EMPLOYMENT TRIBUNALS

Claimant:	**Miss D Mattinson**
Respondent:	**Dr A Milner t/a Anlaby Surgery**
On:	**10 and 11 November 2022**
Before:	**Employment Judge McAvoy Newns**
Heard at:	**Leeds Employment Tribunal (via CVP)**

Appearances:

For the Claimant:	**Ms L Dawson, Counsel**
For the Respondent:	**Mr A Williams, Solicitor**

WRITTEN REASONS

Background

1. Judgment was given orally during the hearing and, on 5 December 2022, the Respondent applied for written reasons. There was a short delay providing these reasons as a consequence of the Christmas break and a short period of ill health in January.

Issues

2. It was agreed that the issues were as follows:

   Unfair dismissal

   a. What was the reason for the Claimant's dismissal? The Respondent said that he dismissed the Claimant because she had been overpaying herself for the work she was doing in the Improving Access Hub (considered later). She also paid herself directly for such work, rather than putting such payments through the Respondent's payroll. Other

issues were raised at the disciplinary stage but these were not pursued during this hearing. The Claimant disagreed and said that the relationship between her and the Respondent had broken down which led to the Respondent trying to find a reason to dismiss her.

b. Was the Respondent's belief in the above mentioned act of misconduct based on reasonable grounds? Was the belief genuinely held and did it follow a reasonable investigation?

c. Did the Respondent act in all the circumstances reasonably in treating its reason as sufficient reason to dismiss the Claimant?

d. Was dismissal within the band of reasonable responses of a reasonable employer?

e. If the Claimant was unfairly dismissed, what compensation is she entitled to? Should a deduction be made as a result of *Polkey v AE Dayton*? Should an adjustment be made as a result of any unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures (the "ACAS Code")?

Breach of contract

f. Was the Claimant entitled to be paid her normal wages during her sickness absence? If so, by paying her statutory sick pay, did the Respondent make unauthorised deductions from her wages?

3. The Claimant confirmed that she was not pursuing a separate claim for breach of contract/wrongful dismissal/notice pay.

4. It was agreed with the parties at the outset of the hearing that I would deal with liability and remedy at the same time (rather than split the hearing into a liability hearing and, if appropriate, a separate remedy hearing).

Evidence

5. The Claimant and the Respondent both served a witness statement and were cross examined on those statements. No other witnesses gave evidence.

6. I also had sight of a large bundle of documents. I informed the parties that I would only be reading those documents that were specifically brought to my attention during the evidence, which the parties acknowledged. In this regard, I highlighted that the investigation, disciplinary and appeal reports were lengthy and if the parties wanted me to focus on a particular part of either report, they should specifically bring that to my attention.

7. Having considered the evidence, both oral and documentary, I make the following findings of fact on the balance of probabilities.

Findings of fact

Background

8. The Claimant commenced employment with the Respondent in June 2017 as the Practice Manager. Her employment terminated, following her dismissal, on 20 January 2022.

9. The Respondent is a General Practitioner and runs the Anlaby Surgery based in East Yorkshire.

10. The Respondent's disciplinary procedure includes theft or fraud as examples of potential gross misconduct [48].

Sick pay entitlement

11. The parties agreed that, early in the Claimant's employment, the Respondent requested that the Claimant draft her own contract of employment and provide it to him, for his approval. This did not happen until late 2018 / early 2019, when the Claimant requested a template from Peninsula. She says that she incorporated into this template contract what had been agreed between her and the Respondent, which included six months full pay and six months half pay during sickness absence.

12. The Claimant provided a detailed account of her conversation with the Respondent about this conversation in her witness statement. She says that, after her contract was signed, it was placed in the HR folder in a locked cabinet. It was not disclosed as part of these proceedings. The Respondent says this was because it did not exist. She acknowledged there was no written evidence of this agreement having been reached.

13. The Respondent denied the Claimant had such an entitlement. The version of the contract provided for these proceedings [54] does not contain such entitlement. Instead, it states: "There is no contractual sickness/injury payments scheme in addition to SSP. Any additional payments which may be made will be at our absolute discretion. The Practice currently has an attendance bonus scheme, which can be withdrawn or amended at any time. Any payments will be at the discretion of the Partner and will only be paid on the condition that you are in our employment and not serving notice at the time that any bonus is due to be paid" [55].

14. When questioned about this, the Respondent said that only "Agenda for Change" nurses are entitled to six months full pay and six months half pay. Only one member of staff at the surgery was entitled to that (Anne) and the Claimant was not. The Claimant agreed with this in cross examination but said that Anne was not on the "Agenda for Change" contract.

15. No other evidence of the Claimant being paid normal pay during previous periods of sickness absence (if any) was provided to me during this hearing.

Improving Access Hub

16. Although numerous other issues were raised in the parties' pleadings, it was acknowledged during this hearing that the Claimant was primarily dismissed for reasons relating to the work done for the Improving Access Hub (referring to as the "Hub" throughout these Reasons). My findings of fact have therefore focused on this matter.

17. The Respondent has a working agreement with the local authority (Yorkshire Health Partnership) that provides a local service called Improving Access to allow patients out of hours care. As part of their relationship, the Respondent's staff can undertake reception work at the Hub. Other GP practices in the area would also assist.

18. In February 2019, the Claimant agreed with the Respondent that she would do some work in the Hub.

19. The Respondent's position was that employees were paid £15 per hour for the reception work at the Hub through payroll. The Respondent then claimed back £21 per hour from the local authority. The Respondent's evidence was that the £6 covered employer national insurance contributions and general administration.

20. The Claimant's evidence was that it was agreed that the Respondent's staff would be paid at the rate of 'time and a half' for the work undertaken in the Hub. For the majority of the administrative staff, who were paid less than the Claimant, this resulted in hourly payments of £15.

21. There is a dispute between the parties regarding what was agreed in respect to the Claimant's pay. The Claimant's evidence was that she told the Respondent the work did not justify her charging 'time and a half', which would have amounted to £27.75 per hour and it as agreed that she would be paid £21 per hour. This agreement was never documented in writing.

22. The Claimant's evidence was that, in March 2019, the practice's accountant, Graham Cooper, told her to include the hours worked in the Hub on an invoice, and make payment for the same separately, rather than pay it through payroll. The Claimant said Mr Cooper suggested this because doing so would save on employer's national insurance contributions and pension payments. The Claimant also said that she agreed this with the Respondent.

23. In his witness statement, the Respondent strongly disputed this. He said that Mr Cooper had been his accountant for 20 years and worked at Price Waterhouse Cooper. He did not understand why Mr Cooper would suggest this when the Claimant did not have self-employed status. The Respondent said that Mr Cooper never discussed this with him.

24. However, in cross examination, the Respondent said: "I knew payments were going out but I didn't know she was being paid in excess". In response to a question specifically about separate payments to the Claimant, he said: "Yes

but didn't know amounts claiming – I thought she was looking after practice – she was in a position of trust". He then made a number of other concessions acknowledging that the Claimant was receiving separate payments, as well as her salary through payroll.

25. It was put to the Respondent that Mr Cooper would have been involved in the completion of the annual accounts and the Respondent agreed. The Respondent confirmed that Mr Cooper did not raise any concerns about the payments being made to the Claimant directly (rather than through payroll). The Respondent would have also been required to sign off these accounts.

26. Earlier on in the Claimant's employment, she was given access to the practice bank account in order to process payments such as invoices and wages. These needed to be approved by the Respondent, who used a pin card to provide such authorisation. At this time, the Claimant was unable to authorise payments without the Respondent approving them.

27. The Claimant's first shift at the Hub was in April 2019. She says she submitted her invoices each month, which were approved by the Respondent. She said these were in the pile of invoices that she took to the Respondent each month.

28. As part of these proceedings, I have seen invoices for the Claimant for May/June 2019 [274], July/August 2019 [272], September 2019 [273], October 2019 [270], November/December 2019 [268], February 2020 [267] and March 2020 [266]. All of these refer to an hourly rate of £21. It was not suggested that these invoices were created retrospectively, either for the disciplinary proceedings or this hearing, and there is no evidence before me of this being the case.

29. In early 2020 the Respondent suffered a marriage breakdown. He took a period of two weeks leave between January and February 2020. During this time, the Claimant had authority over practice affairs, e.g. making payments from the practice account etc. The Respondent provided the Claimant with the pin number for the bank account and told her to process all payments. After he returned to work, he asked the Claimant to continue processing the payments.

30. At around this time, the Claimant says she and the Respondent had another discussion regarding the Claimant's pay for the work undertaken at the Hub. The Claimant says that she requested an increase from £21 to £25 per hour. She says that the Respondent told her to pay herself 'time and a half', like the rest of the staff. The Claimant says she was happy with £25 per hour and did not wish to increase it further at that point. There is no written record of this agreement.

31. As part of these proceedings, I have seen invoices for the Claimant for June 2020 [264], July 2020 [263], August 2020 [261], September 2020 [260], October/November/December 2020 [259], January 2021 [258], February 2021 [257], March 2021 [256], April 2021 [255] and May 2021 [253]. All of these refer to an hourly rate of £25. It was not suggested that these invoices were created retrospectively and there is no evidence before me of this being the case.

32. In preparing these Reasons, I have noted some anomalies with the invoices. For example, some of the dates appear to be incorrect and there are references to double time being payable on certain dates, e.g. bank holidays. There were not points put to the Claimant by the Respondent during the hearing so I have not given them any further consideration.

33. Although the dates of the messages are unclear, it appears that messages passed between the Claimant and Respondent in late 2020 regarding the Respondent reviewing the bank account statements. For example, he queried the amount of locum fees being paid and said "lots of £850" [342]. The Claimant flagged problems with the online banking and the Respondent confirmed that he would try it too [340]. When the Claimant said she was unable to access it with her log in, the Respondent said: "I've not logged online for ages. Tend to use App" [339]. This latter message demonstrated that, whilst he had not logged into the bank accounts using the online banking page, he had done so via the Application, presumably on a smart phone, tablet or other device.

34. Mr Cooper passed away in December 2020.

35. Karen Kenney joined the Respondent as a Finance Manager in April 2021. The Claimant knew Ms Kenney; they had worked together previously in other employment. The Claimant says that she had discussed Mr Cooper's suggestion regarding the invoicing and making of direct payments for the Hub work, with Ms Kenney at the time. From this point onwards, the Claimant was not involved in processing payments, this was all done by Ms Kenney.

36. The Claimant says that, in June 2021, she and the Respondent agreed that her pay for the Hub work could be increased again. As above, there is no written record of such agreement. However, I have seen the Claimant's invoice for July 2021 which referred to an hourly rate of £32.85 [252].

Discussion regarding Anne-Marie Allen

37. Both parties acknowledge that, at some point in or around June 2021, the Claimant asked the Respondent whether he and Anne-Marie Allen, a colleague, were in a relationship. The Respondent confirmed that he was. The Respondent said that, after this, the atmosphere created by the Claimant in the practice was very tense. The Respondent perceived that the Claimant was unhappy about his and Ms Allen's relationship. The Claimant said that the Respondent behaved unprofessionally towards her. She said some days he would ignore her. The Claimant believed that the reason for the Respondent's behaviour arose because she informed him at around this time that she was unable to continue to help him with his personal matters. The Respondent disputed this and said that he relied upon others, not the Claimant, for support with his personal matters.

38. It was put to the Respondent that, because of the comments the Claimant had made about Ms Allen, he took it upon himself to investigate the Claimant. In response, the Respondent said: "One of the things yes – they really surprised

me and a lot of people". It was then put to the Respondent that he was trying to find a way of reason to dismiss her and because bullying was not enough, he looked for the fraud. In response he said: "Bullying not sufficient to dismiss – she stole the money directly from me and my children".

39. I had sight of the Respondent's bank statement for the period April 2019 to July 2021. This consistently showed a separate payment being made to the Claimant, in addition to a payment for all of the employee's wages. It also showed separate payments being made to others, such as Dr Soumya and Dr Abraham.

40. During the pandemic, the Claimant was allowed to work from home. On 16 August 2021, the Respondent informed the Claimant that she was required to work in the practice. He expected this to happen immediately.

41. On 17 August 2021, the Claimant submitted a formal flexible working request [116]. She requested a mixture of home and office working. She offered a trial period. The Respondent said he did not reply to this because "other problems were brought to my attention at this point".

42. At around this time, the Respondent asked Ms Kenney to undertake an audit of how much money the practice was spending on the Hub and how much work they needed to provide. Ms Kenney advised the Respondent about the Claimant's practice of invoicing for the Hub work, rather than arranging for the pay to be included in the payroll. The Respondent says that he was not aware of this, prior to this point.

Suspension and investigation

43. On 24 September 2021, after returning from a one week holiday, the Claimant was informed of her suspension in writing by way of a letter dated 23 September 2021 [118]. The letter stated that the reason for the suspension was to "allow an investigation to take place following issues that have been brought to our attention concerning your conduct". The specific conduct was not however explained in this letter.

44. An investigation meeting took place between the Respondent and a consultant from Peninsula Face2Face [126]. During this meeting, the Respondent said: "I had an issue with her in June which was of a personal nature, and that's when the falling out, sort of, began, I suppose. But, so, this is me keeping a check of when she comes to work". He also said: "initially, when she first started, we used to pay the wages together, so I had to authorise it all, but she's managed to manipulate that into because of my situation, I don't know which point it was, but I'd imagine it was when I had my collapse 19 months ago, whatever it was, and has dealt with lots of things" [140].

45. One of the allegations being considered at this stage against the Claimant concerned a video which the Claimant had put on Facebook of the Respondent. Although this video was posted in January 2019, the Respondent "didn't know this until somebody pointed it out to [him] within the last two weeks" [127].

46. On 28 September 2021, an investigation meeting with the Claimant and a consultant from Peninsula Face2Face took place. The Claimant heard the specific allegations against her for the first time during this meeting. Her evidence was that she was shocked about the allegations being put to her without warning and felt that the Respondent "wanted rid of her". The notes of the meeting record that the Claimant's initial and immediate response to the theft/fraud allegation was: "The improving access service is what I invoice the practice, which the accountant told me to do and then it was paid and any increase in payment was agreed with Dr Milner, because all the staff got paid time-and-a-half and he said I should be getting paid time-and-a-half, as well, and that's where the increases was included" [159]. Later, she said: "He did tell me to do an invoice, just do an invoice for the weekend that you work at the hub, that's exactly-, that's what he said, that's all you need to do" [163]. She later said: "This is just a witch hunt, I'm sorry, but it is" [164]. She acknowledged on numerous occasions that her wage increases were agreed orally with the Respondent and she was "foolish" to not get them confirmed in writing.

47. An investigation report was produced by Peninsula Face2Face dated 13 October 2021 [176]. It was recommended that the Claimant be invited to a disciplinary meeting to consider the following allegations:

    a. abusing her position of Practice Manager having fraudulently obtained money by making unauthorised transactions from the Respondent's business account to her own personal account. As a result, and if proven, the surgery is placed at risk by the HMRC for failing to report PAYE;

    b. deliberately and knowingly overpaying herself for work carried out that does not attract the higher rate of pay, therefore acting in a dishonest an unprofessional manner;

    c. neglecting her duties by failing to adhere to the expected and contracted hours of work thus, being unable to fully discharge her duties and fulfil her role as Practice Manager;

    d. acting inappropriately and unprofessionally with unwelcomed and adverse attention towards a fellow employee with the intention of making them feel intimidated, violating their dignity and/or creating a hostile environment; and

    e. failing to comply with a reasonable management request by attending the Practice Manager course, and charging this to the Respondent, without authorisation.

Disciplinary

48. On 13 October 2021, the Claimant submitted a fit note, due to expire on 6 December 2021, citing 'work related stress and anxiety'.

49. On 14 October 2021, the Claimant was invited to attend a disciplinary meeting, arranged for 20 October 2021, with a different consultant from Peninsula Face2Face [160]. The Claimant did not attend because she was unwell.

50. On 27 October 2021, the disciplinary hearing was rearranged to 27 October 2021 [192]. The Respondent informed the Claimant that she could join the disciplinary meeting via video conference if she preferred.

51. On 26 October 2021, the Claimant confirmed that she would not be attending the hearing as she was too unwell [196].

52. On 27 October 2021, the Respondent wrote to the Claimant to give her an opportunity to provide written representations for the disciplinary hearing. He warned her that if she did not attend the next hearing it would proceed in her absence.

53. On 10 November 2021, the Respondent informed the Claimant that her sick leave superseded her suspension and she would be paid statutory sick pay.

54. The Claimant's evidence was that, on 22 November 2021, she collapsed at home and suffered from a suspected stroke which was subsequently diagnosed as a stress related neurological disorder.

55. On 15 December 2021, the Claimant submitted a fit note citing 'neurological disorder under investigation, TIA, and work related stress and anxiety'. She was signed off until 6 February 2022.

56. On 20 January 2022, the disciplinary outcome report and letter were issued to the Claimant. Dismissal without notice was recommended [281].

57. On the same date, the Respondent wrote to the Claimant to confirm that she had been dismissed [283].

58. It was put to the Respondent that he wasn't involved in the disciplinary process and it was all dealt with by Peninsula. He replied: "That's what the membership is for".

Appeal

59. On 3 February 2022, the Claimant requested an appeal against her dismissal [285]. Although this request was submitted outside the timescales, the Respondent agreed to consider it.

60. On 17 February 2022, an appeal meeting took place [288]. The Claimant attended.

61. On 4 March 2022, the appeal outcome report and letter were issued to the Claimant. The dismissal was upheld which the Respondent confirmed to the Claimant in writing on the same date [334].

Criminal proceedings

62. The Claimant was visited by the police on 17 April 2022. She was advised that the Respondent had reported her for theft, deception, fraud and bullying. She was interviewed on 13 June 2022. On 8 August 2022, the police confirmed that they did not think that the allegations were sustainable and would not be taken forward.

Job search

63. In explaining how the dismissal affected her, the Claimant's evidence was that she had worked for the NHS for over 20 years and no longer felt able to do so. She did not feel fit to return to work until May 2022. She co-started a business in May 2022 which continued to July 2022. She also worked at a pub as a barperson, cleaner and cater (undertaking a mixture of employed and self employed roles). From 26 September 2022, she worked for Hull Churches Home from Hospital as a Service Co-ordinator.

Remedy

64. The Claimant claimed a basic award of £3,264 which the Respondent agreed was correct. In respect to loss of statutory rights, the Claimant claimed £600 stating: "In the era of the 1 year qualifying period for unfair dismissal £300 was considered standard. It is submitted therefore that £600 is now appropriate" [388]. The Respondent submitted that it considered £500 to be the maximum. In respect to immediate loss of earnings, she claimed for 35.5 weeks from her dismissal until 22 September 2022. She stated that, during this time, she would have earned £21,340.82 with the Respondent but actually earned £6,265.36 resulting in a shortfall of £15,075.46. She claimed £2,002.97 for the period of 6.5 weeks between 22 September 2022 and the hearing date. She says that she would have earned £3907.47 with the Respondent but was expecting to earn £1904.50. Finally, she claimed 52 weeks ongoing loss from the date of the hearing totalling £16,023.80. The Respondent confirmed the net figures in the Claimant's schedule of loss were correct.

<u>The Law</u>

Unfair dismissal

65. The relevant parts of s.98 Employment Rights Act 1996 (**ERA**) state:

> *(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…*
>
> *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)*

(b) relates to the conduct of the employee;

(3) …

(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.

66. 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***).

Breach of contract

67. Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 states:

Proceedings may be brought before an [employment tribunal] in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if-
(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;
(b) the claim is not one to which article 5 applies; and
(c) the claim arises or is outstanding on the termination of the employee's employment.

Compensation

68. S.119 of the ERA states:

(1) Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by—

(a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,
(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and
(c) allowing the appropriate amount for each of those years of employment.
(2) In subsection (1)(c) "the appropriate amount" means—
(a) one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,
(b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and
(c) half a week's pay for a year of employment not within paragraph (a) or (b).
(3) Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any year of employment earlier than those twenty years.

69. The relevant parts of s. 123 of the ERA states:

(1) Subject to the provisions of this section and [sections 124, 124A and 126], the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
(2) The loss referred to in subsection (1) shall be taken to include—
(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.
(3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of—
(a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or
(b) any expectation of such a payment,
only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122 in respect of the same dismissal.
(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.
(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.

70. In ***Cooper Contracting Ltd v Lindsey 2016 ICR D3, EAT***, Mr Justice Langstaff (then President of the EAT) summarised a number of principles drawn from the earlier case law that should be used to guide tribunals when considering whether there has been a failure to mitigate loss. He observed that there were considerable dangers in approaching the matter as though the duty to mitigate required the taking of all reasonable steps to lessen loss. Such an approach

risked diverting focus away from the legal principles that applied to mitigation and might lead erroneously to the conclusion that if the employer could show a single reasonable step that was not taken it would inevitably succeed in its submission that there had been a wholesale failure to mitigate. To avoid such a mistake, it was imperative that the following guidance be firmly borne in mind:

a. the burden of proof regarding a failure to mitigate is on the wrongdoer. A claimant does not have to prove that he or she has mitigated the loss;

b. if evidence as to mitigation is not put before the employment tribunal by the wrongdoer, it has no obligation to look for that evidence or draw inferences. This is how the burden of proof works in this context: responsibility for providing the relevant information belongs to the employer;

c. the employer must prove that the claimant has acted unreasonably. The latter does not have to show that what he or she did was reasonable. What is reasonable or unreasonable in this regard is a question of fact, to be determined after taking into account the wishes of the claimant as one of the relevant circumstances, although it remains the tribunal's own assessment of reasonableness — not the claimant's — that counts;

d. the tribunal should not apply a standard to the claimant that is too demanding. He or she should not be put on trial as if the losses were his or her fault, given that the central cause of those losses was the act of the employer in unfairly dismissing the employee;

e. the relevant test can be summarised by saying that it is for the wrongdoer to show that the claimant has acted unreasonably in failing to mitigate; and

f. in a case where it might be reasonable for a claimant to have taken a better paid job, this fact does not necessarily satisfy the test: it is simply important evidence that might assist the tribunal to conclude that the employee has acted unreasonably.

Submissions

71. Both parties provided oral submissions. They are not set out in detail in these Reasons but both parties can be assured that I have considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

Conclusions

What was the reason for the Claimant's dismissal?

72. It is clear to me that the catalyst for the Claimant's dismissal was the falling out that the parties had in June 2022. The cause of such breakdown in relationship may have been, as the Claimant contends, because she informed the

Respondent that she was unable to continue to help him with her personal matters. Or, more likely, as both parties referred to it, it could have been because of the Claimant's reaction to the Respondent starting a relationship with Ms Allen. Whatever the reason, hostility built between the parties from this point onwards.

73. I have concluded that this was the catalyst for the Claimant's dismissal because:

    a. The Respondent accepted that his behaviour towards the Claimant changed from this point. As stated earlier, it was put to the Respondent that, because of the comments the Claimant had made about Ms Allen, he took it upon himself to investigate the Claimant. In response, the Respondent said: "One of the things yes – they really surprised me and a lot of people". During the investigation meeting he said that he had been checking when the Claimant came to work and connected this point with their 'falling out' in June 2021;

    b. It appears from this point onwards the Respondent was trying to find a reason to dismiss the Claimant. Numerous allegations were raised, most of which were abandoned either before or during this hearing. One allegation concerned a video uploaded on Facebook. The Respondent said that the video had been "pointed out" to him two weeks before suggesting that he had been asking colleagues to identify any wrongdoing on the Claimant's part. An allegation of bullying was maintained during the hearing but with no vigour from the Respondent and was then ultimately abandoned during submissions when the Respondent's representative said: "don't wish to dwell on the bullying – not brought any witnesses to confirm or a deny that – rabbit not worth chasing". Furthermore, the Respondent instructed Ms Kenney to undertake the audit of the Hub work after his falling out with the Claimant, not before; despite Ms Kenney joining the surgery in April 2021;

    c. it appears that the Respondent was attempting to make the Claimant's working arrangements intentionally difficult at around this time. During a staff meeting on 16 August 2021, the Respondent told the Claimant that he wanted her back in the office straight away. This was despite the fact she had been permitted to work from home for a number of years. The request for her to return to the office immediately, without notice, was not a step that a reasonable employer would take. Taking this step is indicative of the Respondent's desire to punish the Claimant. As a result, the Claimant promptly submitted a flexible working request but this was neither acknowledged nor considered. A reasonable employer would have at least acknowledged the flexible working request. The fact that the Respondent did not do so is indicative of the fact that the Respondent had already decided that he would be dismissing her;

    d. Neither party gave any evidence of any difficulties between them prior to June 2021. The change in relationship between the two, from this point onwards, was stark; and

e. The Respondent has focused on the fact that it believed that the Claimant had been paying herself more than what had been agreed for work undertaken in the Hub. Further, when paying herself for this work, the Respondent has focused on the fact that the Claimant did not put this pay through the Respondent's PAYE system, meaning that there could have been tax consequences for the Respondent. However, the findings reached in this regard were not based on reasonable grounds, for the reasons explained below.

Were the rates of pay agreed?

74. On the balance of probabilities, I find that the rates of pay that the Claimant earned for the Hub work were agreed. Therefore, the Respondent did not have reasonable grounds for concluding that they were not. This is because:

a. It was clear that 'time and a half' was agreed for the Respondent's employees, this was not in dispute. For the Claimant, this would have been in excess of £15 per hour;

b. Early on during the investigation meeting, after she heard the allegations for the first time, the Claimant referred to having agreed such rates of pay and the rationale for the same. The Claimant had no time to prepare for this investigation meeting, having only heard this allegation for the first time during it. She candidly said that it was foolish of her to not document such agreements in writing;

c. The Claimant produced invoices which the Respondent, as the owner of the business, could have accessed, certainly when considering or signing off the annual accounts. It has not been suggested that these invoices have been created either for the purposes of the disciplinary process or these proceedings nor has any evidence of the same been provided to me;

d. The Respondent's position does not make logical sense, considering these invoices. The Respondent said that he believed that the Claimant had started 'manipulating' the wages after his collapse in January 2020. However, the invoices covered the period between April 2019 and December 2019, before the Respondent commenced his leave of absence. At this point he was checking and physically authorising the payments being made by the Claimant using the pin. Therefore it is likely that he would or at least should have been reviewing the invoices as part of approving the same;

e. The Respondent says that it would not make business sense for him to pay the Claimant these amounts. He could only recover £21 per hour for the Hub work and he expected to be able to keep £6 of that to himself. It would not have made any business sense for him to pay more than £21 per hour as that would have resulted in him making a loss on this work. I agree, this does not make business sense and this is a point which has troubled me significantly when reaching my decision in this case.

However, whilst I agree with the Respondent in this regard, I also find that it is likely to make even less business sense to:

i. physically authorise payments between April and December 2019 which he had not agreed to; and

ii. allow the Claimant to make payments herself, without properly checking and raising any concerns about the bank statements. Although the Respondent says he did not give the bank statements his full attention from January 2020 onwards, this is contradicted by the evidence. As stated earlier, there were messages from the Respondent at around this time specifically raising issues regarding the locum fees. He must therefore have been given the statements his attention. It follows, therefore, that it is likely that he did see the payments being made to the Claimant. It makes no business sense for the Respondent to see such payments and raise no issues regarding them. The fact he did not do so strongly suggests he had no issues regarding them because they were in line with what had been agreed; and

f. As the Claimant was aware that the Respondent would be looking at the bank statements and the accounts, it does not make sense for her to have sought to steal from him in this way. It is more likely that she would have, e.g., paid increased wages through payroll which could have been more easily disguised.

Was it agreed that the Claimant could invoice the Respondent for the Hub work, rather than be paid through payroll?

75. On the balance of probabilities, I also find that Claimant was permitted to submit invoices for the Hub work rather than include such payment in the payroll. This is because:

a. The agreement was reached between the Claimant and Mr Cooper. Unfortunately, as Mr Cooper has passed away, he cannot dispute that such agreement was reached. However the Claimant was able to give evidence, under oath, that it was and the Respondent was able to challenge that evidence;

b. Given that the Claimant was being paid £21 per hour, the amount of money that the Respondent was receiving from the hub, Mr Cooper's rationale, whilst not necessarily legal (this is not for me to determine and therefore I make no determination in this regard), has a rationale. Given that the Respondent did have a practice of paying individuals directly, any tax risk this may have created for the Respondent was already present;

c. The Respondent has submitted that the practice of submitting invoices and paying staff outside of payroll is not a practice they were aware of, nor is it a practice they would sanction. However, the bank statements show payments being made directly to others, as well as the Claimant. The Respondent was

not able to give a satisfactory explanation to this when questioned during the hearing. Furthermore, the Respondent accepted in cross examination that he knew that direct payments were being made to the Claimant. I have included some quotes to this effect in the 'Findings of Fact' section of these Reasons;

d. The Respondent accepted that Mr Cooper would have had to produce the annual accounts and the Respondent would have been required to sign these off. These would have shown direct payments being made to the Claimant and the amounts. The Respondent accepts that Mr Cooper raised no concerns to him about these. This is likely to be because no such concerns existed, that the arrangements were as per what had been agreed between the Respondent, Mr Cooper and the Claimant; and

e. Ms Kenney, who had started work with the Respondent in April 2021 to assist with the accounts, could have corroborated some of the Respondent's position, particularly regarding a conversation that Claimant says she had with Ms Kenny about Mr Cooper's advice. The Respondent has chosen not to call Ms Kenney to give evidence at this hearing and the reasons for not doing so, bearing in mind that the Respondent has professional representation, do not make sense.

76. I do not therefore find that Claimant was dismissed because she been paying herself more than what had been agreed for work undertaken in the Hub. Nor for the fact these payments were not made through payroll. I find that she was dismissed because of the breakdown in relationship which resulted in the Respondent searching for a motivation to dismiss her. He said himself during this hearing that the bullying allegations were not enough. Consequently, he had to find something else. This was it.

77. As a result of the above, the Respondent has not satisfied me that it has a fair reason for the Claimant's dismissal and the dismissal is unfair. Her claim for unfair dismissal is well founded and succeeds.

Reasonableness

78. Although I do not need to address section 98(4), I note that the Claimant was given an opportunity to put forward her representations at the investigation meeting and the appeal meeting in person. Although she requested her appeal late, she was still permitted to pursue it. She was also able to present written representations at the disciplinary meeting. Although there were things that the Respondent could have done better, in particular to give the Claimant more time to prepare for the appeal hearing and to further consider whether the disciplinary proceedings ought to be put on hold until the Claimant was well enough to engage in the same, the Respondent's approach to the disciplinary process was within the range of reasonable responses. There has been no unreasonable failure to comply with the ACAS Code in regard to the process.

Breach of contract

79. The Claimant alleged that she was entitled to six months full pay and six months half pay during her sickness absence. As she was only paid statutory sick pay during her sickness absence, she alleges that she is owed payments and the failure to make those payments is a breach of contract.

80. The Claimant accepted that there were no contractual documents, or other correspondence, before me confirming this entitlement. Indeed, the relevant contractual document states that the Claimant was only entitled to statutory sick pay.

81. The Claimant says she remembers discussing this with the Respondent and them both signing her a contract of employment to this effect. She gave detailed evidence about the discussion she and the Respondent had regarding this. She could not however remember when this conversation took place save that it was around late 2018 / early 2019. The Respondent denies agreeing to this sick pay provision.

82. The Respondent further states that no other employees are entitled to anything more than statutory sick pay, unless they are employed on agenda for change contracts, which the Claimant was not. The parties acknowledged that one other employee, Anne, was entitled to such sick pay provision but the Claimant's position was that she was not on an Agenda for Change contract.

83. On the balance of probabilities, I have found that the Claimant was not entitled to six months sick pay during her sickness absence. This is because:

    a. although her oral evidence was credible, there is no written evidence persuading me that this is the case; and

    b. if it was the case that the Claimant had such an entitlement, it would appear to be irregular in the Respondent's organisation.

84. The position here is different to the position regarding her salary, as explained earlier. Although there is no written record of her rates of pay being agreed, I have found that the Respondent must have been aware of the same following, e.g., his review of the bank statements, the fact he authorised some payments and as part of signing off the annual accounts.

85. Had the Claimant had earlier periods of sickness absence and provided evidence that she had been paid her normal pay during such periods, the matter may have been different. However, no such evidence was presented to me.

Remedy

86. The basic award of £3,264 was agreed and therefore ordered.

87. In respect to the compensatory award:

a. The claim for £600 loss of statutory rights is excessive, particularly bearing in mind the Claimant's modest service. An award for £400 was made instead.

b. For immediate loss of earnings, the Claimant claimed £17,078.43. It is just and equitable to award this amount given the impact of the Claimant's dismissal on her health, preventing her from searching for alternative employment until May 2021, and the attempts at mitigation that she made thereafter. In this regard, I am not persuaded that the Claimant failed to mitigate her losses.

c. In terms of future losses, I considered 12 weeks ongoing loss to be just and equitable. Given that the Claimant has now found an alternative job, it would not be just and equitable to award the full 52 weeks claims. I therefore awarded £3,697.80.

88. In total, a compensatory award of £21,176.23 was made.

89. As stated above, it is not just and equitable to increase or reduce this award as a result of any unreasonable failure to comply with the ACAS Code.

90. This is not a case where I have found that the Claimant was unfairly dismissed due to procedural matters. I have found that she was substantively unfairly dismissed because of the breakdown in her relationship with the Respondent, which led to the Respondent searching for something that he could use to dismiss her. On this basis, it is inappropriate to adjust the compensation payable to the Claimant as a result of *Polkey.*

91. The Recoupment Provisions applied, as further explained in the Judgment.

Employment Judge McAvoy Newns

31 January 2023