EMPLOYMENT TRIBUNALS

Claimant: **Mrs D Morris**

Respondent: **The Partners (as listed in the appendix) t/a Shelley Manor and Holdenhurst Medical Centre**

Heard at: **Southampton (CVP)** **On: Monday 14 and Tuesday 15 November 2022**

Before: **Employment Judge A Matthews**

Representation:
Claimant: **Mr R Jones - Solicitor**

Respondent: **Mr A Williams - Consultant**

RESERVED JUDGMENT

1. Mrs Morris's claim that she was unfairly dismissed by the Respondent because she made a protected disclosure or disclosures is dismissed.

2. Mrs Morris's claim that she was unfairly dismissed is dismissed.

3. Mrs Morris's claim that she was wrongfully dismissed is dismissed.

4. Mrs Morris's claims for wages of £62.38 and £2,050.68 are withdrawn by consent.

5. By consent, the Respondent is ordered to pay Mrs Morris £2,050.68. Any amount which the Respondent lawfully deducts from the above amount by way of income tax, national insurance contributions or otherwise shall be treated to that extent as in payment of the above order. In the absence of evidence to substantiate the lawfulness and amount of such a deduction (such as a payslip) the gross amount shall be due under this Judgment to Mrs Morris.

REASONS

INTRODUCTION

1. Mrs Debra Morris says that she was unfairly dismissed as a result of making a protected disclosure or disclosures by reference to section 103A of the Employment Rights Act 1996 (the "ERA"). The alleged protected disclosures are recorded in the chronological findings of fact below. In the alternative, Mrs Morris says that she was unfairly dismissed by reference to sections 94 and 98 of the ERA. Mrs Morris also says that she was wrongfully dismissed (a claim for notice pay).

2. Mrs Morris made two other claims. First, for £2,050.68 in respect of untaken time off in lieu of pay for overtime worked (commonly referred to as "TOIL"). Second, for wages of £62.38. These two claims are dealt with above by consent.

3. The Respondent Practice admits that Mrs Morris was dismissed but says that the reason for the dismissal was not any protected disclosure or disclosures which may be found to have been made. Rather, the Practice says Mrs Morris was fairly dismissed for gross misconduct.

4. The Tribunal heard evidence from Mrs Morris supported by a written statement. Mrs Morris called three witnesses to support her. They were Ms Judith Young (Practice Manager at the Talbot Medical Centre in Bournemouth), Ms Carole Cusack (currently an independent primary care consultant to GP practices on the Isle of Wight) and Dr Richard Holmes (a partner at the Talbot Medical Centre). Each produced a written statement.

5. On behalf of the Practice, Doctors Susan Walker-Date, Rayhaneh Zahedi, Ashley Savage and Andrew Blaszczyk (all being Partners or former Partners in the Practice) gave evidence supported by written statements.

6. There was an agreed 743 page electronic bundle of documentation. This was considerably in excess of the tribunal order confining the bundle to 472 pages. The excess proved to be unnecessary and included considerable duplication. The parties' respective representatives should take note that these limits are not set arbitrarily, there is good reason for them and they should be adhered to. References in this Judgment to pages are to pages in the bundle unless otherwise specified. References to Mrs Morris's statement include the page number, as the paragraph numbering appears to have gone awry.

7. Mr Jones produced written argument.

8. The case came before Employment Judge Gray on 7 July 2022 and Case Management Orders were made and sent to the parties on 19 July 2022. The Tribunal has referred to those orders, which are not in the bundle.

9. The Hearing was set down for six days. In the event, with the co-operation of the representatives, it was possible to hear the evidence and argument in under two days. Judgment was reserved to allow proper deliberation and it was agreed that it would be given with Reasons because Mr Jones indicated that Mrs Morris would probably want them, whatever the outcome. It was also agreed that this Judgment would address liability only, with dates to be offered for a one day remedy hearing, if appropriate.

10. The material facts are well documented and tolerably clear. The disputes are over the interpretation that should be put on them. The Tribunal's findings of fact are on the balance of probability taking account of the evidence as a whole. There are some other applicable burden of proof rules and these are explained below.

11. As far as the evidence is concerned, the Tribunal records a concern it had with the written statements produced by Doctors Walker-Date and Blaszczyk. Much of what appears in Doctor Walker-Date's statement from paragraph 61 onwards and in Doctor Blaszczyk's statement from paragraph 57 onwards is obviously legal pleading rather than testimony. No doubt their adviser is at fault in this. Fortunately for the Practice, the Tribunal saw no credibility issue with the balance of their statements or with their verbal evidence.

FACTS

12. Mrs Morris started work as the Practice Business Manager ("PBM") for the Holdenhurst Road Surgery in Bournemouth on 13 April 2004. That surgery merged with the Shelley Manor Medical Centre, also in Bournemouth, on 2 October 2016 to become the Practice. Mrs Morris became the PBM for the Practice and remained in that post until she was summarily dismissed for gross misconduct on 24 December 2020.

13. The Practice had ten partners, around fifty employees and a little over 25,000 registered patients across its two surgeries.

14. Mrs Morris's evidence is that a number of the Practice's partners, Doctors Blaszczyk, Walker-Date and Savage, (all from the former Shelley Manor Medical Centre as opposed to the Holdenhurst Road Surgery, from where Mrs Morris had come) seemed unhappy with

Mrs Morris' appointment as PBM (WS 19-20, pages 3-4). Apart from that evidence from Mrs Morris, the Tribunal has seen nothing that supports that view. There is evidence that these Doctors (particularly Doctors Savage and Blaszczyk) took a dim view of the issue with which this case is concerned, but that is another matter.

15. A merger of this sort might be expected to increase the workload on a PBM and their team and there is plenty of evidence that Mrs Morris felt the pressure of an increased workload (see, for example, 262). Whether Mrs Morris's feeling was justified or not, it undoubtedly made a significant contribution to what followed. It is not for determination by the Tribunal, but it may be that the Practice had unrealistic expectations of Mrs Morris and its support operations were understaffed. If that was so, the effects of the onset of COVID-19 may have exacerbated the problem. Mrs Morris's views on the subject can be seen in her personal statement for the disciplinary hearing (343-345).

16. The job of a PBM in a GPs' practice is generally understood to be wide ranging and demanding in terms of skills and scope. As in Mrs Morris's case, there is usually a great deal of autonomy. It is a relationship built on trust. Whilst not strictly a fiduciary relationship in the legal sense of the word, high standards of openness and honesty are expected.

17. Mrs Morris's contract of employment is at 75-81 with an addendum at 195. Mrs Morris's contracted working hours were 37.5 per week. It is not in dispute that, at all relevant times, these were usually worked Monday to Thursday with Friday off.

18. The contract included *"There is no provision for overtime payments or time off in lieu unless this has been specifically authorised in writing in advance."* The Tribunal notes that the wording does not specify that it must be the employer that authorises overtime payments in advance. The Tribunal will return to this below.

19. PBMs will handle demands on their time in different ways. In Mrs Morris's case, this appears to have involved overtime. Since paid overtime was almost never authorised by the Practice for its PBM, it seems to have been the accepted practice that Mrs Morris took TOIL without prior authorisation. This was so, notwithstanding the contractual requirement for prior authorisation of both overtime and time off in lieu. It appears that this arrangement contributed to the overtime issue which has now come before the Tribunal. Mrs Morris seems to have been in a position where she felt she had to work overtime but, in effect, could not exceed her contracted hours. This problem may have become worse with the onset of COVID-19. It

seems that there were discussions on the subject of overtime with the Practice (see Walker-Date WS 25 referring to discussions in 2019). However, the Practice's response was that they did not want Mrs Morris to work more than her contractual hours.

20. In June 2018 an occasion arose when Mrs Morris asked the Practice for approval for overtime and it was granted (196). This is instructive of how authorisation for overtime was understood by Mrs Morris. Mrs Morris's email includes:

> *"For openness and clarity, I have put an overtime log on the Partners drive under staff and DM where I will log all the hours worked and will not exceed 15 hours on any week. I am grateful for the agreement that this overtime can be paid at time and a quarter."*

21. In March 2020 the UK Government established a COVID-19 support fund ("CSF") to be administered by local Clinical Commissioning Groups to provide extra funding to GP practices to cover additional costs they might incur in relation to COVID-19. The Dorset Clinical Commissioning Group (the "CCG") sent out guidelines for this funding (185-194). Claims were to be made in a specified format and, where possible, supported by appropriate paperwork such as pay slips. The first claim was to be for additional cost up to and including 31 March 2020. Different components of the scheme ran for different periods. The scheme was deliberately light touch and flexible, although it included a post-payment spot verification process to check that payments had been made appropriately.

22. It is not in dispute that claims could be made for additional staff cost attributable to COVID-19, including overtime. Where a claim was for reimbursement for practice staff members' costs, it was to be at *"current rates of pay only under their contractual arrangements"* (192).

23. As the PBM, it fell to Mrs Morris to make any appropriate claims on the CSF. As far as staff costs were concerned, Mrs Morris was assisted by her subordinate, the Operations/HR Manager, who logged all overtime payments to staff. So, in the case of any application for overtime to be paid to Mrs Morris, the Operations/HR Manager would log the hours but Mrs Morris would make and have responsibility for the claim on behalf of the Practice.

24. During the period March to October 2020 Mrs Morris submitted around seven claims to the CSF on behalf of the Practice. The first of these is at 198-199. Looking at this, there is mention of some staff costs being recovered at the rate of 1.25 times salary. Against the

£1,973.48 of additional staffing costs claimed, the form records the hours against the headings *"Admin", "Operational"* and *"Management"* and then continues (which formula was used in succeeding claims):

> *"To protect the rights and confidentiality of individual staff, a full audit trail of names, work undertaken, hrs worked, pay rates applied etc has been retained at the practice. Please discuss should there be genuine reason to dispute this."*

25. As a result, an inspection of a claim form would not, on its face, show who had been paid what. Whilst the Tribunal does not suggest there was anything improper in this, it does not think this is entirely coincidental to its findings below.

26. The CCG seems to have been content to accept the claims for staff costs based on Mrs Morris's confirmation, that they were additional costs in-line with the criteria (see 217, for example).

27. Within the claims for additional staff costs made on the CSF in this way, was a considerable amount of overtime for Mrs Morris. By the end of September 2020 this amounted to some 428 hours claimed at a rate of 1.25 times salary and totalling £15,900 (Walker-Date WS 41). This represented 36% of the total of staff overtime costs Mrs Morris claimed in the period (62% if the exceptional position over the Easter Bank Holiday is excluded) (Walker-Date WS 43). The figure of £15,900 differs from those later relied on during the investigation and the disciplinary hearing, but the difference is not material in context. The figures in Doctor Walker-Date's statement were not challenged by Mrs Morris.

28. Whilst the reasonable belief of the Practice about what was going on is the test for the "ordinary" unfair dismissal claim in the case, the Tribunal is required to make a finding of fact on the obvious question arising, because Mrs Morris is making a claim for wrongful dismissal.

29. The question is, why did Mrs Morris make the claims for overtime payable to herself when her contract of employment included the provision set out in paragraph 18 above requiring prior authorisation? In essence this was *"There is no provision for overtime payments" …. "unless this has been specifically authorised in writing in advance."*

30. The issues here are of mixed fact and the construction of the contract.

31. Mrs Morris does not say that she had forgotten about the content of her contract of employment on the subject of overtime when she made the claims. To the contrary, paragraph 57 (page 9) of Mrs Morris's statement indicates that she proceeded on the basis that

prior authorisation for overtime was ordinarily required (albeit this was at a later date). This, of course, accords with how Mrs Morris had acted in 2018 (see paragraph 20 above).

32. What Mrs Morris says about the claims for overtime is this (WS page 6):

> *"41. I just don't believe it occurred to any of us"* [a reference to the Operations/HR Manager and to the former Finance Officer who left in May 2020] *"that there was a need to report or discuss this with a partner.*
>
> *42. If I had considered the matter then I imagine as the payments were not being paid by the Practice and as my submissions were subject to scrutiny and approval by the CCG, I would have concluded that authorisation was not necessary."*

33. The first of those paragraphs, 41, of Mrs Morris's witness statement deals with what Mrs Morris says factually happened. The Tribunal has considered the possibility that Mrs Morris was simply being naïve. That, however, is not borne out by how matters unfolded as described below. On the balance of probability, the Tribunal does not accept Mrs Morris's evidence that it did not occur to her that there was a need to report or discuss claims on the CSF for reimbursement of paid overtime for herself, with the Practice. What is probable, indeed what is tolerably clear, is that Mrs Morris spotted a way of addressing the difficulty that she faced balancing her contracted hours and TOIL with the demands of the job, as she saw them. It addressed a deep sense of grievance she felt on the subject, the evidence for which is discussed below. The mechanism Mrs Morris used was to bury her overtime payments in the claims on the CSF. In this way Mrs Morris attempted to circumvent what she knew to be the Practice's requirement for overtime to be authorised. Conveniently, the payments would not be readily visible to the Practice on the claim forms, although Mrs Morris knew the Practice probably wouldn't come looking.

34. The Tribunal reached this provisional conclusion before it had read the disciplining officer Mr Carl Tudor's report, which is discussed below. The Tribunal notes that Mr Tudor came, in effect, to the same conclusion, although he characterised his findings in a way that the Practice did not adopt.

35. The Tribunal turns to paragraph 42 of Mrs Morris's statement, as set out above. This is carefully worded. It does not record what Mrs Morris thought at the time. Rather, it sets out what she might have

thought, had she thought about it (Mrs Morris's primary case, of course, being that it didn't occur to her). This is the construction argument. Although it might normally be addressed in the Tribunal's conclusions, it will be dealt with here to avoid cross referencing. As the Tribunal understands it, it may be put in two ways.

36. First, in short, it is pointed out that the contractual provision does not specify that approval for overtime must be given by the Practice. If that is so, Mrs Morris says, approval from the CCG for the overtime is all the approval that is required.

37. The starting point with contractual provisions is to construe them against the party seeking to rely on them (in this case the Practice). Here, however, an unqualified literal interpretation defies common sense. Would it be acceptable, for example, for any third party to approve Mrs Morris's overtime in writing? Of course, this was not the intention. Nor was it how the contract had been performed. In June 2018 Mrs Morris had understood that she needed approval for paid overtime before she took it. There is an obvious implied term that the approval was to come from the Practice.

38. Second, is an argument that Mrs Morris relied on throughout. This is that the money to pay her overtime was not coming from the Practice but, rather, from the CCG, which body was checking the payments. It was, therefore, overtime outside the contractual wording in the employment contract. The contract only applied to the payment of overtime by the Practice and not to the payment of overtime by a third party.

39. The Tribunal does not accept that argument. The wording of the employment contract applied to overtime payments by the Practice and these were overtime payments by the Practice. Mrs Morris did not work for the CCG. The mechanism was straightforward. Mrs Morris worked overtime for the Practice. The Practice paid that overtime through its payroll and a reimbursement was claimed by Mrs Morris from the CSF. As far as the Tribunal is aware, almost all the Practice's funding came from the CCG. If Mrs Morris's argument ran, it would presumably apply to almost all pay, never mind overtime.

40. Around early or mid-August 2020 Mrs Morris says she made a protected disclosure to Dr Zahedi. Mrs Morris says that she believed a criminal offence was being committed, being fraud and that the Practice was failing to meet its legal obligations (WS 85, page 17).

41. The context for this is fairly straightforward. The Practice was one of four in the Bournemouth East Collaborative Primary Care Network ("BEC PCN"). In the period April 2020 to April 2021 BEC PCN had a

responsibility to provide 1,360 “extended hours”, for which it would be paid. Extended hours are, in essence, extra hours in which practices provide services to the public. The extended hours could be provided by one or more of the practices in BEC PCN. There is some detail at 499-500. The outcome for the April 2020 to April 2021 period was that BEC PCN delivered 2,784 extended hours, far in excess of its contractual obligation. However, the COVID-19 outbreak had disrupted the delivery of these services and it is not in dispute that, at the time Mrs Morris made the alleged protected disclosures, there had been an under delivery of extended hours. Whilst this was an under delivery in respect of an obligation on all four practices, it was nonetheless the case that the Practice was expected to contribute towards the extended hours’ goal. To do so, Mrs Morris had conversations with several of the Doctors in the Practice on the subject.

42. Contrary to usual practice in cases before the employment tribunals, the alleged protected disclosures had not been particularised before this hearing. It was, therefore, necessary to rely on Mrs Morris’s statement. Mrs Morris’s statement, however, is not specific about the words used, except in one case. Mrs Morris mostly covers the subject in general terms. The truth of the matter appears to be that neither Mrs Morris nor any of the Doctors to whom she spoke, remember what was said. In the case of the Doctors, they often do not recall the conversation.

43. Mrs Morris says the occasion for the first alleged protected disclosure to Dr Zahedi was *“one of our regular appointment planning sessions”* (WS 82, page 14). In essence, Mrs Morris says that she told Doctor Zahedi *“that we need to plan for reinstating Extended Hours and that I was concerned that we were not providing them when other practices had already started to do so and yet we were continuing to receive the funding.”* The Tribunal will refer to this as the “August Zahedi disclosure” (although the conversation almost certainly took place in September as is explained in the next paragraph).

44. The Tribunal assumes that, in fact, this was the meeting on 16 September 2020, which Mrs Morris covertly recorded. A transcript of this two and a half hour meeting is at 559-610. The Tribunal has no expertise on the subject matter and has not been directed by Mrs Morris to any particular part of this fifty one page document. However, reading through the transcript, the Tribunal sees no more than the PBM and a Doctor working through rotas in a collegiate way including the provision of extended hours. It was Doctor Zahedi who first raised the subject of extended hours. There was discussion of whether or not the rotas were including extended hours but nothing at all that fits with the evidence in Mrs Morris’s witness statement that she

expressed a concern that the Practice was receiving the money for extended hours but not providing them. Why Mrs Morris felt she needed to record this meeting is unclear.

45. The issue was added to a Partners' meeting agenda. A copy of minutes from a Partners' meeting on 21 October 2020 records that the subject was raised (514). Mrs Morris's view is that the agreed actions did not amount to providing extended hours. However, an email chain at 726-728 shows that the Practice was well aware that it had to make up any under delivery and Doctor Zahedi had a plan to do so. Mrs Morris was copied in on these emails.

46. Mrs Morris says that, sometime in September 2020 she repeated the concern she had raised with Dr Zahedi to Doctor Walker-Date (WS 81, page 16). Specifically, Mrs Morris says that she told Dr Walker-Date *"we were not truly offering "Extended" access to patients which I felt was wrong and against the interests of patients."* Based on the inaccuracy of Mrs Morris's recollection of what she said to Dr Zahedi on 16 September 2020 (see paragraph 44 above), on the balance of probability, the Tribunal finds that Mrs Morris did not make any such specific comment. Far more likely is that she continued the conversation she had been having with Doctor Zahedi about how to manage extended hours and in the same collegiate vein. The Tribunal will refer to this as the "September Walker-Date disclosure".

47. Mrs Morris's evidence is that she spoke to Doctor Savage on the subject on 16 September 2020 (WS 84, page 17). On the balance of probability, this was a continuation of the same discussion Mrs Morris had with Doctors Walker-Date and Zahedi. The Tribunal will refer to this as the "September Savage disclosure".

48. At the start of October 2020 Mrs Morris had an exchange of emails with Doctors Savage, Walker-Date and Bray (224-227). These were exchanges about continuing support from the CCG as the COVID-19 funding scheme was coming to an end. Doctor Savage was the Clinical Director for BEC PCN. As such, Doctor Savage had more perspective on the funding arrangements. Mrs Morris mentioned that she had been working 60-65 hours per week since April (225). This doesn't seem to have rung any alarm bells with any of the Doctors. At the end of the exchange Mrs Morris, commenting on a suggestion that outside resource be used, wrote this (227):

> *"I would rather see us reimbursed for the work we are doing so that it can be done by those who are readily available and know our practice business and processes best*

> *Thanks for the proposed list – I just want to be able to pay staff for enforced absences and pay others for additional work they do to help when needed [at whatever level] as this seems only fair".*

49. Had the Doctors known about the overtime payments that Mrs Morris had been receiving, they might have seen this as Mrs Morris pleading her own case. With the benefit of the full picture, that is how the Tribunal sees it.

50. Doctor Walker-Date was the finance lead partner for the Practice. Towards the end of September 2020, in preparation for the Practice's year end and as was usual, Doctor Walker-Date asked Mrs Morris for the overtime folder. Ordinarily this would have been provided by the finance officer, but that post had been vacant since 15 May 2020.

51. Mrs Morris said that she did not know that the finance officer kept this information and Doctor Walker-Date left Mrs Morris's office without it. Later, Doctor Walker-Date found the information in a folder on the Practice's shared drive, to which she had not previously been given access.

52. The Tribunal is of the view that, on the balance of probability, Mrs Morris knew that she was running on thin ice with her overtime mechanism. It would, therefore, have been on Mrs Morris's mind that she would eventually be found out. It may be that she was counting on the Practice accepting what had happened as a fait accompli, if the need arose to explain it to them. In any event, Mrs Morris was no doubt apprehensive about this possibility. Doctor Walker-Date's approach to Mrs Morris for the overtime folder crystallised Mrs Morris's concern on that front. What happened next fits this picture. Mrs Morris prepared the ground for the Practice finding out about the overtime she had claimed for herself from the CSF.

53. Mrs Morris explains the steps she took (WS 56 and 57, page 9):

> *"56. On 8 October 2020 I asked Susan Walker-Date if it was ok for me to continue working overtime at the current level even though the Fund had ended.*
>
> *57. I did this because I was aware that the Partnership itself would now have to absorb any additional overtime payment costs and I needed to seek authorisation from a Partner."*

54. Mrs Morris says that Dr Walker-Date led her to believe it was alright for her to do so (WS 58, page 9). It appears that Mrs Morris had not, in so many words, said that the she had claimed overtime for herself

from the CSF and the Tribunal surmises that it took a while for the penny to drop with Doctor Walker-Date.

55. Notwithstanding, in a note (743), on 9 October 2020 Doctor Walker-Date instructed Mrs Morris not to do any further overtime. The reasons given were welfare concerns and there was no suggestion of wrongdoing.

56. Mrs Morris's response to this, addressed to Doctors Walker-Date and Yeoman, dated 9 October 2020, is at 230-231. In the Tribunal's view, this is a revealing and key document. It is the final step in Mrs Morris's preparation for the Practice finding out about the overtime payments. Mrs Morris sets out her case for overtime going back to March 2020, when she had first started to use the CSF as a mechanism to secure overtime payments without having to get prior approval from the Practice. It also sets out Mrs Morris's case for continuing overtime pay and her grievance on the subject of overtime generally is clear. It should be read for its full content. However, it includes this:

> *"I am particularly upset about this given that it has been well known that I have been working long days and my day-off [Friday] since March; this seems to have been acceptable whilst funded by the CCG but now that the Covid fund has been withdrawn it isn't.*
>
> *I am grateful for the concerns about my welfare and at looking at ways to prevent burnout but simply saying don't do something does not just make the problems that exist today, this week, next week go away!*
>
> *I confess to not understanding some of the rationale*
>
> *One of the pressures at the moment is in getting the accounts up-to-date. My hourly rate is £29.70 plus on costs. Sandisons will charge £33.00 per hour plus VAT. I will still have to spend the time scanning paperwork to send it over and even then they will have queries that I will have to research to answer so I will do half the work anyway. Why am I denied being paid when the Partners are willing to pay more to Sandisons to do the same work?" ….*
>
> *"I have never been a clock watcher and I do not wish to start now. The suggestion that extra hours worked should be taken as time owed, although appreciated, is impractical considering the number of hours that are being undertaken." ….*

> *"I have become tired each year of asking to be remunerated for the extra work and responsibility since the merger and having my requests denied. On the last occasion my polite request was even totally ignored!"*

57. This communication made it pretty clear that Mrs Morris had been claiming overtime for herself through the CSF. Consequently, as Mrs Morris had been requested to do, on 12 October 2020 she sent Doctor Walker-Date two emails with information on the Practice's claims from the CSF (232-233). There was no break-down of the staff cost claims in the financial summary but the overtime sheets were provided. There had obviously been some discussion about the overtime claims. Mrs Morris was careful not to personalise these to herself but commented generally:

> *"When the CCG said that the Practices should not be disadvantaged by Covid and that we could claim for the extra staffing caused, I paid the staff for their time – as it was cost-neutral to the Partners, I did not feel I no reason to think I needed Partner approval. I am sorry if the Partners feel that was wrong."*

58. Mrs Morris might have hoped that would be the end of the matter, but it was not. The Practice now put a somewhat unwieldy process into motion. In 2017 the Practice had engaged the well-known Peninsula Business Services organisation ("Peninsula") to provide HR and employment law support and insurance. The Practice understandably did not consider itself to have expertise in the increasingly complex area of employment law. However, the result was that an investigatory, disciplinary and appeal process was delegated to three separate outside consultants overseen by the ten partner Practice, which took decisions based on recommendations. Inconsistencies were probably inevitable.

59. On 12 October 2020 Doctors Walker-Date and Yeoman met Mrs Morris and told her that, on 11 October 2020, the partners of the Practice, having taken advice, had decided to appoint Peninsula to carry out an investigation. Mrs Morris covertly recorded this difficult meeting and there is a transcript at 515-524. It is apparent from the transcript that Mrs Morris understood the subject of the investigation was the overtime payments she had claimed for herself from the CSF. It is also clear that Mrs Morris anticipated she was potentially in serious trouble and was both upset and belligerent. During this meeting Mrs Morris said this:

> *"Oh so I will go and phone the CQC now shall I and say oh by the way, you know, these extended hours we are doing,*

> *we're really not doing them, we've just moved it from….oh yeah cos we are all so open and honest about everything here aren't we?"*

60. In her statement Mrs Morris refers to this occurring on 20 October 2020 (WS 83, page 17). This is presumably an error as the transcript is a contemporaneous document and it is dated 12 October 2020. The Tribunal will refer to this as the "October Walker-Date/Yeoman disclosure".

61. On 14 October 2020 Mrs Morris says that she spoke to Doctor Zahedi again on the subject of extended hours (WS 82, page 16). Mrs Morris says *"I called down to speak with her and I advised that I was still worried that what we were doing was "fudging" the extended opening and that this really wasn't meeting the requirements or spirit of the Extended Hours requirement which was to offer patients more appointments."* The Tribunal will refer to this as the "October Zahedi disclosure".

62. A letter from the Practice dated 23 October 2020 required Mrs Morris to attend an investigatory meeting by video conference (234-235). The subject of the investigation was specified as concerns about conduct, without any elaboration. Possible outcomes were a formal disciplinary procedure or no further action. Mrs Morris's evidence is that she *"only knew what the two very brief and vague allegations were just before the meeting"* (WS 69). As a result, Mrs Morris says, she was unable to properly prepare for the meeting.

63. The investigatory meeting was conducted on 5 November 2020 by Ms Kerry Tibble, consultant. The investigation report and a transcript of the meeting are at 239-263. The report sets out the matters to be investigated. It seems from Mrs Morris's evidence above that she had some forewarning of these:

> *"It is alleged that DM has been claiming for overtime hours which have not been authorised by a partner.*
>
> *It is alleged that these hours may not have all been Covid related and therefore should not have been claimed through the Government Covid fund."*

64. Ms Tibble's report records that she had spoken to Doctors Walker-Date, Savage and Blaszczyk. It is not clear if this was before or after the investigatory meeting with Mrs Morris. From the content of the transcript, the Tribunal deduces that it was probably before. In any event, no notes of any such meeting or meetings were produced to Mrs Morris.

65. In paragraph 46 of the report there is what the Tribunal sees as a fair summary of the position:

> *"KT notes that there appears to be no question around the significant workload that DM has, but the question is whether these additional hours should have been worked and whether they should have been claimed for through the Covid government fund. KT notes that these questions would have bee answered if DM obtained adequate authorisation for these personal claims from a partner or senior manager."*

66. The transcript should be referred to for the full record of the meeting. What is obvious from it is that Mrs Morris repeated at length the views she had expressed in her note of 9 October 2020 to Doctors Walker-Date and Yeoman, referred to in paragraph 56 above.

67. Having identified overtime payments to Mrs Morris of around £13,000, Ms Tibble's findings were that:

> *"the additional hours claimed repeatedly each month appear to be excessive for DM's required Covid related activities and recommends that the allegation be taken forward to a disciplinary hearing."* and
>
> *" KT finds that DM should not have claimed this overtime without prior authorisation from a partner and recommends that this allegation be taken forward to a disciplinary hearing."*

68. The recommended disciplinary charges were framed in similar terms to the findings referred to in the previous paragraph.

69. Ms Tibble also noted that Mrs Morris had claimed overtime at a rate of 1.25 of her salary. Ms Tibble's report records that Mrs Morris explained this was the Practice's policy for overtime beyond contracted hours. That explanation, however, is not in the transcript as far as the Tribunal can see and the Tribunal's conclusion is that Mrs Morris did not say that.

70. Ms Tibble's report was dated 11 November 2020. Between the investigatory meeting and the date of the report, Mrs Morris had unsuccessfully applied for another job (238, 264). Perhaps Mrs Morris had had enough and/or knew she was in serious trouble.

71. On 16 November 2020 the Practice wrote to Mrs Morris requiring her to attend a disciplinary hearing (265-266). The disciplinary charges were, in terms, those identified by Ms Tibble. Various documents

were attached, including Ms Tibble's report. These were later supplemented by attachments to a second letter on 17 November 2020 (267-268). There was a warning that dismissal for gross misconduct might be the outcome once the Practice had considered any recommendation by the consultant carrying out the disciplinary hearing. Mrs Morris was reminded of her right to be accompanied.

72. The disciplinary hearing was conducted by Mr Carl Tudor, consultant, on 24 November 2020 by video conferencing. Ms Cusack attended as Mrs Morris's companion. Mr Tudor's report and a transcript of the hearing are at 276-307. The report is dated 22 December 2020, nearly a month after the hearing. It appears from the bundle that the delay was caused by unsuccessful settlement negotiations (see 644).

73. The report provides a list of documents Mr Tudor had before him. These include a personal statement from Mrs Morris and seven personal references/testimonies from individuals including Dr Holmes, and Ms Young (both of whom gave evidence to the Tribunal).

74. Mr Tudor recorded that he had spoken to Doctor Walker-Date. Again, it is not clear whether this was before or after the hearing and no note was made available to Mrs Morris.

75. The report records that £16,888.39 of overtime payments to Mrs Morris had been made in the period April-September 2020. Mrs Morris had claimed these on the basis that they were *"a fair average of what I was doing".* In essence Mrs Morris had claimed two hours a day in her normal Monday-Thursday working week and ten hours on Fridays (that is, 18 hours a week in the context of Mrs Morris's normal working week of 37.5 hours). Mr Tudor was not able to reconcile the overtime claimed by looking at examples of login and logoff times. Perhaps that was unsurprising as Mrs Morris had explained that she had exercised her judgement and taken an average. Mr Tudor quoted Mrs Morris on the subject generally. This sums up what is at the heart of the case:

> *"Yeah. I mean, obviously the allegation is that I should have gone to a partner. Which would be normal process in any other situation, but in this situation from my perspective, funding always comes into the practice. This was a different situation where the funding didn't come into the practice and the control for that funding stayed with the CCG, and approval was coming from the CCG. And so in that respect, it did not occur to me to need to go to a partner for this. The only example that I can try and give that helps to try and explain what I mean is that if I do work overtime, then the standard process is that I would claim time back, because*

> *that doesn't affect any of the practice budgets. So the only time that I would go and ask a partner would be if there would be an impact to the practice budgets. There's no requirement for me to go and ask a partner if I'm logging time owed because it doesn't impact the practice budgets. And the principle from, my rationale, the principle for this was the same. Because the money was staying with the CCG and the control for that money was staying with the CCG, that they were people that I needed to get authority from."*

76. As far as the overtime claims being at the rate of 1.25 times salary was concerned, Mrs Morris asserted this was not a policy of the Practice but custom and practice in the NHS. Mr Tudor's conclusion was these had been claimed at the wrong rate because the CSF guidance required claims to be made on the basis of contractual entitlement, which indeed it did. However, the question of whether or not the contractual entitlement was 1.25 times salary by custom and practice remained on the table.

77. Mr Tudor's conclusions on the two allegations were:

> *"49. CT confirms that by DM's admission, she did not obtain permission, therefore, CT finds the allegation that DM claimed for overtime hours that have not been authorised by a partner is upheld. Moreover, DM processed the overtime payment herself with a subordinate, at the wrong rate and failed to keep auditable information on hours worked."*
>
> *"63." …. "CT finds on the balance of probability DM has taken the covid fund as an opportunity to increase her remuneration, circumvent getting approval from the partners as DM was aware this would be rejected, and has used her position as Practice Manager to process payment, which would constitute fraud under NHS counter-fraud description, "Fraud is deception carried out for personal gain, usually for money. Fraud can also involve the abuse of a position of trust.""*

78. Having reached those conclusions and upheld the allegations, Mr Tudor moved to his recommendations. Mr Tudor identified two examples of gross misconduct within the Practice's handbook. These were:

> *"Theft, fraud or misappropriation of, or failure to account for, or falsely claiming entitlement to the Practice Business's property assets, or funds"* and

"Indecent or immoral acts in the workplace."

79. The Tribunal does not understand how the second example could apply to Mrs Morris's conduct. In any event, it went no further. The second example is not in point in determining the issues because the Practice chose to go down the lack of authority rather than the fraud route. However, it does, of course, matter to Mrs Morris. Mrs Morris received assurances on the subject at the appeal stage that are mentioned below.

80. Mr Tudor, therefore, concluded that Mrs Morris's actions amounted to gross misconduct and recommended summary dismissal.

81. Ordinarily in these circumstances, the Tribunal would be looking at the decision taken by the disciplinary officer. Here, however, there was an intermediate step. Mr Tudor's job was to make a recommendation to the partners of the Practice. It was those partners who made the decision. As Ms Bayliss later noted at the appeal stage and as the Tribunal has also noted, it is evident that the partners did not accept Mr Tudor's findings in full, although they did accept the recommendation of summary dismissal.

82. On 24 December 2020 Mrs Morris received a letter from the Practice dated 23 December dismissing her summarily for gross misconduct (308). As noted, the letter of dismissal departed from Mr Tudor's recommendations to some extent. It gave the reasons for dismissal in short:

> *"1. You have been claiming for overtime hours which has not been authorised by a partner.*
>
> *2. That these claimed hours have not all been Covid related and therefore should not have been claimed through the Government Covid fund."*

83. As Mrs Morris had been invited to do, she appealed against her dismissal in an e-mail on 6 January 2021 (311-313). The grounds of appeal were a modified restatement of her case. No doubt Mrs Morris had the benefit of legal advice on the subject. They can be referred to for their full content. Central to the modification was the argument that there was no contractual provision that required Mrs Morris to seek authorisation for the overtime claims she had made. In addition, Mrs Morris asserted that the Practice had no evidential basis for the finding that the claimed hours were not all covid related. This is ground that has been carried forward to this hearing. Mrs Morris also took issue with Mr Tudor's finding of fraud, as that had not been an allegation put to her.

84. A third consultant, Ms Gina Bayliss, heard the appeal by video conferencing on 13 January 2021. Ms Bayliss's report and a transcript of the hearing is at 317-333. Ms Cusack was in attendance as Mrs Morris' companion.

85. Ms Bayliss records that she spoke to Doctors Walker-Date, Savage and Blaszczyk. Once again, it is not clear when (although it appears that it was prior to the appeal hearing) and there is no note that was shared with Mrs Morris.

86. The transcript records a re-run of issues and arguments previously covered.

87. Ms Bayliss's short summary of the grounds of appeal in her report does not fully reflect the modified argument based on the lack of contractual provision. Ms Bayliss's conclusions do, however, address this. Referring to the contract of employment, Ms Bayliss dismissed the argument.

88. In her report, Ms Bayliss does not seem to have tackled the alleged lack of evidence that all the claimed hours were not COVID-19 related other than through the route of noting that the Practice had decided that at least a proportion was not and it was going to repay all the overtime.

89. Importantly for Mrs Morris, Ms Bayliss's report clarified that "fraud" had not been relied on in the decision to dismiss. In the hearing itself Ms Bayliss had explained her understanding that Mrs Morris had not been dismissed for falsifying her hours.

90. The recommendation was to dismiss the appeal.

91. On 20 January 2021 the Practice wrote to Mrs Morris dismissing her appeal (334).

92. Although recognising that some of the overtime would legitimately have been attributable to COVID-19, the Practice decided to repay the CCG a sum equal to all the overtime Mrs Morris had claimed for herself.

93. In her witness statement Mrs Morris mentions that one partner took her aside early on in the process that led to Mrs Morris's dismissal and suggested that Mrs Morris should think about moving on (WS 89, page 18). Obviously, this would be of concern if it was evidence of pre-determination of the outcome of the process, which is how Mrs Morris's statement reads. The Tribunal asked Mrs Morris about this. The Doctor concerned was Doctor Nermina Selimovic. It was clear from Mrs Morris's responses that she saw this as a welfare concern,

although it made her feel she had no chance in the process. What it was not, was Doctor Selimovic telling Mrs Morris that it had been decided that Mrs Morris was going to be dismissed.

94. Mrs Morris's contract of employment includes this. *"In cases of gross misconduct, the Practice may terminate your employment without notice."* The Respondent's applicable *"Disciplinary (& Dismissal) Procedure/Policy"* is at 153-158. The non-exhaustive list of examples of gross misconduct does not seem to the Tribunal to have any application in this case. However, the policy includes this: *"Gross misconduct is generally seen as serious enough to destroy the contract between the employer and employee and make further working relationship and trust impossible."*

95. The Respondent had a *"Whistleblowing Policy* (162-163). This invited notifications of concerns in writing.

APPLICABLE LAW

96. Section 43A ERA provides:

> ***"43A Meaning of "protected disclosure"***
>
> *In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B which is made by a worker in accordance with any of sections 43C to 43H."*

97. Section 43B ERA, so far as it is relevant, provides:

> ***"43B Disclosures qualifying for protection***
>
> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following-*
>
> *(a) that a criminal offence has been committed, is being committed, or is likely to be committed,*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,"*

98. Section 43C ERA, so far as it is relevant, provides:

> ***"43C Disclosure to employer or other responsible person***
>
> *(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure -*
>
> *(a) to his employer,"*

99. Section 103A ERA provides:

> ***"103A Protected disclosure***
>
> *An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."*

100. Section 94 ERA provides an employee with a right not to be unfairly dismissed by his or her employer. Section 98 ERA sets out provisions for determining the fairness or otherwise of a dismissal. So far as it is relevant it provides:

> ***"98 General***
>
> *(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."*

101. The test for a fair conduct dismissal is well established. In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is fair or unfair an employment tribunal has to decide whether the employer who dismissed the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First, the fact of that belief must be established, that is that the employer did believe it. Second, the employer must have had in

his mind reasonable grounds upon which to sustain that belief. Third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation as was reasonable in all the circumstances. The first of these elements goes to the reason for dismissal, which it is for the employer to show. Otherwise, the burden of proof is neutral.

102. Added to this test is the requirement that the sanction imposed by the employer is within the band of reasonable responses.

103. Implicit in all this is that it is not for the tribunal to substitute its view for that of an employer provided that the employer's view falls within the band of responses which a reasonable employer might adopt.

104. Section 122 (2) of the ERA provides:

> *"(2) 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 that amount accordingly."*

105. Section 123 (6) of the ERA provides:

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

106. The Tribunal was not referred to any case law.

CONCLUSIONS

107. **Did Mrs Morris make a protected disclosure or disclosures? (Sections 43A, 43B(1)(a) and (b), ERA).**

108. It is not in dispute that Mrs Morris was an employee eligible to make a "whistleblowing" claim.

109. The first question is, was there a disclosure of information which, in Mrs Morris's reasonable belief was made in the public interest tending to show either that a criminal offence had been committed, was being committed or was likely to be committed or that the Practice had failed, was failing or was likely to fail to comply with any legal obligation to which it was subject?

110. Here the Tribunal is concerned with the August Zahedi disclosure (paragraph 43 above), the September Walker-Date disclosure (paragraph 46 above), the September Savage disclosure (paragraph

47 above), the October Walker-Date/Yeoman disclosure (paragraph 60 above) and the October Zahedi disclosure (paragraph 61 above).

111. The August Zahedi disclosure: As the Tribunal explained above, the transcript of this meeting reveals nothing that fits with the evidence in Mrs Morris's witness statement that she expressed a concern that the Practice was receiving the money for extended hours but not providing them. There is no evidence of a disclosure of information which, in Mrs Morris's reasonable belief was made in the public interest tending to show either that a criminal offence had been committed, was being committed or was likely to be committed or that the Practice had failed, was failing or was likely to fail to comply with any legal obligation to which it was subject.

112. The September Walker-Date and Savage disclosures: These can be taken together as, putting Mrs Morris's case at its highest, it appears that Mrs Morris says she said more or less the same thing as she had said to Doctor Zahedi to Doctors Walker-Date and Savage. The Tribunal's findings of fact are set out in paragraphs 46 and 47. There was no protected disclosure.

113. The October Walker-Date/Yeoman disclosure: On this occasion Mrs Morris did mention extended hours in the context of honesty and the CQC. Mrs Morris's motivation looks to have been retaliatory, rather than a matter of public interest. However, in context it could have been understood that Mrs Morris was alleging dishonesty and, as such, a criminal offence or breach of a legal obligation. The Tribunal doubts that Mrs Morris believed it was either. However, it cannot, on the balance of probability, make a finding of fact to that effect. Assuming, then, that Mrs Morris did believe that it was one or the other or both, the belief from Mrs Morris's perspective was reasonable. (It does not seem to the Tribunal that, even if the Practice had been receiving money for extended hours provision whilst not providing the extended hours, it was likely to be committing any criminal offence or to be in breach of contract. The reasons for this are set out in paragraph 41 above. However, that is not definitive of whether or not Mrs Morris's belief was reasonable in context. As far as the Tribunal is aware, Mrs Morris did not have the perspective that, for example, Doctor Savage had on the issue. Therefore, Mrs Morris's belief was probably reasonable.)

114. This was a qualifying disclosure within the meaning of section 43B ERA and it was made to the employer.

115. The October Zahedi disclosure: As with the August Zahedi and September Walker-Date and Savage disclosures, it seems more likely that Mrs Morris was continuing the conversation about how to

provide extended hours rather than making any disclosure. The word "fudging" in the context it was used, is not a disclosure that meets the statutory test in section 43B(1) of the ERA.

116. **Was Mrs Morris dismissed as a result of making a protected disclosure by reference to section 103A ERA?**

117. The Practice says that the reasons for Mrs Morris's dismissal were the conduct reasons set out in the letter of dismissal. In the context of protected disclosure, Mrs Morris argues that the principal reason for the dismissal was the protected disclosure that the Tribunal has found Mrs Morris made. Mrs Morris has established that she made a protected disclosure. It is also the case that Mrs Morris was dismissed. Beyond that, however, there is no evidence that this figured in the dismissal. To the contrary, the Doctors to whom the protected disclosure and other alleged disclosures were made had little, if any recollection of them. They were somewhat bemused when they were asked about them. This is probably because they did not think twice about them at the time and did not take them into account when deciding to dismiss Mrs Morris. As far as the Tribunal can see, the protected disclosure was never an issue in the investigatory, disciplinary or appeal process. That, of course, is not fatal to Mrs Morris's claim. However, Mrs Morris must produce sufficient evidence to raise the question of whether or not the reason for the dismissal was the protected disclosure and she has not done so. The Tribunal finds it was not. If the Tribunal was to be wrong about that, and the burden shifted to the Practice to show the reason for the dismissal, it would find that the Practice has proved its conduct reason for the dismissal.

118. Accordingly, Mrs Morris's claim that she was unfairly dismissed by the Respondent because she made a protected disclosure or disclosures is dismissed.

119. **Was Mrs Morris unfairly dismissed by reference to sections 94 and 98 ERA?**

120. Was there a potentially fair reason for Mrs Morris's dismissal? Was there some other reason for dismissal?

121. The Practice dismissed Mrs Morris. It is, therefore, for the Practice to show a potentially fair reason for the dismissal. The Practice says that the reason was conduct. The Tribunal finds that the reasons for the dismissal of Mrs Morris were those set out in the letter of dismissal. These were conduct reasons. They were potentially fair reasons for dismissal under section 98(2)(b) of the ERA.

122. As an alternative to the protected disclosure, Mrs Morris says the reason for her dismissal was a desire to remove her and replace her with someone more to the Practice's (or certain members of the Practice's) liking, namely Ms Emma Prince. This was not Mrs Morris's evidence, but it came out in the questioning of Doctor Savage, in particular. Apparently, Ms Prince was someone Doctor Savage worked with closely at BEC PCN. There is no evidence to support this proposition and the Tribunal must conclude that it played no part in the decision to dismiss.

123. Having identified a potentially fair reason for dismissal the Tribunal moves on to the section 98(4) tests.

124. <u>Did the Practice hold a genuine belief in Mrs Morris's misconduct on reasonable grounds following as reasonable an investigation as was warranted in the circumstances?</u>

125. On the evidence, the Tribunal finds that the Practice had a genuine belief in Mrs Morris's misconduct and had reasonable grounds for that belief. In making this finding the Tribunal is aware that there is no contemporaneous evidence of what the Practice (as opposed to the consultants) believed other than the outcome letters at the disciplinary and appeal stages. In the bundle there are some email exchanges between Doctor Walker-Date and Peninsula, but they do not throw much light on this. No doubt ten partners meant ten different views. However, the Tribunal has no reason to doubt that the letter of dismissal and the letter dismissing the appeal were duly authorised acts of the partners of the Practice and represented their collective belief.

126. Mrs Morris makes a number of points about the investigatory and disciplinary process. First, Mrs Morris says that the Practice gave her no advance notice of the issues to be dealt with prior to the investigatory meeting on 5 November 2020. On the evidence, that is not the case. Mrs Morris had a meeting with Doctors Walker-Date and Yeoman on 20 October. It is clear from that meeting that Mrs Morris knew what the issues were.

127. Second, Mrs Morris points out that the investigation, disciplinary and appeal reports make mention of the consultants concerned having spoken to various of the Doctors. Notwithstanding, no notes of any evidence taken were provided to her. The ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) (the "ACAS Code") says this on the subject (paragraph 9):

> *"If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This*

> *notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification."*

128. What the Code is looking for, is for a person facing a disciplinary charge to understand the charge they must answer. In a case where there is disputed evidence about an act of misconduct and statements are taken from witnesses about that, it would usually be fatal to procedural fairness not to produce those to the employee facing the disciplinary charge in good time for any hearing. However, in this case there was no dispute about the facts and the issues were clear. Had Mrs Morris claimed overtime unauthorised by the Practice and was all the overtime claimed COVID-19 related? Whilst the consultants might have been well advised to have a written position paper from one or more of the Doctors they spoke to and shared that with Mrs Morris, the fact that they did not was not unreasonable in the circumstances.

129. Third, Mrs Morris says that the CCG should have been contacted as part of the investigatory process for guidance on how the CSF worked, whether or not Mrs Morris's claims on the CSF on behalf of the Practice were adequate and to enable a comparison with claims submitted by other practices. However, none of this was material to the allegations of misconduct. The consultants appear to have understood sufficient about how the CSF worked and the Practice certainly would have. There was never a suggestion that the claims were not intrinsically adequate (although it was noted that they were not transparent about Mrs Morris's overtime - in context however, that was a matter for the Practice, not the CCG). The size of the claim relative to others was not material to the issues. It was for the Practice to decide whether or not its claim could be justified.

130. All in all, the Tribunal finds that the Practice carried out as much investigation as was reasonable in the circumstances.

131. Mrs Morris raises some other issues of substantive fairness. In some instances, they go to procedure as well. First, that the letter dismissing her and the later letter rejecting her appeal did not provide any reasoning. The reasoning, however, was in the accompanying consultant's reports. In the case of Ms Bayliss's report at the appeal stage it seems to the Tribunal that this is obvious. However, in the case of Mr Tudor's report at the disciplinary stage, the position is not as clear. The Practice did not adopt Mr Tudor's express finding that Mrs Morris had acted fraudulently. That was considerably watered

down and no explanation was given. Since it was a move in favour of Mrs Morris, however, it does not seem to the Tribunal that any explanation was needed.

132. Second, Mrs Morris says that the partners of the Practice should have split themselves up so that no partner was involved in any two of the decisions to hold an investigation, dismiss and reject the appeal. The ACAS Code provides (paragraph 6) *"In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing"* and (paragraph 27) *"The appeal should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case."* Apart from that, it is common sense that the three stages of investigation, disciplinary and appeal should be handled by different managers for the sake of fairness. It is not uncommon for a small business to call in an independent outside party to conduct one or more of the different stages of a disciplinary process, particularly an appeal. Here, as sometimes happens, the outside party was not called in to make decisions but, rather, to recommend them. The decisions were all taken by the same body, the partners of the Practice. That centralisation of decision making is objectively potentially unfair. Although the Tribunal would agree that it risks unfairness for a business to adopt this procedure, in this case it was not unreasonable. As the Tribunal has recorded, although it has seen almost nothing of the Practice's decision making process, there is evidence that the Practice gave the matter considerable thought and that there were differences of opinion. That would have ensured a measure of fairness. More importantly, the Practice, in effect, followed the recommendations of outside consultants, albeit that they watered down the disciplinary outcome.

133. The Tribunal records that, if it was to be wrong about the fairness of any of the procedural aspects of the case and a finding of unfair dismissal was appropriate, it would have gone on to find that the deficiency made no difference. Mrs Morris would have been fairly dismissed and in the same timescale. No basic or compensatory award would have been made because of Mrs Morris's contribution to her dismissal.

134. <u>Was dismissal a fair sanction in the circumstances?</u>

135. There is a disparity of treatment argument. The Tribunal understands that claims were also made on the CSF in respect of overtime worked by the HR/Operations Manager (Mrs Morris WS 45, page 7). Mrs Morris points out that, notwithstanding, no action was taken against the HR/Operations Manager. This is not a point that Mrs Morris has pursued with any vigour, but it should be dealt with.

Where two people who have committed the same wrongdoing are treated differently, one being dismissed and the other not, a tribunal may find a dismissal unfair. The two people, however, must be in materially the same circumstances. In this instance it was Mrs Morris who was responsible for and made the claim on the CSF, not the HR/Operations Manager. The Tribunal is unable to comment on whether or not the two were in collaboration on the venture.

136. There is little question that Mrs Morris's dismissal in the circumstances would have been catastrophic for her (although she does appear to have had a sympathetic hearing from a variety of health professionals in her circle at the time and since). The sanction needed careful consideration, especially in light of her long service. In this respect, the Tribunal is at something of a disadvantage because, as previously pointed out, it does not have access to any contemporaneous documentation showing what factors the partners of the Practice took into account.

137. The Tribunal's task on this subject is, again, an objective one. Was dismissal within the band of reasonable responses open to the Practice at the time? Here, the nature of the industrial wrongdoing is a key issue. Mrs Morris was dismissed for two reasons.

138. First, Mrs Morris had claimed for overtime hours without the required authorisation of a partner. That bald statement must be seen in context. A material sum was involved and a claim had been made for its reimbursement from a specific fund held by the CCG. Despite the obfuscation, which is a feature of this case, in context this was a serious industrial wrongdoing, viewed objectively.

139. Second, Mrs Morris was dismissed because not all the claimed hours were COVID-19 related and should not have been claimed from the CSF. That is more difficult to pin down. Mr Tudor tried to do this in an analytical way and did not succeed.

140. In her argument on this subject Mrs Morris conflates two separate issues. The issue was not whether or not Mrs Morris worked the hours, but rather, whether or not they were all COVID-19 related. (It is true that Doctor Savage, in evidence, expressed his view that Mrs Morris had exaggerated her overtime claims for personal benefit, but that was not a reason for dismissal.) An objective observer, however, would conclude that, next to Mrs Morris, it was the partners of the Practice who were in the best position to make a judgement on the issue, giving appropriate weight to Mrs Morris's views. Whilst it does not regard it as particularly material, the Tribunal notes that the Practice was unsure enough about the overtime Mrs Morris claimed as to pay it back to the CSF.

141. From the Tribunal's perspective, there is little doubt that the sanction of dismissal was well within the reasonable band of responses in the circumstances

142. Mrs Morris's claim of unfair dismissal is, therefore, dismissed.

143. Was Mrs Morris wrongfully dismissed?

144. On the Tribunal's findings, Mrs Morris was in breach of the contractual provision to obtain prior authorisation for overtime from a partner of the Practice. More importantly, the Practice explained, in the letter of dismissal, that Mrs Morris's acts had *"destroyed the working relationship".* This echoed the provision in Mrs Morris's contract of employment: *"Gross misconduct is generally seen as serious enough to destroy the contract between the employer and employee and make further working relationship and trust impossible."*

145. The Tribunal has made findings of fact in paragraph 33 above. In the circumstances, the Practice was within its rights to regard Mrs Morris as having committed an act or acts of gross misconduct and to dismiss Mrs Morris summarily. Accordingly, Mrs Morris's claim for wrongful dismissal must be dismissed.

Appendix

Dr Andrew Blaszczyk, Dr Susan Walker-Date, Dr John Bray, Dr Nermina Selimovic, Dr Heidi Yeoman, Dr Rayhaneh Zahedi, Dr Sarah Cadwallader, Dr Ashley Savage, Dr Kayvan Bidad, Dr Luke Smith

Employment Judge A Matthews
Date: 20 November 2022

Judgment & Reasons sent to the Parties:
29 November 2022

FOR THE TRIBUNAL OFFICE