EMPLOYMENT TRIBUNALS

Claimant: **Miss Ilona Gustaltiene**

Respondent: **Metroline Travel Ltd.**

Heard at: **Watford (by CVP)** **On:** **13-14 October 2022**

Before: Employment Judge Le Grys

Appearances
For the Claimant: In person
For the Respondent: Ms. C. Nicolau (solicitor)

JUDGMENT having been given to the parties on **14 October 2022** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant was employed by the Respondent as a bus driver until her dismissal without notice on 19 May 2021. By way of a claim form of 3 September 2021 the Claimant asserts that her dismissal was unfair within section 98 of the Employment Rights Act 1996.

2. The Respondent contests the claim. It says that the Claimant was fairly dismissed for misconduct in the form of exaggerating symptoms of sickness, and falsely claiming company sick pay as a result. It asserts that it was entitled to terminate her employment without notice on the ground of gross misconduct.

3. The Claimant represented herself in these proceedings and gave sworn evidence. The Respondent was represented by Ms Nicolau, who called sworn evidence from Justine May, Operations Manager, and James Wright, Garage Manager. I considered the documents in a 171 page bundle which the parties introduced in evidence.

Preliminary matters

4. The Claimant was accompanied on the first day by her daughter-in-law and Ms Thwaite from the Citizen's Advice Bureau. Neither was representing the

Claimant but were there to support her. Ms Thwaite raised a concern that English was the Claimant's third language. I discussed with the Claimant whether she required an interpreter and she said that she did not. She stated that she fully understood what was being said and had her daughter-in-law there to help if she had any difficulty. I was satisfied from this discussion that the Claimant had a good understanding of English. I highlighted that the language used in legal proceedings could be more difficult to understand that ordinary spoken English and asked the Claimant to notify me at once should there be anything that she did not understand. I continued to monitor this throughout the hearing. I was satisfied that the Claimant followed the proceedings and she sought assistance from her daughter-in-law on a small number of occasions, all of which related to how to correctly pronounce a word. The Claimant was unaccompanied on the second day but confirmed that she remained happy to proceed. I was satisfied that the hearing was a fair one.

5. As a further preliminary matter, I noted that the Respondent had stated in their response form that the correct Respondent was Metroline Travel Ltd, the Claimant having given the name 'Darren Hill' in her claim form. I asked whether this had been formally amended, and if not whether there was any objection to it being done now. The Respondent believed that the name had been amended but was unable to say when, and both parties were in agreement that the amendment should be made. As such, and for the avoidance of any doubt, the name of the Respondent was amended to Metroline Travel Ltd, if this amendment had not already been made.

Issues for the Tribunal to Decide

6. Having dealt with these preliminary matters, I agreed with the parties the issues to decide. These were noted as follows:

(a) What was the reason for dismissal? The Respondent asserted that it was a reason related to conduct. The Claimant asserted that the conduct identified by the Respondent was not the real reason for the dismissal.

(b) 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 Claimant stated that the dismissal was unfair because the Respondent had not conducted a reasonable investigation, having failed to obtain any medical evidence to support its conclusion that she was exaggerating her symptoms.

(c) Did the Respondent adopt a fair procedure? The Claimant asserted that a fair procedure was not adopted because the Respondent engaged in a highly intrusive surveillance exercise without reasonable grounds, and that the Respondent unjustifiably interfered with convention rights (Article 8). The Claimant also asserted that the Respondent failed to notify her of the nature and purpose of a meeting when it began, and also failed to provide her with a copy of the surveillance instruction, in breach of their own guidelines.

(d) 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? The Claimant asserted that there were obvious and readily available alternative options for the Respondent falling short of dismissal.

(e) 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?

(f) If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct?

The Facts

7. The relevant facts are as follows. The Claimant was employed as a bus driver. The nature of this work required her to sit for periods of time without a break. She started on 2 April 2007, initially in a full time role, but in September 2012 this changed to two days a week. In 2014 she signed a part time worker declaration, confirming that this was her only paid employment.

8. The Claimant was a competent employee, with no performance issues other than advice and guidance for minor driving matters. She did, however, have a poor attendance record; the records show 18 days sickness absence, 1 day unauthorised absence and 1 day non-completed duty in 2017; 5 days sickness and 4 days unauthorised absence in 2018; 11 days sickness and 3 days unauthorised absence in 2019; and 20 days sickness and one day unauthorised absence in 2020. These figures are in the context of the Claimant's two day working week, and so amounted to as much as 1 in 5 days absence in some years. No management action was ever taken, however, in respect of her attendance.

9. On 2 March 2021 the Claimant notified the Respondent that she would be absent because she had *"really bad back pain"*. The following day she said that she would not be returning as her back was still bad and she would be speaking to her GP.

10. A fit note was provided by the GP, dated 4 March 2021. It is common ground that all medical appointments in this case, including this one, were undertaken by telephone. The fit note stated that the Claimant was unfit for work from 1 March 2021 until 21 March 2021 due to *"low back pain".*

11. On 18 March 2021 the Claimant had a telephone review meeting with her manager, Mr Stuart McManus. She reported that she was still feeling back pain, and was taking medication for a soft tissue injury. She said that she had a further GP appointment on 20 March 2021, and that her doctor had recommended physiotherapy and that she was not ready to return to work.

12. A referral to Occupational Health ("OH") was made the same day. A second fit note was then provided by the GP which stated that the Claimant remained unfit for work from 22 March 2021 until 11 April 2021.

13. The Claimant attended her telephone appointment with OH on 8 April 2021. A fitness status certificate was produced on the same date stating that she remained unfit for work. The subsequent OH report, dated 14 April 2021, noted that the Claimant had reported lower back pain. She had reported that her symptoms had improved since her absence and that she was planning to return to work on 20 April 2021. She still experienced discomfort and pain in her lower back, particularly when she was required to sit for prolonged periods. She struggled to undertake her daily tasks at home but could manage slowly at her own pace. She reported that she had been *"struggling with all aspects of her daily activities, particularly sitting for prolonged periods of time".*

14. Around this time – the document is undated – Mr McManus sent a request for surveillance to the Respondent's Area Operations Director. The purpose recorded was *"to confirm exaggeration of sickness and possibility of working elsewhere whilst sick".* The information sought was "*physical capability to sit, stand or walk for periods of time or carry heavy items. Believed to be working as a hairdresser".*

15. On 12 April 2021 Mr McManus had another phone conversation with the Claimant. She told him that she was getting better. She stated that she had not driven her car since she had been off. She had been signed off by her GP until 11 May 2021 and was carrying out daily exercises. A third fit note from her GP confirms these dates, again stating that she was not fit for work due to lower back pain.

16. On 16 April 2021 the Claimant was observed through covert surveillance to leave her property at 13:40 with her daughter. She entered her car and drove away. At 15:36 she returned alone. She removed several 'laden' shopping bags. She carried the bags inside. At 18:44 she was again seen to drive away in her vehicle, returning at 19:32 with her daughter.

17. On 17 April 2021 the Claimant was seen to leave her property at 10:48 and walk towards her vehicle. At 12:00 she returned carrying two shopping bags.

18. On 19 April 2021 the Claimant left her property at 08:20 and entered her car. She was wearing high heeled boots. She drove and parked near a primary school in Barnet at 08:51, getting out of the car at 08:54 and going into the school with her daughter. She returned alone at 08:59 and drove back to her home, going back inside at 09:13.

19. On 26 April 2021 the Claimant left her property at 08:12 and got into her car. She was wearing trainer style shoes with a high heel. She again drove to Barnet and parked at 08:31, getting out of the car at 08:43. She walked with her daughter and another woman towards a primary school and was standing outside at 08:51. At 09:05 she walked back to her car and drove home, where she arrived at 09:22. At 13:32 she again drove from her home address to the school. She parked there and walked to the rear entrance. At 14:06 she walked back to her car, now with her daughter, and drove home. She parked at 14:22 and entered her house.

20. It was said that the Claimant did not appear to be in any discomfort, or have any difficulty in moving, in any of the surveillance footage.

21. On 6 May 2021 Mr McManus held a further sickness review meeting with the Claimant. He did not initially disclose the fact of the surveillance, or the contents of the report. The Claimant reported that she had been resting at home and had recently started taking her daughter to school. She stated that she had not been driving, but did start driving again after Easter. She was not doing shopping. She was trying not to move quickly and the pain was worst when sitting. She was trying not to lift anything but could manage her handbag. She would be fit to return to work on 13 May 2021. She further reported that her father had died on 31 March 2021 and she probably would have been unable to work in any event.

22. Mr McManus then presented the Claimant with the surveillance evidence. When this was disclosed the Claimant accepted that she did go shopping. Mr McManus advised her that an investigation meeting would take place on 13 May 2021. This was followed by a letter of the same date, which advised her of the decision to commence an investigation and of her rights in that meeting, for example to be accompanied.

23. When cross examined the Claimant suggested that the notes of this meeting may not be accurate. This was the first time that such a point had been raised. As the notes were made contemporaneously, and their accuracy had not previously been challenged during the internal disciplinary procedure or the Tribunal proceedings until this point, I do accept them as an accurate record.

24. On 13 May 2021 the Claimant attended the investigation meeting with Mr McManus. She told him that the pain was about 8 out of 10 at the beginning, but she had noticed an improvement *"maybe the end of March".* She said that she stopped using the prescribed medication and just used paracetamol and gel. She stated that the *"pain was still there, it was not really painful but it was like a toothache and it was just there".* She had not told OH about her father dying, and accepted that the OH report stated that she was struggling with all daily activities at home. She said that she had not returned to work because the company doctor had said she was not ready to. She had started driving *"definitely after 3 weeks or so"* after reporting sick. When asked why she had told Mr McManus on 12 April that she had not driven her car since she had been off she replied that she thought *"it just happened once"*. She thought she had started taking her daughter to school again after the school holidays, perhaps the 19 April. She had taken her daughter to a play date on 16 April and then went shopping. She did not accept that the bags shown on 16 April were heavy, and said she had been to M&S. On the 17 April she had been to Tesco. She stated that her shoes did not interfere with her back ache.

25. After a short break the Claimant was informed that Mr McManus was forwarding the matter for a formal disciplinary hearing. The allegations were listed as (1) providing false and exaggerated information in relation to a medical condition between 2 March 2021 and 1 May 2021, and (2) falsely claiming company sick pay between 2 March 2021 and 1 May 2021. This was again followed in writing, with the Claimant advised of her rights.

26. After the meeting the Claimant emailed amendments to the notes in which she stated that she could not drive for the first three weeks but used her car from the middle of April for short journeys on the advice of OH.

27. The disciplinary meeting was held by Justine May, an Operations Manager, on 18 May 2021. The Claimant was accompanied by a union representative. She stated that she felt her answers were misrepresented and taken out of context. She confirmed that she did not require an interpreter. She told Ms May that her back had been really bad for about 3-4 weeks. She denied that her father passing away had been one of the reasons why she did not return to work. She accepted that she had told the company doctor that she was struggling with her daily activities. She said that she had told the doctor that she had improved and had answered how it was on the day. She had started driving again on 14 April. She disputed that the surveillance evidence showed anything about her sitting for long periods or doing anything strenuous. She stated that the shopping was light. She stated that the discomfort was still there at the time of the surveillance but it was not painful. She did not believe that she was fit to return to work at the time the surveillance was taken and that sitting for three hours would have been uncomfortable. She was just following the doctor's recommendation.

28. The panel reconvened the following morning when Ms May informed the Claimant of the decision to dismiss. Ms May accepted that the Claimant may have suffered from slight back pain at the time of the original sick report but did not accept that she was in the pain and discomfort alleged for the period of time she was off sick. She described inconsistencies between what she said in her meeting on 6 May 2021 and the surveillance taken three weeks before. The Respondent did not believe that the footage was consistent with taking things slowly and felt that it showed her away from her home for quite long periods of time as well as carrying multiple bags of shopping. She accepted that the Claimant had taken the advice of the company doctor but noted that this was given on the basis of the information supplied by the Claimant. She felt that the death of the Claimant's might have had a detrimental effect and asked herself whether it was a coincidence that the time off was when her partner was on furlough, that it was the Claimant's 50th birthday, and her child was off school. She concluded that the Claimant had exaggerated her medical condition and falsely claimed sick pay, and that this amounted to gross misconduct. Her decision was summary dismissal. This was confirmed in a letter of the same day, which also outlined the right of appeal.

29. On 24 May 2021 Claimant notified her intention to appeal. She stated that the instruction form in relation to the surveillance had not been made available to her before the meeting, in breach of the company's surveillance policy. In a letter of 11 June 2021 she was invited to an appeal meeting, which again informed her of her right to be accompanied.

30. The meeting was held on 17 June 2021 by James Wright, a Garage Manager, along with Mr Webley, another garage manager. The Claimant was accompanied by a union representative. She did not accept that what she had told the OH doctor did not represent how she was, but agreed that the footage did not show her suffering from any physical difficulty or

immobility. The appeal panel concluded that the Claimant would not have been able to carry out the activities seen on surveillance without discomfort or difficulty if her pain had been as bad as she had reported to her manager or OH. They concluded that she had exaggerated her symptoms and was far fitter than she had made out. They also concluded that there was no evidence that the surveillance instruction had been withheld from the Claimant, or that she had previously requested a copy. They sent her a copy following the meeting but felt that it would have made no difference to the outcome. They were satisfied that Ms May had not insinuated that the Claimant was off work because of her father, but was trying to establish if there were any other factors that might her influenced her absence. They were satisfied that summary dismissal was appropriate in the circumstances.

31. The Respondent agreed that they had not sought any medical opinion in respect of the surveillance, although Mr Wright accepted in his evidence to the Tribunal that it would have been possible to do so. In the Respondent's view this was unnecessary because the question was one of conduct rather than capability.

Relevant law and conclusions

32. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that she was dismissed by the Respondent under section 95, but in this case the Respondent admits that it dismissed the Claimant (within section 95(1)(a) of the 1996 Act) on 19 May 2021.

33. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the Respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason.

34. It is the Respondent's case that it dismissed the Claimant because it believed she was guilty of misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2). The Claimant asserts that the reason given was not the true reason, and the Respondent instead suspected that she was working elsewhere as a hairdresser.

35. The burden of proof on employers at this stage is not a heavy one. The employer does not have to prove that the reason actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness. The statute only refers to a reason which 'relates to' conduct, and it is sufficient that the employer genuinely believed on reasonable grounds that the employee was guilty of misconduct. The employer does not have to prove the offence.

36. I am satisfied that the Respondent has shown that the reason for dismissal related to conduct. While it is correct to say that the original surveillance request referred to a suspicion that the Claimant was working as a hairdresser, the essence of an investigation is to find evidence that either proves or disproves a suspicion. The fact, therefore, that an investigation does not uncover evidence to support the earlier belief does not automatically mean that the investigator was unreasonable in calling for that investigation. While the Claimant asserts that this suspicion continued to operate on the Respondent's mind at the time of the dismissal there is no evidence to support this; it is not referred to by the Respondent again, and does not appear in the reasons given. These instead refer to charges of providing false and exaggerated information in relation to a medical condition, and falsely claiming sick pay. These are matters that relate to the Claimant's conduct and I am therefore satisfied that the Respondent has discharged this burden.

37. Having established the reason for the dismissal, section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.

38. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in **Burchell** 1978 IRLR 379 and **Post Office v Foley** 2000 IRLR 827. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited v Jones** 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and **London Ambulance Service NHS Trust v Small** 2009 IRLR 563).

39. Both parties provided me with written and oral submissions on fairness within section 98(4) which I have considered in reaching my conclusions.

40. I find that the Respondent held a genuine belief that the Claimant was guilty of misconduct. Ms May and Mr Wright's evidence was clear about the reasons why they dismissed; the dismissal and appeal letters were unequivocal; and the Claimant did not dispute that she had undertaken the activities that could be seen in the surveillance, instead disputing the interpretation of what this meant. I am therefore satisfied that the Respondent genuinely believed that the Claimant had exaggerated her symptoms of sickness, and that this therefore amounted to misconduct.

41. The Claimant contends that the Respondent did not carry out a reasonable investigation before reaching this conclusion. She states that the Respondent should have obtained medical advice as to whether the surveillance footage was inconsistent with what she had reported, and states that the Respondent substituted its own lay opinions for that of medical professionals.

42. I am asked in this respect to consider the decision in the case of **Pacey v Caterpillar Logistics Services (UK) Ltd** (3501719/10). This is a first instance decision and I am therefore not bound by it, and given that no two set of facts are identical I do not derive any real assistance from it. I note key differences such as the Tribunal in that case hearing no evidence from the dismissing manager, and that there had also been no investigation in that case before the disciplinary hearing.

43. The position of the Respondent in respect of a medical report is that the matter related to conduct rather than capability, and a report would therefore have done no more than confirm what they already knew. The Claimant had informed OH that her back pain was affecting every aspect of her daily life. Had she said at the meeting on 6 May 2021 that this had improved the outcome may have been different, but instead she maintained that she was still resting at home, not shopping, and trying not to lift anything. The Respondent contends that it was therefore within the band of reasonable responses to conclude that the Claimant had exaggerated her symptoms. In support of this conclusion I was referred to the case of **Metroline West Ltd v Ajaj** UKEAT/0295/15/RN, which I have considered.

44. Applying **Metroline West**, the question for me is not to ask how the Claimant represented or mispresented her ability; it is whether there were grounds on which a reasonable employer could hold the belief that the Claimant had misrepresented her ability. I note that she had specifically stated that she was not shopping but then accepted she was; this was something that she also accepted in her evidence to the Tribunal, seeking to make a distinction between different types of shopping. Such a distinction had not been made in the meeting of 6 May 2021, however, when she had told Mr McManus that she was not shopping at all. She had also stated that she was trying to lift no more than her handbag when the surveillance showed her carrying several bags of shopping. She appeared to be moving normally, something she accepted in her appeal meeting, having previously said that she was taking things easy and trying not to move quickly.

45. The Claimant had also accepted in the investigation meeting of 13 May 2021 that the back pain had in fact improved by the end of March, and was *"not really painful but it was like a toothache and it was just there".* This is fundamentally different to what was said to OH, over a week after the end of March, that she could manage slowly, and was "*struggling with all aspects of her daily activities".* There was therefore an apparent contradiction between what she told OH, who concluded as a result that she could not even return for light duties (which may not have involved sitting for lengthy periods), and how she later described her condition.

46. As such, the Respondent had reasonable grounds to conclude that the Claimant had exaggerated her symptoms. The matter therefore related to her conduct, and the question was not how long the Claimant might actually have been able to walk or sit, or even whether surveillance footage showed activities that meant that she could have returned to work; it was whether the employer had reasonable grounds to believe that she had misrepresented the extent of her illness. I further note that the Respondent provided the surveillance report to the Claimant in advance of the disciplinary meetings, and so had furnished her with the material required to challenge their conclusions. In the circumstances it was within the range of reasonable responses for the Respondent to conclude that a further medical report would take the matter no further.

47. I therefore turn to the fairness of the procedure. In relation to surveillance, section 3 Human Rights Act 1998 imposes a duty on the Tribunal to interpret legislation in a way that is compatible with convention rights so far as possible. Given that the activity involved the Claimant and, by association, members of her family being watched and followed as they went against their daily business, I am satisfied that Article 8 is engaged insomuch as there was an interference in the Claimant's private life.

48. I take note of the guidance published by the Information Commissioner's Office (ICO) that it will be rare for covert monitoring of employees to be justified, and that it should only be done in exceptional circumstances, as part of a specific investigation into suspected criminal activity (part 3.4 of the ICO's "Employment Practices Data Protection Code").

49. I am, however, satisfied that the infringement was no more than reasonable in the circumstances. The Respondent had in place a full policy for its use which imposed a number of safeguards, including that the circumstances be exceptional, with an example given being strikingly similar to the facts of this case – an employee suspected to be committing fraud by continuing to receive sick pay, or that they had a second job. The policy further stated that there should be no alternative practical way of obtaining the same information, and efforts should be made not to record images of anyone other than the subject. Should a manager cause surveillance without reasonable suspicion they themselves would be liable to disciplinary action. Ms May told the Tribunal that surveillance was by no means a routine procedure, and that she herself had only requested it on two occasions in ten years.

50. I am satisfied that the suspicions in this case fell within the exceptional circumstances outlined in the policy, with the request stating that it was in relation to suspicions of exaggerated sickness and the possibility of working elsewhere. In relation to exaggerated sickness, this is self-evidentially potentially criminal activity as a fraudulent claim for sick pay. In relation to working elsewhere, Ms May explained that the Respondent has certain legal duties relating to working time and driving hours, which they cannot properly monitor if someone has another job. The Claimant had signed an agreement in 2014 that this was her only work for this reason. As such, whether the Claimant had another job was a potential matter of public safety relating to working hours.

51. I am further satisfied that the surveillance was for no longer than was necessary, capturing only a few hours on four days. Furthermore, it was entirely limited to public locations, in other words a place where the Claimant would have a reasonable expectation that she would be seen. There was no alternative practical way of obtaining the same information, as by making the Claimant aware of the process there was an inevitable risk that she would moderate her behaviour. Taking all of this into account I am satisfied that this was a proportionate interference in respect of a legitimate aim.

52. Finally, I note that the Tribunal's competence to consider Article 8 is limited to the Article's interaction with employment rights within the Tribunal's jurisdiction, and it is only where a breach of that Article is relevant to the dismissal that it is likely to be held unreasonable. Whether the employer's behaviour in this case was disproportionate does not impact on the employer's reasonableness in forming a view, upon the material available, that the Claimant was guilty. It is unlikely that an investigation will ever be held unreasonable because it is too thorough (**City and County of Swansea v Gayle** 2013 IRLR 768).

53. In relation to the interview on 6 May 2021, this was a sickness review meeting and the evidence does not show that a decision to formally investigate had been made at this stage. There was therefore not a requirement to formally warn the Claimant that she was under investigation before the meeting began. Once a decision to investigate had been made the Claimant was notified in writing of all of her rights, including of the right to be accompanied. She was given the opportunity to appeal the decision, which was heard by a separate panel. I am satisfied that this aspect of the procedure was fair.

54. It is accepted that the Respondent did not provide the Claimant with a copy of the surveillance instruction before the review meetings. Mr Wright was not sure why this was, but did arrange for it to be provided after the meeting. It was suggested to me by the Respondent that the policy does not strictly require the instruction to be provided before the meeting as long as it is provided at some point; while I accept that this would be a literal interpretation of the words, in my view the clear inference to be drawn, given the sentence its ordinary English meaning, is that it should be done before the meeting. In my view there was, therefore, a breach of the surveillance policy in this respect.

55. While the Claimant highlights the fact of the breach, however, it is not suggested anywhere in submissions that this had any bearing on the manner in which she presented her case to the Respondent, or that its inclusion would have otherwise have altered the outcome. I do not find, therefore, that the breach had any material impact on the fairness of the procedure or the conclusions reached.

56. For all of these reasons I am satisfied that the procedure adopted by the Respondent was a fair one.

57. I turn therefore to the question of whether the decision to dismiss was a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts? It is accepted that, other

than her attendance record, the Claimant was a good employee with 14 years service. Having said this, however, the Respondent had a genuine belief on reasonable grounds that she had exaggerated her symptoms and falsely claimed sick pay. This is effectively a finding that the Claimant had engaged in fraudulent conduct. I am satisfied that it was therefore within the band of reasonable responses for the Respondent to categorise it as gross misconduct. The disciplinary policy states that for a single offence regarded as gross misconduct an employee may be dismissed without notice. I am therefore further satisfied that the decision was within the band of reasonable responses.

58. For all of these reasons I do not find that the Claimant was unfairly dismissed and the claim does not succeed.

Employment Judge Le Grys

Date: 7 November 2022

Sent to the parties on
18 November 2022

For the Employment Tribunal