds for appeal.
71. Ms Barber explained that as the appeal hearing officer, it became clear from the papers before her that GC had capacity in accordance with the Mental Capacity Act 2006. This meant that he was in a position to decide whether he would be supported by adult services or not. She noted that as he had been referred to Later Life and Memory Services, it was likely that over time his capacity would become an issue, but that in early 2020, the overriding issue was that unless he was found to be incapacitated, he could make what would be considered '*unwise decisions*' and could refuse offers of support. She said that this would not mean that a case would formally close, but that no support would be provided at that moment in time, with the question of assessing capacity being '*an ongoing process*'.
72. She acknowledged that in many ways it was fortunate that Mrs Cunliffe was '*around*' so that concerns could be raised with the Council. However, she also stressed that Mrs Cunliffe had experience of issues of mental capacity and any issues of that nature should have been raised using the normal processes with a registered social worker who was trained and designated to make the relevant assessments as to legal capacity.
73. She was questioned by Mr Birchall about mitigating factors which would have reduced or ameliorated the misconduct of accessing the Mosaic system inappropriately. She was unequivocal that the searches made by Ms Cunliffe should never have been made. She explained that Mosaic was a national system used by a range of local authorities including third party information which could include details about people who had been abused or were abusers and sensitive personal data was therefore included within individual files. She reminded the Tribunal that the Council was bound by the provisions of the GDPR, was an appropriate guardian for adults and children within their Council area and auditing responsibility rested with senior officers, ultimately provided by the Local Government Act 1972.
74. She added that Ms Cunliffe was a trusted employee who had not simply inadvertently accessed the Mosaic system on a single occasion, but had done so on at least 12 occasions and was not just looking at the details of allocated social workers for GC, but the record of her access which was included within the hearing bundle and was available during the disciplinary process, revealed a number of enquiries regarding GC, who had capacity and who had not given permission for Mrs Cunliffe to access his records on the system. This was therefore a fundamental breach of his rights to confidentiality concerning his personal data. While Mrs Cunliffe asserted during the process that she had done no harm, it was clearly not the point because it was the breach of trust and the accessing personal data of a third party without that person's permission which was the real concern here.
75. In terms of the allegations found at the disciplinary hearing, Ms Barber did vary the decision made by Ms Stubbs. In relation to allegation (d), she decided that it was not sufficiently clear that Mr Brown had given Mrs Cunliffe a direct management

instruction, although nonetheless emphasised that Mr Brown made clear to her that if she got involved in GC's case, there would be a clear conflict of interest. She also found that allegation (f) was not proven in that although employees had a responsibility to maintain accurate records and Mrs Cunliffe had not completed time records since November 2019, her manager had knowledge of the issues she was having with her flexi sheets.

76. However, the allegations which were proven persuaded Ms Barber that overall, the appeal would not be upheld. She convincingly explained in her evidence that Mrs Cunliffe held a role where she was in a position of responsibility and she had access to:

*'personal, confidential, sensitive and high-risk information. This information can include information in relation to abuse, safeguarding proceedings and confidential Police and Court intelligence. As such there are reasons why there are tight restrictions on access to this data in order to protect people's privacy. This is evidenced by the fact that we have tracking systems in place to track follow and stop anybody accessing data that they do not have the permission to access, it is on a need-to-know basis. I felt from the evidence submitted and the claimant's experience that she was aware of the importance of safeguarding the information, however, despite this she accessed GC's records'*

At this re-hearing appeal, this evidence of Ms Barber explained perfectly why Mrs Cunliffe was dismissed.

77. Ultimately, it was clear that Mrs Cunliffe failed to show sufficient contrition about her actions and when pressed by Ms Barber to confirm whether she would repeat her actions in future, she replied, *'...if I had to I would.'* This was hardly something which would inspire confidence in an employer and taking into account the repeated acts which were subject to the disciplinary process and this equivocal reply about future possible conduct of a similar nature, it was not enough for Ms Barber to step away from upholding the decision of Ms Stubbs to dismiss Mrs Cunliffe.

### **The law**

78. Under section 98(1) of the Employment Rights Act 1996, it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position he held. A reason relating to conduct is a potentially fair reason falling within section 98(2).

79. The reason for the dismissal is the set of facts or the beliefs held by the employer which caused the employer to dismiss the employee. In determining the reason for the dismissal, the Tribunal may only take account of those facts or beliefs that were known to the employer at the time of the dismissal; see W Devis and Sons Ltd v Atkins 1977 ICR 662.

80. Under section 98(4) of the Employment Rights Act 1996, where the employer has shown the reason for the dismissal and that it is a potentially fair reason, the

determination of the question whether the dismissal was fair or unfair 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 must be determined in accordance with equity and substantial merits of the case.

81. When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in British Home Stores v Burchell 1980 ICR 303, the Tribunal must consider a threefold test:
- a. The employer must show that he believed the employee was guilty of misconduct;
  - b. The Tribunal must be satisfied that he had in his mind reasonable grounds upon which to sustain that belief; and
  - c. The Tribunal must be satisfied that at the stage at which the employer formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.
82. It is not for the Tribunal to substitute its own decision as to the reasonableness of the investigation. In Sainsburys Supermarkets v Hitt [2003] IRLR 23 the Court of Appeal ruled that the relevant question is whether the investigation fell within the range of reasonable responses that a reasonable employer might have adopted.
83. In Polkey v Dayton Services Ltd [1988] ICR 142, it was stated that if an employer could reasonably have concluded that a proper procedure would be "utterly useless" or "futile", he might be acting reasonably in ignoring it.
84. In respect of certain claims, such as unfair dismissal and breach of contract, Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 provides that where an employer or employee has unreasonably failed to comply with the Code of Practice, it may, if it considers it just and equitable in all the circumstances to do so, increase or reduce compensation awards by up to 25% (this does not apply to any Basic Award for Unfair Dismissal).
85. Section 122(2) of the Employment Rights Act 1996 provides that where the Tribunal finds that any conduct of a Claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, the Tribunal must reduce that amount accordingly.
86. Section 123(6) of the Employment Rights Act 1996 provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable.

## Discussion

87. This was an unfortunate case as it involved an employee who had been trained and equipped to behave in an appropriate way and who could reasonably have been expected to use the Council's ICT systems and access confidential

personal data in an appropriate way which was consistent with the Council's policies and procedures. Nonetheless, it is necessary to consider the relevant stages of the process identified in the list of issues above.

88. Firstly, it is not controversial that Mrs Cunliffe was dismissed on 9 November 2020 and accordingly, it is necessary to consider the usual factors when determining a conduct dismissal as described in the Law section above.

Did the respondent genuinely believe that the claimant had committed misconduct?

89. The Council asserted that Mrs Cunliffe was fairly dismissed for the potentially fair reason of conduct. Both the dismissing officer Ms Stubbs and the appeal hearing officer Ms Barber (who reheard the appeal), had a genuine belief that Mrs Cunliffe had committed misconduct and that this was the reason for her dismissal. Both of these witnesses gave credible and reliable evidence and I have no reason to disagree with the asserted reason of conduct.

Did the dismissing officer have reasonable grounds to sustain that belief?

90. This was a case which was subject to a disciplinary investigation and Ms Byrne conducted a thorough consideration of the matters under investigation. Mrs Cunliffe was interviewed by her on two separate occasions, Mike Watson who reported the incident, Dan Blackledge who was Mrs Cunliffe's line manager, Gareth Brown and Sammie Corcoran. Mr Byrne produced an investigation report which made clear that Mrs Cunliffe could only access Mosaic for genuine business reasons, she had not been allocated GC's case on a professional basis, she accepted that she accessed GC's records nonetheless on several occasions and there was a record that on 8 separate dates, the access took place. Finally, Mrs Cunliffe confirmed that this access of GC's case (which was not work related), took place during work time.

91. Mrs Cunliffe was subject to a disciplinary hearing which was provided with the outcome of the disciplinary investigation and where Ms Stubbs concluded that she abused her position and fundamentally breached confidentiality by accessing GC's confidential records on 12 occasions using the Mosaic system and despite initially finding the data relating to the social worker whom she wished to contact, she continued to access this data on numerous other occasions. Three of the four allegations related to this unauthorised access and the fourth allegation related to personal care meetings during working time without requesting authorised leave from her line manager. It was clear from both Ms Stubbs and the appeal hearing officer Ms Barber that the three 'data breach' allegations amounted to gross misconduct.

92. Both Ms Stubbs and Ms Barber had reasonable grounds to believe that this conduct amounted to gross misconduct following what was a reasonable investigation by Ms Byrne and which Mrs Cunliffe was able to fully participate in. Indeed, she was given the opportunity at both hearings to provide her own views concerning the allegations and could also provide grounds of mitigation. Ultimately however, there was no dispute that the incidents under investigation had happened as alleged and could amount to gross misconduct under the Council's policies and procedures and dismissal could take place for the potentially fair reason of conduct.

Was the reason to treat the conduct as a sufficient reason to dismiss, within the range of reasonable responses?

93. The primary argument advanced by Mrs Cunliffe was that while she accepts her failure to comply with Council policies by accessing the Mosaic system to view GC's personal data, is that the decision to dismiss her was harsh and disproportionate.
94. Mrs Cunliffe may have felt that the decision to dismiss her was harsh, but I am unable to agree with her contention that the decision to dismiss her fell outside the range of reasonable responses available to a disciplinary hearing manager.
95. Both Ms Stubbs who dismissed her and Ms Barber who heard the appeal felt that the conduct which had taken place was so serious as to undermine the trust and confidence between the Council and Mrs Cunliffe. They did confirm that her previously clean disciplinary record, long service and mitigation evidence was taken into account and that while these matters were relevant, dismissal remained an appropriate sanction. This was because of her seniority, her awareness of policies, the multiple breaches which took place accessing GC's confidential records and there was a clear conflict of interest in view of the connections that she had with GC.
96. I also heard during the hearing that had Mrs Cunliffe not been dismissed and permitted to remain in her post, she would have continued to require access to the Mosaic system as part of her role and she could not be trusted to access the system unsupervised. Importantly, Ms Stubbs noted that while Mrs Cunliffe accepted that she had accessed the Mosaic system to access unauthorised personal data, she did not seem to appreciate the severity of the data breaches and their consequences for the Council. Indeed, when asked by Ms Barber directly at the appeal hearing whether she would repeat her unauthorised access of GC's records in future, she was equivocal and was recorded as saying '*...if I had to I would*'. Given that Mrs Cunliffe had a connection with GC, and he would remain a vulnerable service user, there was a clear risk that she would put her misplaced sense of obligation to him over and above her clear duties to the Council as an employee with access to systems containing confidential personal data.
97. Simply put, Mrs Cunliffe had committed serious and repeated access to confidential personal data on a system which she had been properly trained and where she was under no illusions of what she could and could not do and the consequences of doing so, not only for her, but also for the Council, her colleagues and vulnerable service users.
98. The dismissal was a decision which was within the range of reasonable responses.

Was a fair process followed?

99. The Council was a large employer and had access to a HR team, Legal Services and considerable policies and procedures. Managers were expected to be trained in how to manage disciplinary investigations, hearings and appeals. I was satisfied that this was the case and that the 3 witnesses involved in the process handled the case in a proportionate way.



100. Mrs Cunliffe was made aware of the allegations made against her, was interviewed on two occasions by Ms Byrne and had access to relevant documents produced and could rely upon the support of union advisors if she wanted. She was provided with the necessary paperwork for the disciplinary hearing and appeal and was able to fully participate in the hearings and provide arguments of mitigation.

101. I was satisfied that this was a case where a fair process was followed and did not hear evidence which persuaded me that the Council's managers had predetermined their decision in the case or failed to listen to the arguments advanced by Mrs Cunliffe.

Questions of Polkey, contributory fault and failure to comply with the ACAS Code of Practice

102. In light of my previous findings, I find that the disciplinary process was procedurally fair and there is no need to consider Polkey, contributory fault or a failure to comply with the ACAS Code which might justify an uplift to any compensatory award.

103. Even if there had been procedural failures, the correction of these errors would have still resulted in a dismissal and contributory fault would have been significant. This was not a case where the Council as the employer behaved inappropriately and the dismissal arose from conduct which quite properly could be considered as gross misconduct under its policies and procedures. A full investigation, disciplinary hearing and appeal hearing took place in an appropriate and fair way which was consistent with what is expected by the relevant ACAS Code of Practice dealing with disciplinary action and grievances.

**Conclusion**

104. For the reasons given above, I must therefore conclude that the claimant's complaint of unfair dismissal is not well founded, which means that the respondent dismissed her fairly by reason of her conduct.

---

Employment Judge Johnson

Date 17 October 2022

JUDGMENT SENT TO THE PARTIES ON  
21 October 2022

FOR THE TRIBUNAL OFFICE