EMPLOYMENT TRIBUNALS

Claimant: **Ms C Lickfold**

Respondent: **Firvale Clinic Limited**

Heard at: Southampton **On:** 20th & 21st March 2023

Before: Employment Judge Dawson

Appearances
For the claimant: Mr Large counsel
For the respondent: Mr Wayman, counsel

JUDGMENT

1. By consent the name of UW will be replaced with the initials UW[1] to avoid identification of her.

2. The claimant was unfairly dismissed by the respondent.

3. The claimant was dismissed in breach of contract in respect of notice and the respondent is ordered to pay damages to the claimant for an amount to be determined.

4. The respondent has failed to pay the claimant's holiday entitlement and is ordered to pay the claimant an amount to be determined.

5. The question of remedy is adjourned to 21st April 2023.

6. The following directions are given in respect of the remedy hearing:

    a. If either party is seeking to rely upon witness evidence at the remedy hearing,

[1] Selected by the use of a web based random letter generator

i. they must serve a witness statement for each witness who will be called, on the other party, by 14 April 2023.

ii. The total number of words in the witness statements of either party must not exceed 2000.

b. The parties must agree a bundle for use at the remedy hearing not exceeding 100 pages in length.

REASONS

Introduction

1. By a claim form presented on 11 October 2022 the claimant presented a claim of unfair dismissal and for notice and holiday pay.

2. By way of brief overview, the claimant was employed by the respondent as a practice manager between June 2015 and May 2022. She was dismissed by letter attached to a WhatsApp message sent on 27th of April 2022. She was dismissed on 4 weeks' notice although she had worked for the respondent for 6 complete years.

3. The respondent is a relatively small private medical practice which carries out cosmetic treatments. It is owned by its director, Dr Berry.

4. The respondent says that the claimant was dismissed due to the fact that despite conversations and informal warnings about the her performance and behaviour, the claimant's behaviour had become so toxic and damaging to the practice and the mental well-being of employees that trust and confidence had been eroded[2].

Issues

5. The issues in the case are as follows, having been agreed by the parties in an agreed list of issues.

Ordinary Unfair Dismissal

1.1 Can the Respondent show the reason for dismissal was solely or principally for a potentially 'fair reason'(*the Respondent relies on the potentially fair reason of SOSR and it is* agreed the dismissal letter referred to 'interpersonal issues'. The Respondent says this concerned SOSR, being a breakdown in trust & confidence; *the Claimant does puts the Respondent to proof as to the* reason for the dismissal, but says that if interpersonal issues are found to be the sole or principal reason for the dismissal, they did not give rise to a breakdown in trust & confidence and

[2] Taken from paragraphs 18 and 20 of the Grounds of Resistance

so do not amount to SOSR under s.98(1)(b) Employment Rights Act 1996 (ERtsA))

1.2 Did the Respondent act fairly in all the circumstances, taking into account its size and business resources and equity of the case in treating the alleged SOSR as a sufficient reason for the Claimant's dismissal (*Per Perkin v St George's NHS Trust, the Respondent proposes issues*

- *Did Dr Berry have a reasonable belief in the personality clash?*

- *If so, was the belief genuinely formed?*

- *As to the procedure, did dismissal follow reasonable investigation*?*)*

1.3 Was the dismissal within the range of reasonable responses open to a reasonable employer?

1.4 Was the dismissal procedurally unfair (*the Claimant relies on alleged breaches in 3.2 below*)

1.5 If unfair, would the Claimant have been dismissed (by Dr Berry not a hypothetical employer) or would she have otherwise resigned in any event and what reduction reflects this (*Polkey*; s.123(1) ERtsA);

1.6 Did the Claimant contribute to the dismissal, namely was there conduct that was *culpable or blameworthy; caused or contributed to the dismissal*; & *it is just & equitable to reduce the award* (*Nelson v BBC (*No2) s122(2);123(6) ERtsA);

1.7 What should the Claimant receive by way of award, to include whether the Claimant took reasonable steps to mitigate her loss and whether the receipt of notice pay involves an element of double recovery (ss.119 – 124 ERtsA)?

2. Breach of Contract

2.1 What is the contractual term relied upon (*the Claimant on the statutory notice period afforded by ss.86-87 ERtsA*)

2.2 Was that term breached (*the Claimant received one month's pay in lieu but had continuous employment of 6 years- 6 days' pay is said to be due*)

2.3 Was the Claimant, prior to dismissal, in repudiatory breach of contract or committed gross-misconduct (*Boston Deep Sea Fishing v Ansell* (1888) 39 Ch D 339; *Williams v Leeds United FC* [2015] IRLR 383)?

2.4 What, if anything, is the Claimant due by way of damages?

3. ACAS Uplift (S.207A & Sch.A2 TULR(C)A)

3.1 Did the ACAS CoP 1: Disciplinary & Grievance Procedures apply (*the Respondent says no* Phoenix House v Stockman [2016] IRLR 848; *the Claimant says yes* Lund v St Edmund's School, Canterbury UKEAT/0514/12)?

3.2 If so, was a provision of the Code breached (*the Particulars of Claim cite-*

(a) no fair or reasonable investigation;

(b) failure to detail particulars of allegations prior to disciplinary meeting;

(c) failure to afford opportunity to bring a colleague or trade union representative as Companion to the meeting;

(d) failure to provide reasonable opportunity to respond to allegations put;

(e) failure to provide opportunity to appeal (paragraphs [5]; [9]; [12]; [22])?

3.3 If so, should there be a corresponding increase in any award of no more than 25% (S.207A TULR(C)A).

4. Holiday pay

4.1 Did the Respondent pay the Claimant in lieu of her full entitlement to accrued but untaken holiday due on the termination of her employment? *(the Claimant says no and that pay in lieu of 6 days' of accrued but untaken holiday is due).*

6. At the close of the hearing the respondent confirmed that it was no longer challenging the claim in respect of holiday pay.

7. To understand the allegations which are said to have led to the breakdown of trust and confidence it is necessary to refer to the grounds of resistance. Counsel for the respondent confirmed that the allegations are those set out in paragraphs 7, 3 and 15 as follows, however it is also important to note that the list of issues has refined those allegations in that the behaviour said to lead to the breakdown of trust and confidence is interpersonal issues:

> 7. After the move on 1 November 2021 the Claimant's behaviour did not improve and she became more petulant, avoided direct questions and was failing to carry out her role. Her relationship with the colleagues, which she was employed to manage, also deteriorated examples include:
>
> a. during the first week of December 2021, she verbally assaulted Ana Olivia (Aesthetician) by publicly shouting and demeaning her and criticising her work. This was dealt with by Dr Berry; the Claimant was told that this was completely unacceptable behaviour and she needed to apologise.
>
> b. at the Christmas party, on 10 December 2021, she insulted almost every team member including:
>
> i. UW, about her personal appearance, specifically her breasts. She then made further derogatory comments about her breasts in front of rest of the table which was humiliating and demeaning for UW.
>
> ii. Rachel Bartlett, calling her 'actual trash' and a 'cunt' in front of other colleagues.
>
> 13 On 22 April 2022 Dr Berry informed the Claimant that they needed to have an urgent meeting regarding her performance and conduct. This had been planned following the meeting in January; however, her recent behaviour made it evident urgent action was required. The meeting was scheduled for 25 April 2022 During the meeting Dr Berry covered various issues including:
>
> a. Complaints from patients

b. Complaints from members of staff resulting in many of them wanting to leave.

c. Her behaviour at the Christmas Party

d. Lying about a botox shortage.

e. Her poor performance in her role,

  i. Not providing monthly reports

  ii. Lack of dedication

  iii. Regular stock issues

  iv. Not preparing ideas for profitability for the Practice (i.e. where was the Practice making money, who is making money, how can this be improved).

  v. Unprepared for practice meetings

  vi. Lack of staff management (including playing staff off against each other)

  vii. Finance and payment plans, such as Klana not being explored, which was key to assist in the survival of the Practice.

15 The following day, the Claimant was ignoring some of her direct reports (victimising them for raising complaints), including the notetaker from the meeting, as well as starting arguments with other staff members. Her behaviour was so disruptive no work was being carried out. This was of great concern given the meeting the previous day and the state of the Practice's finances. The Claimant seemed to completely ignore what had been discussed, demonstrating that the relationship between the parties had completely broken down. She was asked to go home in order to allow the Respondent an opportunity to attempt to defuse the situation

The Conduct of the Hearing

8. At the outset of the hearing the parties made a joint application for an extension to the word count of the statements. The tribunal was, therefore, presented with something of a fait accompli, and having considered the overriding objective, decided that the extensions in the word count should be allowed. The tribunal was in a position to start the evidence by 11:45 and the parties agreed a timetable for the cross-examination of witnesses which they largely stuck to without the need to ask for further time.

9. The hearing had commenced in Hearing Room 10 which was a small room, although it could just accommodate all of the people who wished to attend. Given that it was something of a squeeze, however, I arranged for enquiries be made as to whether a larger hearing room could be available from lunchtime, which was possible. The case commenced in hearing room 10 without objection by either party and then moved to a larger hearing room after lunch on the first day.

10. Just before lunch on the first day, Dr Berry, who the respondent had called first, stood up and stated "I want to rest, I'm getting upset by this, I think it is getting very aggressive." She then left the witness table. I invited Dr Berry to take a seat with her counsel and, having heard representations from him, the case was adjourned for lunch.

11. After lunch, counsel for the respondent informed me that he was concerned for the health of Dr Berry. Although Dr Berry had seen the larger room she did not wish to continue with her evidence. Mr Large was concerned that she was not mentally fit to give evidence and sought to interpose his other witnesses to allow Dr Berry to attend her general practitioner with her husband. Counsel for the respondent did not object to that, but did not wish to start his case until the evidence of Dr Berry was concluded.

12. The matter, therefore, continued with tribunal hearing from the respondent's other witnesses and the case was then adjourned overnight.

13. By the 2nd day of the hearing, Dr Berry had not been able to see her general practitioner and counsel for the claimant asked for the tribunal to leave consideration of her evidence until she had seen her doctor in the afternoon. Mr Wayman, for the respondent, agreed to that and also agreed that he would call the claimant to give evidence in the meantime. The claimant's evidence concluded without incident although I was made aware by court staff that the claimant had experienced some difficulties immediately after leaving the tribunal room. The claimant's case closed after her evidence was called.

14. At approximately 3pm, Mr Large handed up a letter from Dr Berry's general practitioner stating that Dr Berry was suffering from PTSD and severe anxiety and she was unfit to give evidence. It stated that she would require to be monitored and re-examined in one week's time before being deemed fit to testify.

15. Mr Large outlined for the tribunal two possible ways forward, one was to adjourn the hearing as part heard, the other was to conclude the case without hearing the cross-examination of Dr Berry in full and he referred to a similar situation in the case of *Shui v University of Manchester*. I asked Mr Large what application he was making but he declined to make any application on the basis that he told me he was unable to take instructions. He did not seek an adjournment to take instructions. For the claimant, Mr Wayman, invited the tribunal to conclude the case without the evidence of Dr Berry being finished, accepting that he would be unable to put his whole case to her. He did not want there to be an adjournment, particularly in circumstances where the claimant was finding the case to be stressful.

16. I considered the case of *Shui* and in particular paragraphs 50 – 55. I took account of the fact that the respondent had been represented throughout by experienced solicitors and counsel and that counsel had not objected to any of the questions put by Mr Wayman to Dr Berry during the course of the first morning's hearing (no criticism is made of Mr Large, but the lack of objection shows that Mr Wayman's questions were not inappropriate). No application had been made, or was made, for reasonable adjustments to be applied to the hearing. I took account of the fact that Dr Berry's counsel was not asking for an adjournment. Applying the overriding objective I noted that fairness requires fairness to both sides and it was inevitable that adjourning the proceedings part-heard for an indeterminate period would be stressful to the claimant, who would not have a resolution in respect of her claim. I noted that Mr Wayman was willing to take the risk of the tribunal accepting Dr Berry's evidence in so far as it was

not challenged but also that, according to Mr Wayman, he had less than 30 minutes of cross-examination left (Dr Berry had given evidence from 11:48 until around 12:55 on the first morning of the hearing).

17. Having weighed all of those matters, in circumstances where neither party was seeking an adjournment, I concluded that it was in the interests of justice to follow the course I was invited to by Mr Wayman and the case moved to closing submissions.

The evidence at the hearing

18. For the respondent I heard from Dr Berry, as set out above, and also from UW who was working for the respondent at the material times and Ana Oliveira who works for the respondent as an Aesthetic Therapist. The claimant gave evidence on her own behalf and submitted witness statements from two other witnesses who she did not call; I have read their statements but have not found they assist me very much, particularly in circumstances where the makers have not been available for cross-examination.

19. I received a bundle running to 126 pages.

The law

20. Section 98 Employment Rights Act 1996 provides :

(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—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment

21. Section 98(4) states that "The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

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 shall be determined in accordance with equity and the substantial merits of the case".

22. Section 207A Trade Union and Labour Relations (Consolidation) Act 1992 provides:

> (2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
>
> (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
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> (b) the employer has failed to comply with that Code in relation to that matter, and
>
> (c) that failure was unreasonable,
>
> the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

23. The ACAS Code of Practice and Disciplinary and Grievance Procedures provides that if there is a disciplinary case to answer the employee should be notified of this in writing. The notification should give details the time and venue for the disciplinary meeting and advising employee their right to be accompanied at the meeting. It does not require a statement of the possible outcome of the meeting, although often letters do state, if it is the case, that dismissal is a potential outcome. The Code also states that it would normally be appropriate to provide copies of any written evidence with the notification. It provides that where misconduct is confirmed it is usual to give the employee a written warning and employees should be provided with an opportunity to appeal.

24. In *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23 the Court of Appeal held that the range of reasonable responses test (or to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision.

25. In respect of a dismissal for "some other substantial reason", *Perkin v St Georges Healthcare NHS Trust* [2005] EWCACiv 1174 the Court of Appeal held:

> [59] That said, I agree with Mr Langstaff that personality, of itself, cannot be a ground for dismissal within ERA 1996 s 98. For there to be a potentially fair reason for dismissal, an employee's personality must, it seems to me, manifest itself in such a way as to bring the actions of the

employee, one way or another, within the section. Whether, on the facts of a particular case, the manifestations of an individual's personality result in conduct which can fairly give rise to the employee's dismissal; or whether they give rise to SOSR of a kind such as to justify the dismissal of an employee holding the position which the employee held, the employer has to establish the facts which justify the reason or principal reason for the dismissal. Provided the employer can do so, s 98(4) then kicks in. So much is, I think, obvious.

26. In addition to those cases the respondent referred to *Jefferson v Westgate* as authority for the proposition that the ACAS code does not apply to all situations of dismissal, it is designed for disciplinary and grievance procedures although it might be capable of extending beyond such strict situations given the wording of the first bullet point in paragraph 1. The respondent also argues that *Westgate* requires the tribunal to apply section 98(4) of the 1996 Act, not a procedural check list. I accept that submission.

27. Counsel for the respondent also referred to *Phoenix House v Stockman* as authority for the proposition that the code does not apply to SOSR dismissals. In that case the Employment Appeal Tribunal held:

    [21] In my judgment, clear words in the Code are required to give effect to that sanction, otherwise an employer may well be at risk of what is in reality a punitive element of a basic and compensatory award in circumstances in which he has not been clearly forewarned by Parliament and by ACAS that that would be the effect of failing to heed the Code. The Code does not in terms apply to dismissals for some other substantial reason. Certain of its provisions, such as for example investigation, may not be of full effect in any event in such a dismissal. What is required when a dismissal on that ground is in contemplation is that the employer should fairly consider whether or not the relationship has deteriorated to such an extent that the employee holding the position that she does cannot be reincorporated into the workforce without unacceptable disruption. That is likely to involve, as here, a careful exploration by the decision maker, in this case Ms Zacharias, of the employee's state of mind and future intentions judged against the background of what has happened. Of course, it would be unfair, as it was found to be here to a marginal extent by the Tribunal, to take into account matters that were not fully vented between decision maker and employee at the time that the decision was to be made. Ordinary commonsense fairness requires that. Clearly, elements of the Code are capable of being, and should be, applied, for example giving the employee the opportunity to demonstrate that she can fit back into the workplace without undue disruption, but to go beyond that and impose a sanction because of a failure to comply with the letter of the ACAS Code, in my judgment, is not what Parliament had in mind when it enacted s 207A and when the Code was laid before it, as the 2009 and 2015 Codes both were.

28. The claimant relies upon *Lund v St Edmund's School, Canterbury*. The Employment Appeal Tribunal in that case held:

> So although there are particular situations to which the Code does not apply – dismissals for redundancy and the non-renewal of fixed-term contracts on their expiry – it is intended to apply to those occasions when an employee faces a complaint which may lead to disciplinary action or where an employee raises a grievance. If the employee faces a complaint which may lead to disciplinary action (whether because of his misconduct or his poor performance), the Code applies to the disciplinary procedure under which the complaint is to be investigated and adjudicated upon. Of course, the outcome of the disciplinary procedure may not result in the employee's dismissal at all. Or it may result in his dismissal which on analysis turns out not to be a dismissal for his misconduct or poor performance but a dismissal for something else. The important thing is that it is not the ultimate outcome of the process which determines whether the Code applies. It is the initiation of the process which matters. The Code applies where disciplinary proceedings are, or ought to be, invoked against an employee.

29. The claimant, contending that this was a misconduct dismissal in reality, relies upon *British Home Stores v Burchell* that "First, there must be established by the employer the fact of that belief; that the employer did believe it. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. And, third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case". The respondent accepts that usefully be applied to this sort of case where the respondent is relying upon some other substantial reason.

30. In respect of the claim of breach of contract the respondent relies upon the well-known principles in *Boston Deep Sea Fishing* and also *Williams v Leeds United Football Club* where the High Court dismissed a claim for breach of contract despite the fundamental breach occurring 5 years earlier.

31. In *Gestmin SGPS SA v Credit Suisse (UK) Ltd*, Leggatt J gave the following helpful guidance

> *Evidence Based On Recollection*
>
> **[16]** While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

...

> **[22]** In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. ... Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

32. I have approached the evidence in that way, whilst bearing in mind that in an employment case one may expect less contemporaneous documentation than in a commercial case.

Law on Compensation

33. In circumstances where it is found a decision to dismiss was unfair the tribunal must consider how much compensation to award in accordance with sections 122 and 123 the employment rights 1996.

34. In respect of the basic award, section 122 (2) ERA 1996 provides

    Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly

35. In respect of the compensatory award, s123 ERA 1996 provides

    > (1)Subject to the provisions of this section and sections … , 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.
    >
    > ...
    >
    > (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.

36. There are 3 potential reasons for reducing a compensatory award relevant to the facts of this case.

37. The first is where the claimant is likely to have left employment with the respondent in any event, either because she would have been dismissed or

because she would have resigned. This is often referred to as a Polkey reduction.

38. The second is where the claimant by their inappropriate conduct contributed to their dismissal. In this case there can be a reduction to the basic award as well as the compensatory award.

39. The third is where there is other conduct by the claimant, which did not contribute to the dismissal but is relevant. Commenting on W *Devis & Sons Ltd v Atkins [1977] 3 All ER 40*, Harvey on Industrial Relations sates "In this case no compensatory award was made because it was discovered subsequent to the dismissal that the employee had committed certain acts of misconduct. Although these had not caused or contributed to the dismissal, because they had not influenced the employer when the decision to dismiss was taken, they made it just and equitable for the tribunal to award no compensation"

40. It is also necessary to take account the principles laid down in *Rao v Civil Aviation Authority* [1994] IRLR 240. In making the calculation, the Employment Tribunal should first assess the amount of the loss taking account of Polkey, including the chance of employment continuing if the employee had not been unfairly dismissed. Thereafter, and in light of that finding, the Tribunal should decide the extent to which the employee caused or contributed to the dismissal and the amount by which it would be just and equitable to reduce the compensatory award in that respect.

41. Counsel for the respondent also relied upon the case of *Bottling Ltd v Cave*, as authority for the proposition that the tribunal must consider a number of imponderables when assessing the quantum and *Thornett v Scope* as authority for the proposition that the tribunal must speculate when considering matters under *Polkey* .

42. In respect of contributory conduct the respondent referred to *Nelson v BBC* and *Hollier v Plysu.* In *Nelson* the CA stated "It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody-minded. It may also include action which, though not meriting any of those more pejorative epithets, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved."

43. When considering section 123(6), the tribunal must consider whether the conduct was blameworthy, whether it caused or contributed to the claimant's dismissal and whether, if so, it would be just and equitable to reduce the basic and/or compensatory awards and, if so, by how much.

44. In respect of the claim for an ACAS's uplift, the respondent referred to *Lawless v Print Plus.*

Findings of Fact

45. In this case there is a very substantial factual dispute. The respondent's case is, in essence, that the claimant was a disengaged employee who was unresponsive to her employer and bullying towards those she line managed. The claimant's case is that she had a good working relationship with the respondent (at least before November 2021 and in 2022), that she never bullied those she line managed and that there was simply no reason for her dismissal. A large number of allegations are made which are not evidenced in the documents before me.

46. In order to reach conclusions in this case, I start by analysing the factual situation

    a. as evidenced in the documentation or

    b. where there is agreement on facts from which I can draw conclusions.

47. It is trite, but perhaps worth emphasising (given some of the answers which were given by witnesses in cross examination) that a tribunal must decide the case on the evidence which is before it[3].

48. The bundle which I have been provided with contains a large number of WhatsApp messages. In cross examination, Dr Berry accepted that, with the exception of the WhatsApp message that notified of the claimant's dismissal, all of the WhatsApp conversations have been disclosed by the claimant. With the exception of the minutes of the meeting which took place on 25 April 2022 and the dismissal letter, the respondent has disclosed no documentation which clearly shows concern about the behaviour of the claimant, indeed the respondent has disclosed barely any documents which appear in the bundle.

49. When Dr Berry was asked whether the WhatsApp messages in the bundle were the relevant messages to the case, she suggested they had been cherry picked. When she was asked whether there were other messages, she stated that she had been focusing on obtaining witness statements and did not know that WhatsApp messages were allowed in the case. The respondent has been legally represented throughout these proceedings and I do not regard it as credible to suggest that Dr Berry did not know that if she had relevant WhatsApp messages they could be used as evidence.

50. In May 2021, Dr Berry messaged the claimant stating "you are however a superstar!" The claimant replied stating "according to the patient yesterday [I] am terrifying to someo[ne I] didn't even talk to and today I am not patient…". The letters I have enclosed in square brackets are letters which are obscured at page 61 of the bundle but which I believe to be appropriately inserted. The part of the message after "patient" is not visible. The claimant gave evidence that her reply was in jest, I accept that, but it was clearly based in facts which

[3] A possible exception being where the tribunal is assessing quantum by reference to "Polkey" principles and speculation is necessary, although even then there must be an evidential basis for the speculation.

had happened. I have placed no reliance on the reference to “today I am not patient” since it is not clear what words followed.

51. In June 2021, there was an exchange of WhatsApp messages between Dr Berry and the claimant about the fact that the gates to the practice had not been properly closed. The exchange reveals that Dr Berry was largely relying upon the claimant in that respect, as would be entirely proper given the claimant's role as practice manager. However there is no indication that Dr Berry lacks any trust in the claimant. I note that Dr Berry, talking of whoever left the gate open, states "what, kind of fucktard does that?" I record that simply to show the language which Dr Berry considered acceptable during WhatsApp exchanges when talking about junior members of staff.

52. In July 2021, Dr Berry wrote to the claimant stating "did Ana apologise to Courtney for yesterday?", I find that WhatsApp message again suggests that she had confidence in the claimant to manage the workplace (page 63). Likewise on 27 July 2021, when Dr Berry wrote talking about her own anxiety levels, she stated to the claimant "I'm sorry to put you in this position but my focus is all over the place" (page 64).

53. At page 65 of the bundle is a WhatsApp message which relates to an incident in September 2021. Dr Berry asserted in cross examination that the claimant had been involved in an argument with a customer and stated that the argument had gone on for about half an hour before she came to shut it down. In her evidence the claimant accepted that the argument probably had gone on for half an hour. Dr Berry asserted that a patient was more vulnerable and no matter who was right, the responsibility was to make sure that the patient was looked after. It was put to Dr Berry that at no point had she suggested that there was anything which the claimant had done which was inappropriate. Dr Berry said that she had done so at the time. It seems to me, on a proper reading of page 65, that Dr Berry was of the opinion that the claimant was not significantly at fault- she describes the patient as always having been a problem and says "you can't argue with stupid! I will get rid of her." However the message does go on to say "I know you are very loyal to the business, but these things should be dealt with in consultation i.e. Ana should have sorted the milia that's what she is paid to do!". The evidence of Dr Berry was that would have been the preferable way to deal with the matter. I find that the message shows that Dr Berry did have confidence in the claimant at that stage even if, as is often the case with employees, she required some guidance.

54. A message from October 2021 records Dr Berry stating to the claimant, "in the nicest way possible, because I love you and know you bleed the clinic, but the efficiency of this lot is going to determine what I can give you in a pay rise next year! If they aren't bringing it in, I can't give it out" (page 67).

55. Dr Berry accepted that the reference to "bleed the clinic" meant that she was describing the claimant as “loyal through and through” but also asserted that her point in the message was that the claimant was responsible for managing the others and she should be managing the staff to bring in as much money as possible. I accept that explanation by Dr Berry; the claimant was employed as a practice manager and the tone of the message is that the claimant may not

get a bonus because of inefficient staff, who the claimant was responsible for managing.

56. On 1 November 2021, there was a move of the clinic to its current address.

57. On 30 November 2021 Dr Berry wrote a WhatsApp message stating "I just want Chrissie [the claimant] back with all your charm, personality and sense of humour! I have no one else to look after me and keep me sane! I think of you as my work daughter. You know I love you. I am sorry I have been stressed but I think patients like us for the atmosphere and we need to get it back. Have a lovely evening and Sunday!" (Page 72). There is no WhatsApp message in reply from the claimant

58. Dr Berry says that message reflects that after a move of workplace on 1 November 2021, the claimant's attitude changed. I accept that evidence for a number of reasons as follows.

59. Firstly, the only logical explanation for the message is that, in Dr Berry's opinion, the claimant had changed. The claimant had not physically gone anywhere and the message cannot be a reference to the claimant's physical location. It seems to me more likely than not that it was a reference to the way the claimant presented herself in the workplace. That is also consistent with the reference to, charm, personality and sense of humour.

60. Secondly, my view is fortified by a message which the claimant sent to a friend, Christine, on 9 November 2021 stating, about Dr Berry "we are hardly talking" and a further message on that day saying "I literally did absolutely everything to move this clinic… She went to Tenerife and she hasn't even said two words of thank you… It literally takes nothing…" (page 71). Christine was a former employee of the respondent, she was also an existing patient of the respondent.

61. At around the same time- according to the index to the bundle, between November and December 2021- the claimant wrote the same friend stating (among other messages)

    - her [Dr Berry’s] moods have worsened and it’s even better because we have a new nurse who she is now trying to be besties with…

    - She [Dr Berry] forgets she can’t maintain nicey

    - I think she [Dr Berry] wants to be the most popular person in the room but doesn’t do the work required for that then she bonds with other women by… well being mean

    - I could take her [Dr Berry] to court over how she has been behaving over last couple of months

    - it makes me think that’s what went wrong with everyone else because they weren’t smart enough to kind of protect themselves

- or know how to emotionally cut it off so would take it all home and at which point I can fully believe these women all being close to breakdown

- I mean I can't say it doesn't effect me [sic] when she's [Dr Berry] an arse but I have structure and relationships away from clinic so it effects her more

- she didn't even bother her arse to say thanks for moving the clinic etc so I was like piss off

- so two weeks of that and then come week 3 instead of being an adult and saying I'm so sorry if you think I'm not grateful or if you think I left to (sic) much to you but I did this because I genuinely thought that you could handle it… She instead shoved 500 in my bank account and then when I hadn't said anything as I'd been off work sick from covid booster she message me to be like you must have seen your thank you bonus…"

62. The claimant also wrote to the friend "…so new laptop ordered… LinkedIn will be sorted over Xmas and come the New Year might take 6 months but I will be out" (page 79, the date of the message is not shown but, according to the index is between November and December 2021.)

63. I find that as a consequence of the move, relationships between the claimant and the Dr Berry were at a particularly low ebb. However, I also find that Dr Berry was attempting to make things right, that is evidenced by her message on 30 November 2021 and the fact that she gave the claimant a £500 bonus. The claimant was clearly displaying a negative attitude to Dr Berry and it is apparent from the message of 30 November 2021 Dr Berry was concerned that patients would notice the atmosphere. It seems to me that Dr Berry was being gracious in the circumstances given her status within the business compared to the claimant, it would have been open to her simply to warn the claimant that she needed to change her attitude.

64. According to the witness statement of Ms Oliveira, during 2021 the claimant had been making comments about Ms Oliveira's mental health in front of others and telling her that she couldn't sell her as "sassy" Ana any more. She says that on 3 December 2021 she asked for more time to carry out an Ultherapy session but the claimant refused, screaming at her in the middle of reception with clients around that "Alicia was able to do it at that time" so she should be able to. She says Dr Berry overheard the situation and came to find her in the kitchen area where she was crying.

65. Ms Oliveira goes on to say that in the middle of December 2021 she spoke to Dr Berry about the situation and said that if things did not change she would leave. She says there was a meeting with the claimant and Dr Berry on 14 December 2021 to try and assist and mediate the problem.

66. That meeting is not dealt with in the claimant's witness statement but, in evidence, the claimant said that it was around an incident where Ms Oliveira thought that an appointment had been booked over her lunch (supper) break and was, as a consequence, upset with the claimant.

67. Given the passage of time, it is likely that none of the witnesses have a clear recollection of precisely what was said at the meeting, none of them having taken notes. It is clear that Ms Oliveira was sufficiently upset about something the claimant had done to approach Dr Berry and for Dr Berry to arrange a meeting. However, there is no evidence that Dr Berry took a more proactive approach such as disciplining the claimant, or even telling her that she had done wrong.

68. The respondent's Christmas party was held on 10 December 2021. It was attended by the claimant and, amongst others, junior staff in respect of whom the claimant was line manager.

69. UW's account of what happened is as follows:

    At one point myself, Ana, Lindsey White (an ex-colleague) and Chrissie [the claimant] were in the bathroom where I was being asked questions about my figure by them. … The Claimant returned to the table announced how it was 'hilarious how much my breasts hang low' and that she had larger breasts than me but despite hers being larger 'UW' hang lower' and 'she has such better breasts than me considering how much younger I am'. Daisy defended me and said the conversation wasn't appropriate. I was not at the table during this conversation which made me feel even worse

    (see her witness statement para 8)

70. In cross-examination of UW, that account was not challenged, although when she came to give evidence the claimant suggested that she had been making fun at her own expense, not the expense of UW.

71. In deciding whose version of events I prefer in relation to the Christmas party, I take account of the following pieces of evidence.

72. On the day after the event, Dr Berry wrote to the claimant stating "can't believe you girls are still standing after that" to which the claimant replied "so ill… I deserve to be ill to be fair…". That suggests the claimant was inebriated.

73. On the same day the claimant became aware that UW was offended by what she had said and sent a WhatsApp stating "… Apparently I said something to you at the dinner table last night that upset you…". That suggests the claimant has no clear recollection of what happened.

74. UW then sent a voice message which is transcribed at page 76 of the bundle which stated "… Then apparently you went to the table in front of everyone… And basically taking the piss about how low they were, they are, apparently that they like, you went over and said something like oh my god erm so funny how… So funny that my boobs sit higher than UW, that I've got better boobs and her because hers just literally just hung beyond low or something like that…"

75. Having received that voice message, the claimant wrote "only just got this now xxx I am so sorry that I continued any private bathroom jokes out at the table… Absolutely no excuse to be had… I was a drunk and giddy arse who

didn't even realise hadn't followed out of the bathrooms and didn't even take a second to think…" (sic) The claimant did not suggest that she had been in any way misunderstood or that she was making a joke at her own expense.

76. It seems to me more likely than not that the claimant was so inebriated at the Christmas party that her recollection of what she said cannot be trusted. The fact that she did not deny UW's version of events means that I am not willing to accept the version of events which the claimant advanced during evidence and I accept UW's account.

77. The claimant, however, gave a fulsome apology which was accepted by UW and matters moved on.

78. A staff meeting took place on 24 January 2022 with a number of members of staff, the agenda of which, created by the respondent, states "Team, wants the attitude and moodiness to stop and blown out of proportion"

79. Dr Berry says that part of the agenda was aimed at the claimant. There is no direct evidence to that effect but it appears to be consistent with the way that Dr Berry dealt with finding the claimant looking at (what she thought) were recruitment sites in April, when, again, she sent a message to all of the staff. Having said that, it is difficult to understand why she would have addressed that message to the whole team if it was <u>only</u> aimed at the claimant and, as set out below, it appears that on 5 February 2022 she was accepting that there was a level of moaning about petty things within the practice. I find that there were some interpersonal relationship problems between staff in January 2022 and that the way the claimant behaved towards the end of 2021 would suggest that she was, at least, a contributing factor to those interpersonal issues.

80. At the same meeting it was stated that there would be appraisals for all members of staff on alternative Mondays starting from 31 January 2022.

81. There is no dispute that a meeting did take place on 31 January 2022 between Dr Berry and the claimant. Dr Berry says that she raised with the claimant that there was a need for change and warned her that her greatest foe was herself and her terrible moodiness. The claimant says that the meeting was an informal discussion in general terms and no targets were set . She says that no mention was made of any performance issues, any disciplinary matters or any issues regarding her relationship with team members. It is, however, agreed that at that meeting the claimant was given every other Saturday off without any reduction in pay. The claimant's explanation for that is that Dr Berry had commented to her that she seemed better after a break and asked if she was on antidepressants. Dr Berry said that she was looking at ways to help the claimant and, in that context, offered her every other Saturday off.

82. I accept the claimant's evidence in respect of the meeting. The evidence suggests that Dr Berry is not somebody who was very willing to confront the claimant about behaviour she found difficult and, in the absence of any minutes of the meeting, I am not persuaded that Dr Berry would have said to the claimant that she needed to change or give her any kind of warning. I find that Dr Berry was trying to deal with the situation by offering the claimant every other

Saturday off, in doing so Dr Berry was being gracious and trying to assist the claimant.

83. However, I find that the giving of every other Saturday to the claimant is further evidence that the claimant's attitude had changed since November 2021 and not returned to normal as the claimant suggests in 2022. If things had gone back to normal in 2022, it is difficult to understand why Dr Berry would be offering the claimant every other Saturday off without any reduction in pay.

84. The claimant places reliance upon a WhatsApp message sent on 5 February 2022 where Dr Berry writes "for Monday, I want you to lead the practice meeting with regard to getting Rachel and the girls busier and bringing in money… I want your time to be spent looking at ways to increase turnover and profit…". A few messages later Dr Berry wrote "there is always going to be a level of moaning about petty things, that's what people do. They need to be given direction and kept busy. Listen to their grievances but try to move them on to more important things. You need to motivate them. I know you are more than capable of this and that's why I want you to show them on Monday that you are driving the business forward."

85. The claimant argues those messages show there were no concerns about her ability. Dr Berry states that the problem was that the claimant was not leading the meetings, she was just telling the staff off and running them down. It seems to me that the reality, evidenced by that WhatsApp message, lies somewhere between those 2 positions. If things were as bad as Dr Berry now says, I would expect the message to be written differently, even taking account of the fact that I have concluded that Dr Berry not very willing to directly confront the claimant. She would not have written that there would always be a level of moaning and the claimant should listen to their grievances but try to move them on to more important things. However it does seem that Dr Berry was at least trying to guide the claimant about how she should be spending her time as practice manager.

86. On 15th February 2022 Dr Berry wrote to the claimant stating "I am looking at income details and I only person making any money. I'm going to have to lay someone off if this continues!" (sic). The claimant replied to state "so I've split UW and Daisy as they hang in her office too much…" It appears, therefore, and I find, that Dr Berry was continuing to treat the claimant as a functioning practice manager and appeared to have ongoing confidence in her, even if she found her attitude difficult.

87. That is borne out by the fact that, according to the claimant, when Dr Berry struggled from too much pressure and had a panic attack she asked the claimant to assist her. I accept the claimant's evidence in that respect because it is borne out by the WhatsApp exchange at page 85 where Dr Berry asks the claimant to come into her room (which is when she asked for assistance) and then around 45 minutes later sent a message saying "I'm home" to which the claimant replied "good now rest up".

88. Notwithstanding the message of 15 February 2022, I am not persuaded that the respondent was facing a financial situation whereby it was necessary to make

redundancies or that it was likely that the claimant would be selected for redundancy in any selection process. The respondent has adduced no evidence to that effect beyond the message of 15 February 2022.

89. There is a WhatsApp message from March 2010 where Dr Berry wrote to the claimant stating "thanks Chrissie you did well sorting 3D. I am thinking a bit clearer today." Again I find that message shows that as late as March the respondent had confidence in the claimant.

90. According to Dr Berry, on 19 April 2022, she found the claimant looking at things up on a computer which were unrelated to her work and she told the claimant that she would need to have a meeting to review her performance. On the same day she sent a WhatsApp message to everyone in the practice stating "just a little reminder ladies that applying for other jobs and writing covering letters should not be done on my time. This is something you should have the decency to do in your own time!" There is no evidence that anybody else was using the computer inappropriately and, therefore, I find that the sending of the message was prompted by the behaviour of the claimant and primarily targeted at her. Dr Berry says that she told claimant they would have a meeting to review her performance the following Monday. Nothing was put in writing and there is no evidence that a meeting had already been planned and, therefore, I find that the meeting was triggered by Dr Berry's unhappiness at what she believed the claimant was doing.

91. The claimant's evidence is that she thought that the message was directed at her because she had visited the Indeed recruitment site that morning. She says that she went to see Dr Berry who said she had no time to discuss it further and the WhatsApp message caused her, the claimant, to have a panic attack. Dr Berry agrees that it appeared the claimant was having some sort of panic attack.

92. A meeting then took place on 25 April 2022. The claimant says that she had not been formally invited to the meeting and had no idea what Dr Berry was intending to discuss. She had been given no information or evidence prior to the meeting. That appears to be largely consistent with what Dr Berry says. She does not suggest that there was any formal invitation or that the claimant was provided with any information or evidence prior to the meeting.

93. The meeting took place on 25th of April 2022 and was a long one as evidenced by the minutes. Although the minutes are headed "disciplinary meeting" the claimant says that she was not told that until towards the end of the meeting when Dr Berry stated "this is a disciplinary by the way". Although Dr Berry was not asked about that (the cross examination had not reached that stage at the time when Dr Berry became incapacitated) she does say, in her witness statement, that "the outcome of the meeting was that Chrissie was given a month to improve her behaviour and performance. We made it clear that *disciplinary proceedings would have to start*, if she couldn't behave and do the job as she was paid to." (emphasis added). Thus, according to Dr Berry, despite the fact that minutes were headed "Disciplinary Meeting", she actually only told the claimant that disciplinary proceedings may be started in the future. In those

circumstances I prefer the claimant's version of events, since it is more coherent.

94. A large number of matters were raised in the meeting according to the minutes, including the use of the computer in clinic time to access LinkedIn, the creation of a covering letter which was seen by another member of staff, complaints from patients about the claimant, the claimant's people management skills, the claimant's behaviour at the Christmas party, members of staff threatening to leave, insults to the social media manager, a lack of monthly reports, issues with stock, failure to shut down arguments between members of staff, partiality towards members of staff, lack of preparation for practice meetings, issues with claimant plans and direct debits, an issue regarding Botox, playing 2 members of staff off against one another, a disconnect and lack of communication from the claimant.

95. The claimant does not accept the veracity of the minutes although has not challenged them in any particular respect. In the absence of being forewarned about the allegations to be discussed in the meeting, the sheer number of them would have made it very difficult for the claimant to be able to properly defend herself. The minutes show that whilst a lot of allegations were made, few specifics were given. For instance in relation to the complaints the minutes record that Dr Berry did not name individual names but spoke collectively of a complaint. In relation to the claimant's people management skills there was reference to disquiet amongst the staff but no specifics of any people who were upset apart from the allegation in relation to the social media manager.

96. One gains the unavoidable impression that finding the claimant using the computer to look for another job (as Dr Berry believed) caused something of a dam to burst for Dr Berry and a large number of largely unexpressed frustrations flowed out.

97. According to the minutes, at the end of the meeting the claimant was told there would be a meeting on 28 April 2022 with all members of staff and a further meeting would be planned for 26 May 2022 to see whether the issues had been resolved. That is largely consistent with what the claimant says, which was that there would be a review in 4 weeks and I accept the minutes as being accurate to that extent. It is apparent, therefore, that at that stage Dr Berry was of the view that things might improve; not that immediate dismissal was an appropriate resolution to the difficulties in the workplace.

98. What happened next is somewhat opaque. On 27 April 2022, by WhatsApp message and email Dr Berry sent a letter to the claimant which stated "I am writing to inform you that after much deliberation over the last few weeks we are terminating your employment, as practice manager at Firvale Clinic and hereby serve one months' notice. The official finish date is 27 May 2022. However due to interpersonal issues that have worsened over the months since Christmas this will be taken as an administrative leave…" No further explanation was given.

99. In her witness statement Dr Berry says that when the claimant came into work on 26 April 2022, she was ignoring some staff and was causing trouble with

other staff. She states it was chaos with no one attending to patients and that she had 3 staff complaining to her at one time. She states that the claimant was on the front desk ignoring and being rude to everyone who came near her and she was concerned the patients were at risk of a serious mistake due to her actions. She states that the fear was of injury and risk to patients and staff and the claimant had been told to leave the premises. Once the claimant had left the staff got focused and she could tell that the staff were happy performing their tasks. She goes on to state "Reflecting on this I realise it was my subconscious triggering of the criteria of the Hypocratic oath, ingrained in all doctor's psyche, and it was telling me the problem had to be removed at source and immediately once and for all" (sic). As a consequence, following reflection, she sent the letter of termination.

100. The claimant says that she went into work on 26 April but was told by Tom, Dr Berry's husband, that she should go home for the rest of the day as tensions were running high. The following day the claimant was signed off as unwell and sent a sick note to Dr Berry at 6:45 PM who replied at 9 PM with a letter dismissing her. I have not heard from "Tom".

101. Ms Oliveira does not deal with the events of 26 April 2022, UW states that the claimant was sent home on the day of the dismissal because she was stomping around and being really disruptive. That account must be wrong, Dr Berry says that the claimant was sent home on the 26 April 2022 and the dismissal was on the 27 April 2022.

102. It is necessary for me to address a number of allegations which appear in the witness statements but not within the documents put before the tribunal.

103. Ms Oliveira alleges that the claimant undermined her on purpose and put herself between her and Dr Berry by saying that Dr Berry was unapproachable. She says that, because of a number of reasons, waking up to come to work was like torture (which is what led her to speak to Dr Berry in or around the middle of December 2021). I have already concluded that it is apparent that Ms Oliveira was sufficiently upset about something the claimant had done to approach Dr Berry and for Dr Berry to arrange a meeting. However, I am unwilling to go further than that. Ms Oliveira gives little by way of clear particulars of allegations. One allegation that she makes is that the claimant would "say things like "you have to calm down, you are overthinking this", or that I was self sabotaging, because I wasn't looking after myself and I should make an effort." Taken at face value those comments are at least as consistent with a line manager's concern for their staff as they are with bullying.

104. In the absence of Dr Berry or Ms Oliveira keeping any kind of records of the complaints that Ms Oliveira was making or of things that Ms Oliveira heard the claimant do, I am not satisfied that the recollections put forward by Ms Oliveira are accurate. Whilst I accept that the claimant was clearly unhappy in November and December 2021 and said something to upset Ms Oliveira, the documentary evidence does not allow me to go further. If matters were truly as bad as Ms Oliveira now says, it is difficult to understand why Ms Berry did not confront the claimant. I consider that there is a real risk that as Ms Oliveira has

looked back in the light of the claimant's dismissal and, in giving evidence in support of her employer, things have become magnified in her mind.

105. I am also unpersuaded by the evidence of UW, to the extent that it is not supported by contemporaneous evidence. Her witness statement makes a serious allegation that the claimant was stealing from the respondent which she did not think was a good example to set. Her evidence for that allegation is that during the office move she saw products from the treatment rooms in the claimant's handbag in her office. She thought that was "weird" at the time and the fact that "no one ever saw them again was suspect". UW did not discuss her concerns with either the claimant or Dr Berry but appears to have made the allegation for the first time when making a statement in these proceedings. Even if the products were in the claimant's handbag, that, without more, does not mean that the claimant was stealing and the willingness of UW to draw that conclusion, without any apparent investigation on her or the respondent's part, affects how much weight I can give to the rest of her evidence. The other example UW gives in support of the allegation of stealing is that the claimant had kept a box of Coolsculpting Cycles (a beauty treatment) which would have cost a few hundred pounds. She says the claimant told her not to tell anyone that she was keeping them there as they were "hers". The claimant's explanation is that she had been given the Cycles by a sales representative. Again, UW did not mention the matter at the time and there is a potentially innocent explanation. Again I find that the willingness of UW to conclude and assert in these proceedings that the claimant was stealing from the respondent, without having made any such allegation at the time and without knowing the full picture, causes me to doubt the objectivity of the rest of her evidence.

106. I also find that Dr Berry's evidence was affected by hindsight and that she was viewing previous events through the lens of a claim having being made against the respondent. To the extent that she makes allegations that go beyond what can be substantiated from the contemporaneous documentation, I am not satisfied on the balance of probabilities that those events occurred in the way that she now believes. In particular, whilst I accept that the claimant was a difficult employee, and accept that the claimant was probably churlish towards Dr Berry on occasions, I am not persuaded by the parts of Dr Berry's evidence that go further. I give two illustrations as follows.

107. At paragraph 28 of her witness statement, Dr Berry says that at the meeting on 25 April 2022 the claimant said these like "none of this is illegal anyway". I cannot find such a comment within the minutes and it was not put to the claimant in cross-examination that she had made that comment. I find that this is an example where Dr Berry's recollection has changed over time.

108. In her witness statement, Dr Berry says that she "was still getting the employees coming to me every single day, with a 'Chrissie incident', this could be in relation to her behaviour, her rudeness or how she would treat the employees. In addition, I found at the practice meetings, she was not prepared and had nothing to contribute to improving the practice but would attack the girls for not doing something. There was never any contribution to improving

practice turnover or feedback on performance.”.[4] The WhatsApp messages do not show a picture anything like that bad, they show that, overall, up to April 2022, of Dr Berry retained confidence in the claimant as a practice manager despite there being some interpersonal issues.

109. Turning, against that background, to the particular allegations made in the Grounds of Complaint. I make the following findings.

110. In relation to paragraph 7a of the Grounds of Resistance, whilst I accept that the claimant said something which upset Ms Oliveira sufficiently for her to speak to Ms Berry, I am not satisfied that it amounted to “publicly shouting and demeaning her and criticising her work”. I do not find that Dr Berry told the claimant, as alleged in paragraph 7a, that her behaviour was completely unacceptable and she needed to apologise; in her own witness statement Dr Berry only says that “I expressed my concerns to [the claimant] and asked her to meet with Ana and apologise”. In my judgment the severity of this incident has become exaggerated over time.

111. In respect of paragraph 7b, there is no evidence that the claimant insulted almost every team member at the Christmas party but I do accept that she was offensive about UW and that her comments were unacceptable.

112. The claimant accepted that she had called Rachel Bartlett a cunt but says that was language they used between each other. There is no evidence to gainsay that, apart from statements made in examination in chief by Ms Oliveira and UW that they had not heard that word used. I am not satisfied that was unacceptable behaviour, especially in the light of some of the language used by Dr Berry as evidenced in the WhatsApp messages.

113. It is also alleged that the claimant called Rachel Bartlett “trash” at the Christmas dinner. The claimant denied that, saying that she had actually told Rachel Bartlett that mixing wine and water would not stop her being trashed. The only evidence of the allegation is a statement by UW that the claimant “went on to say to Rachel Bartlett she was trash”[5]. At a Christmas party it would have been easy for UW to mishear the comment. There is no evidence that Ms Bartlett made a complaint at the time and she was not called as a witness in these proceedings. I am not satisfied, on the balance of probabilities, of this allegation.

114. In respect of paragraph 13 of the Grounds of Resistance, there is no contemporaneous evidence of any complaints from patients, indeed the only evidence is the statement of Dr Berry that “there were lots of patient complaints…”. If that allegation were accurate I am surprised, firstly, that there is nothing in writing and secondly that matters were not raised with the claimant until, at the latest, 22 April 2022. It seems to me that if complaints are being made to a medical practice, it is highly unlikely that no note of the complaint is made at the time. I do not accept Dr Berry’s evidence on that point. In making that finding I take account of my earlier finding that the WhatsApp message of 21 May 2021 suggests that something had been said to the claimant about

[4] witness statement paragraph 26
[5] witness statement paragraph 9

patients finding her terrifying, but it is not possible to move from an isolated WhatsApp message to a finding that there were complaints from patients on a more regular basis.

115. In respect of paragraph 13b I accept that Ms Oliveira complained about the claimant on one occasion and said that her behaviour made her want to leave and UW had complained about the claimant. There is no evidence of other complaints and I do not find that there were any. I do accept, however, that the claimant's attitude in the latter part of 2021 and into 2022 may well have affected staff relationships generally within the clinic, as is evidenced by the agenda for the meeting of 24 January 2022.

116. I accept that the claimant's behaviour at the Christmas Party was unacceptable, indeed I consider it to be deeply unacceptable. Apart from anything else, it is behaviour that left the respondent open to an allegation of harassment on the grounds of sex and was a comment made by a line manager in respect of a junior employee.

117. In respect of paragraph 13d there was no evidence adduced of the claimant lying about Botox shortages and I do not find that she was.

118. In respect of paragraph 13e, I am not satisfied that the claimant performed poorly in her role. The contemporaneous WhatsApp messages suggest that Dr Berry had overall faith in the claimant in her role as Practice Manager albeit that, at times, she needed to guide her.

119. In respect of paragraph 15, I find, on the balance of probabilities, that following the meeting on 25th of April 2022, it is likely that the claimant's behaviour at work reflected the fact that she was unhappy. Given the way the claimant was prepared to speak about her employer to her friend Christine, and the fact that the claimant had clearly been able to make her displeasure known to Dr Berry in November 2021, I find that it is more likely than not that she would have been willing to show her displeasure by her behaviour on 26 April 2022. That is likely to be the reason why Tom asked her to leave. I do not, however, accept Dr Berry's description of what happened on that day. If it were the case that she was concerned that the actions of the claimant were placing her patients at serious risk than I would have expected that to be set out in the letter of dismissal. Instead the letter of dismissal simply talks about deliberation over the last few weeks. It makes no statement of any concern about the way the claimant behaved on the 26 April 2022.

120. The question, then, which I must decide is what was the reason for the decision to dismiss the claimant. I find that the meeting of 25 April 2022 took place because Dr Berry believed that the claimant had been applying for alternative jobs in the company's time. Having reached that conclusion, she then had a meeting with the claimant where she brought up a series of things which she believed were unacceptable but which she had not, in any serious way, addressed before. When the claimant's attitude on 26 April 2022 showed that the claimant was not immediately going to change and tensions remained, I find that Dr Berry reacted by dismissing the claimant.

Conclusions

121. Against those findings of fact I now set out my conclusions by reference to the list of issues. The list of issues states that it was interpersonal issues which led to the breakdown in trust and confidence and gives rise to some other substantial reason for the dismissal. The list of issues does not refer to poor performance (except to the extent it might be suggested that bad behaviour is poor performance).

122. The parties invited me to make a determination of whether the dismissal was for misconduct or for some other reason. As I set out below, in my judgment, the way in which the reason for the dismissal is categorised makes little difference to the question of whether the dismissal was fair or unfair.

123. However, the question is potentially relevant to the question of whether there should be an uplift to the award pursuant to section 207A of the 1992 Act. I consider that when the claimant was dismissed she was, in reality, dismissed for misconduct. The respondent held her to blame for the breakdown in relationships which was caused, it considered, by her conduct. The wording of section 98 Employment Rights Act 1996 is such that a tribunal must consider whether the dismissal was for capability/qualifications or conduct or redundancy or contravention of a duty or restriction or a reason **other** than those reasons, being a substantial reason of a kind such as to justify the dismissal (my emphasis). In this case the dismissal was not for a reason other than one of the reasons listed in section 98(2), it was because of the claimant's conduct.

124. However, for the sake of fullness, I will address the issues on the basis that the dismissal was some substantial reason, as well as that it was for misconduct. I deal firstly with "some other substantial reason".

125. In respect of issue 1.1 and 1.2 , addressing the matter in the way the respondent proposes in paragraph 1.2, I am satisfied that Dr Berry had a genuine and reasonable belief in a personality clash between the claimant and other members of staff. A complaint had been made by Ms Oliveira and by UW following the Christmas party. Moreover, Dr Berry had a genuine and reasonable belief that there were interpersonal issues between herself and the claimant, caused by the claimant. I do not find that Dr Berry had a genuine or reasonable belief that the claimant's had any serious performance issues in respect of her role, the messages show that she had faith in the claimant in that respect.

126. I must then address whether the dismissal followed a reasonable investigation (to some extent this issue overlaps with issues 1.4 and 3.2 of the list of issues).

127. If I were to accept the respondent's case, that this dismissal should properly be characterised as for "some other substantial reason", it is still necessary to apply the test in section 98(4) Employment Rights Act 1996 and consider 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.

128. In my judgment, on the facts of this case, for the employer to act reasonably it would be necessary for it to investigate whether the relationship of trust and confidence had been seriously damaged or destroyed and whether it could be restored. The claimant was entitled to be given the opportunity to have her say on those issues, in the context of knowing that the respondent was unhappy with her and considering dismissing her for that reason.

129. In fact, at no time did the claimant know that the respondent was considering dismissing her and she did not even know that she was in a disciplinary meeting until the meeting of 25 April 2022 was almost at the end.

130. The respondent took no notes of any discussions between it and the staff who had allegedly complained about the claimant and the claimant had no opportunity to comment on any such notes. Even if the meeting on 25 April 2022 was as full as the minutes would suggest, the allegations made were vague and would be difficult to answer, especially when the claimant had no idea in advance that was the reason for the meeting. Simply stating that "there is disquiet among the staff" and "members of staff are threatening to leave" does not allow the claimant to answer the allegations.

131. In my judgment, the circumstances of this case were such that the claimant should have been told, in advance of the meeting on 25 April 2022, of the allegations against her and the evidence in support of those allegations. She should have been given time to consider the allegations and she should have been given the opportunity to bring a colleague to the meeting on 25 April 2022, given that it had the flavour of a disciplinary meeting.

132. I conclude that the respondent did not carry out a reasonable investigation.

133. In respect of issue 1.3, in my judgment the dismissal was not within the range of reasonable responses open to a reasonable employer. In respect of the conduct which led up to the meeting on 25 April 2022, it is obvious that the respondent did not consider that dismissal was the appropriate response, since it gave the claimant the opportunity to improve. It was right to do so. It is not suggested that the claimant was guilty of gross misconduct and the claimant should have been warned that the respondent was considering dismissing her because of the problems with interpersonal issues, to see if those interpersonal issues could be improved. In fact, what happened, was that the claimant was told there would be a review in around a month and then, within 48 hours, was dismissed.

134. It is not suggested that the claimant was dismissed simply because of the events of 26 April 2022, but even if it was, the claimant's conduct on that day was not such that it would have been reasonable to dismiss her without further process. In the absence of gross misconduct, the claimant should have been given until the meeting on 26 May 2022 to improve.

135. In respect of issue 1.4, the dismissal was procedurally unfair. Even if this were to be treated as an SOSR dismissal, the claimant should have been told of the allegations and the evidence in advance of the meeting and should have been allowed a colleague or TU representative at the meeting. She should have been warned that if relationships did not improve she may be dismissed. Time should have been allowed for the relationships to improve.

136. Considering the issues on the basis that the claimant was dismissed for misconduct, the outcome is the same. I accept that Dr Berry had a genuine and reasonable belief that the claimant was behaving badly in the way she behaved towards her and other members of staff. However, for the reasons I have given, the respondent did not carry out a sufficient investigation and the process it carried out was not fair and not compliant with the ACAS code.

137. Whilst there might be an argument that the claimant's behaviour at the Christmas party amounted to gross misconduct, the respondent was fully aware of that behaviour and chose not to dismiss the claimant for it. In those circumstances I do not consider that it could be said that dismissal in April 2022 was within the band of reasonable responses.

138. Thus, I conclude that whether the case is analysed on the basis of the reason for the dismissal being misconduct or the reason for the dismissal being "some other substantial reason", the dismissal was unfair.

139. I must then consider whether the claimant would have been dismissed if the respondent had followed a fair procedure.

140. If a proper procedure had taken place, the claimant would have been clearly warned that she risked dismissal because of her behaviour and she would have been given an opportunity to improve her behaviour.

141. In reaching my conclusions in this respect I take account of the way the claimant expressed herself to Christine towards the end of 2021, the willingness of the claimant to display a negative attitude towards Dr Berry who was, in effect, her employer and the failure by the claimant to change her attitude (to any significant extent) on 26 April 2022. However, I also take account of the fact that up until November 2021 the claimant was a good employee who was described as a superstar, with charm, personality and sense of humour[6] and I do not consider that it was clear to the claimant, at any time, that if things did not change she would lose her job.

142. I consider it to be most likely that if the claimant had been warned that if her attitude did not improve she would lose her job, the claimant would have improved her attitude, whilst looking for another job. She would not have wanted to stay with the respondent but her attitude would have improved while looking for another job.

143. However, there is a chance that the claimant would be unable or unwilling to change her behaviour. She had not done so in in November/

[6] pages 61 and 72

December 2021 and did not do so after the meeting in April 2022. I consider that there is a 40% chance that the claimant would not have improved her attitude and that she would have been dismissed, on 26 May 2022, had the respondent followed a fair procedure.

144. If the claimant had not been dismissed I find that it is more likely than not that she would have found another job at around the 6 month period she anticipated when she messaged Christine in December 2021. Thus, I consider it most likely that the claimant would have found another job, at around the same remuneration she was working for with the respondent, by 30 June 2022.

145. Precisely how those findings relate to an award of compensation is something which will be considered at the remedy hearing.

146. In respect of issue 1.6, I find that the claimant did contribute to her dismissal by the way she behaved at the Christmas party. I have set out my findings in relation to that; the comments made about a junior member of staff, were, at best, foolish and in my opinion were unreasonable. It was a factor which the respondent took into account in deciding to dismiss the claimant.

147. The claimant's culpability was mitigated by the fact that she did offer a complete apology which was said to have been accepted and, in my view, the behaviour of the of the claimant at the Christmas dinner was not a particularly significant factor in the decision to dismiss her. The others factors were that the claimant was believed to have been applying for another job on the respondent's time and the way the claimant spoke to Dr Berry over a prolonged period as well as her relationship with others.

148. I do not consider it appropriate to reduce the basic and compensatory awards because of the way claimant spoke to Dr Berry or other members of staff because the claimant had not been warned that her behaviour was unacceptable. It is not suggested by the respondent that the claimant's use of the computer in April 2022 was culpable behaviour.

149. In deciding the amount by which compensation should be reduced, I must take account of the fact that my findings in relation to *Polkey* will inevitably lead to a reduction in compensation and looking at the matter in around I consider that the basic award and compensatory award should be reduced by a further 10% due to the behaviour of the claimant at the Christmas party.

150. Issue 1.7 will be determined at the remedy hearing.

151. In respect of issues 2.1 and 2.3, it is not in dispute that the claimant was entitled to 6 weeks' notice pay (unless she was in repudiatory breach of contract) but was only paid for 4 weeks.

152. The repudiatory breaches relied upon by the respondent are the alleged stealing by the claimant and the claimant's communication with Christine who was a patient of the respondent.

153. I do not find that the claimant was guilty of theft, the evidence in respect of that allegation was unpersuasive (simply being the evidence of UW) and I do not find that she was in breach of contract in that respect.

154. Whilst the conversations which the claimant had with Christine were unprofessional, the question for me is whether they amounted to a repudiatory breach of contract. Whilst Christine was a patient of the respondent, it is clear that she was also a friend of the claimant. It is not suggested that the claimant sent similar messages to other patients and, as a friend, the claimant would have had a legitimate expectation that Christine would keep the matters confidential (as she appears to have done). It is apparent that Christine shared a similar view of Dr Berry from when she worked for her and, therefore, the situation is different to a situation where the claimant was speaking to somebody who had no knowledge of Dr Berry or the working environment. In all circumstances I do not find that the WhatsApp message exchange amounted to a repudiatory breach of contract.

155. In respect of issue 3.1, I must decide whether or not the ACAS code on Disciplinary & Grievance Procedures applied in this case. If I am correct in my view that dismissal was for misconduct on the part of the claimant then it is not disputed that the code applies.

156. However, even if I was incorrect in my view, on the facts of this case I would still have concluded that the code applied for the following reasons.

157. As noted above the opening paragraphs to the Code state

> 1. This Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace.
>
> - Disciplinary situations include misconduct and/ or poor performance.

158. The use of the word “include” suggests that the code is applicable in more situations than simply where misconduct and/or poor performance are alleged.

159. The present case is not one where there has been a breakdown of relationships and the respondent is not alleging that anyone was at fault but simply acknowledging that there is an insoluble problem in the workplace. The respondent in this case was very clearly placing the blame for the breakdown in relationships at the feet of the claimant. Moreover the respondent had, on its own case, invited the claimant to a disciplinary meeting. In my judgment the requirement to comply with the ACAS code arises at the point where the respondent invites the claimant to the disciplinary meeting. It does not matter whether, ultimately, the claimant is dismissed or not. Indeed it does not matter whether the claimant is ultimately disciplined or not. Often an employer will not know at the time when it invites an employee to a disciplinary meeting whether the employee will face a sanction.

160. In my judgment the correct analysis is as follows. The claimant is bringing a claim (of unfair dismissal) to which section 207A of the 1992 Act applies. The next question is whether the claim concerns a matter to which a relevant Code of Practice applies. The claim does concern such a matter since it concerns a disciplinary situation, as evidenced by the fact that the claimant was invited to a disciplinary meeting where she was blamed for, amongst other things, a breakdown in relationships at the practice. Thus the Code should have been complied with.

161. The respondent failed to comply with the ACAS code in that it did not, sufficiently, establish the facts of the case, there was no collation of any evidence for use at the disciplinary hearing, it did not provide copies of any written evidence with the notification. The respondent did not allow the claimant to be accompanied at the meeting. The claimant was not given a warning of the need to improve. Moreover, having regard to my view that the claimant was dismissed for misconduct, she should have been provided with an opportunity to appeal.

162. The only thing which the respondent did which could be said to comply with the ACAS code was hold the meeting on 25 April 2022, however even then the respondent did not tell the claimant that it was a disciplinary meeting until well into the meeting.

163. I take account of the fact that the respondent is a small employer and that the claimant was responsible for HR matters generally. However, it has not been suggested that the respondent could not afford to pay for proper advice as to how to deal with the situation with the claimant. The non-compliance with the code was, at best, careless even if it was not deliberate. There are few mitigating circumstances, I do not accept the respondent's case that Dr Berry had to act quickly because the claimant was putting patients and staff at risk. If that was the case, the claimant could have been suspended. In my judgement, had the ACAS code been followed and the claimant warned of the need to improve, her behaviour may well have changed. However, the respondent did invite the claimant to a meeting and did give some sort of warning at that meeting. Taking everything into consideration, I consider that the very substantial failures by the respondent mean that the award should be uplifted by 20%.

164. The claim in respect of holiday pay is no longer pursued.

Overall conclusions

165. In summary, therefore, the claimant was unfairly dismissed by the respondent but the award of compensation will reflect the fact that:

   a. there is a 40% chance that the claimant would have been dismissed even if the respondent had followed a fair procedure,

b. if the claimant had not been dismissed, she would nevertheless have chosen to leave the respondent and it is more likely than not that she would have done so by 30 June 2022[7],

c. the award will be increased by 20% because of the respondent's failure to comply with the ACAS code of conduct,

d. the claimant contributed to her dismissal by her behaviour and the basic and compensatory award will be reduced by 10% to reflect that.

166. The claims in respect of breach of contract in respect of notice pay and holiday pay are well-founded.

Employment Judge Dawson
Date 30 March 2023

Judgment sent to the parties: 13 April 2023

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

[7] In this respect it will be necessary to hear submissions on Wardle v Crédit Agricole Corporate and Investment Bank, paras 62-66