



EMPLOYMENT TRIBUNALS

Claimant: Miss T Clark

Respondent: Bristol City Council

Heard at: Bristol **On:** 5 June 2023 (VHS) & 6 June 2023 (in person)

Before: Employment Judge Christensen

Representation

Claimant: represented herself

Respondent: represented by Mr Stewart of Counsel

RESERVED JUDGMENT

1. The claimant has been unfairly dismissed on procedural but not on substantive grounds.
2. There is a 100% Polkey reduction and the claimant is not entitled to receive a compensatory award.
3. The claimant is entitled to receive a basic award without any reduction for contributory conduct.
4. The claim for unpaid wages/holiday pay is dismissed.
5. Directions have been issued to the parties to address the basic award to which she is now entitled.

REASONS

The claim, the issues and the hearing

1. This claim of constructive unfair dismissal and unpaid wages was presented on the 23 August 2022. It went before EJ Gibb on 1 February 2023 on an application for a deposit order under Rule 39. The application was dismissed. EJ Gibb identified three potential matters that the claimant relied upon to establish that the dismissal was substantively unfair and four matters that the claimant relied upon to establish procedural

unfairness. It was agreed at the outset of this hearing that that list set out the issues that I needed to address to determine whether the dismissal was unfair. The issues are set out at paragraph 10 of the Order of Judge Gibb dated 1 February 2023. That appears at page 44 of the bundle. To that list is added a further issue raised by the claimant during this hearing; namely her assertion in her witness statement at paragraphs 22 and 25 that some of the documents relied upon by the respondent have been falsified, these are the signature of Ms Pearce on the supervision record on 7 October 2021 [p161] and 21 October 2021 [p173]. The claimant also raised in her questioning of Ms Pearce, her assertion that the tagging-in reports relied upon by the respondent were false and have been manually altered and that the actions taken by the respondent show that there was a personal issue that had arisen rather than a genuine concern regarding her conduct.

2. At paragraph 11 of her witness statement, the claimant raises the possibility of a new claim under the Equality Act based on the protected characteristic of pregnancy. I discussed this with the claimant at the outset, on the basis that any such claim had not been foreshadowed in any previous documentation and that to proceed with such a claim would require an application for amendment. The claimant confirmed to me that she did not wish to pursue a claim under the Equality Act.
3. The hearing was listed for 2 days by VHS. On the first day of the hearing difficulties were encountered in the claimant being able to participate as she had persistent connectivity problems. The hearing was switched to CVP on Day 1 to see if that assisted at all with those problems, however it did not assist.
4. It was therefore agreed by the parties that the hearing would convert to an in-person hearing that would take place on Day 2. A fresh timetable was agreed that would ensure that evidence and submission on liability only were finalized by the end of Day 2. In the event that a further hearing is needed for remedy further directions will be given.
5. The claimant gave evidence and called as a witness her TU representative, Mr Brown, who had supported her whilst she was employed during the process which led to the claimant's dismissal.
6. The respondent called three witnesses. Ms Pearce, the claimant's manager and Team Leader; Ms Stone, Service Manager, who commissioned the investigation reports into the claimant's conduct and chaired the first disciplinary hearing in May 2021; Ms Clifford Head of Service who chaired the disciplinary hearing in May 2022 made the decision to dismiss the claimant.
7. A bundle was produced running to 308 pages; I have considered the pages in the bundle that I have been taken to in evidence.
8. During day 2 of the hearing it became apparent that an issue arose regarding what email address the respondent had used to send the claimant the invite to the Teams disciplinary meeting which took place in May 2022. The claimant's case being that she had never received an invite and therefore could not participate. The claimant's case was that

she was using the email address tonicc43@icloud.com, and that the respondent knew this was her email address as this was email address that was used by the respondent to enable her to attend a grievance meeting by Teams in April 2022. The respondent's case was that one was sent on the morning of the disciplinary meeting but that the claimant failed to attend. I therefore directed that the invite to the disciplinary meeting be disclosed by the respondent to establish whether one was sent and if so to what email address. The disclosure of the invite established that Ms Clifford sent the invite to the Disciplinary Meeting on the morning of that meeting, to the claimant using the email Toni.clark43@ecloud.com. This was produced and was added to the bundle as p248a.

Findings of fact

Work history and pay arrangements

9. The claimant started work for the respondent in September 2009 as a home-care Reablement Support Assistant (RSA). She went into the homes of service users with physical and/or mental issues to enable them to learn or re-learn the skills necessary to be able to engage in activities/occupations that were important to them.
10. Ms Pearce became her manager in 2015. No issues arose in relation to the performance of her duties and issues only started to arise in relation to attending visits on time, in 2018. Ms Pearce's evidence was that other than in relation to the issues that arose with time keeping from 2018, the claimant had a good work ethic, no issues arose in relation to the performance of her duties as such but instead in relation to attending appointments in accordance with her schedule.
11. The claimant had a period of maternity leave from June 2013 after the birth of her daughter. Prior to that the claimant had worked 35 hours a week on split shifts and was entitled to be paid a shift allowance under the respondent's Working Arrangements Policy (WAP). The claimant returned from maternity leave in March 2014 and reduced her hours to 21 each week and worked a fixed pattern across two weeks starting at 9.00am and finishing at 1.00pm. She was therefore no longer entitled to receive a shift payment but the respondent continued, in error, to pay it. The claimant remained entitled to, and continued to receive, payments for weekend and bank holiday working.
12. In 2016 the respondent made a number of changes to the payments it made to employees who worked non-standard hours. These would have resulted in reduced payments to the claimant for weekend working but increased payments for working on bank holidays. The claimant was entitled to pay protection for a period and until April 2018. The claimant was written to on 26 August 2022 to confirm the arrangements in place from 2016. The claimant's post was regraded on 1 February 2018 from BG5 to BG7 and she was written to on 18 June 2018 to confirm the changes.
13. The claimant asserts in her witness statement that the respondent has been covering up internal errors in payroll as the basis for her claim for unpaid wages.

Claimant's personal circumstances

14. Part of the claimant's case is that the respondent failed to take into account her personal circumstances but I am not satisfied that the evidence supports this possibility. I find that the claimant had a number of undoubtedly challenging personal circumstances that impacted upon her during the relevant period. These included ill health suffered by her partner, her own health problems related to menstrual issues, a pregnancy termination, experiencing domestic violence and a court process, being homeless and sleeping on friend's sofas with a 6 year old child, being a single parent, and needing to work through covid as a key worker. From my findings of fact I am satisfied that the respondent took these into account to the degree that they reasonably could whilst also ensuring that the needs of its vulnerable service users were not jeopardized.

The tagging system

15. The respondent operated a system of tagging in and out at service user's homes both to ensure the safety of lone workers and to ensure that service users received their allotted care. When staff attended on a double visit only one member of staff needed to tag in and out and when a Senior Officer attended a double visit they would not tag in and out.

16. Some other members of staff failed on occasions to tag in and out correctly but not generally on a consistent basis. When other RSAs had difficulty in getting a signal to ensure that they could tag in/out their practice was to call the office to report this.

Attendance and time keeping problems - 2018

17. The timekeeping problems surfaced for the first time in 2018. Ms Pearce held meetings with the claimant on 19 June 2018 and 6 August 2018. Occupational Health were involved as the claimant had been away from work been suffering from stress due to her partner's ill health and a pending court case. An OH report was prepared.

18. The respondent had received a report from a service user's family on 6 August 2018 that the claimant had failed to attend a visit at the scheduled time. The claimant confirmed that her phone had a cracked screen and that she had gone to the wrong address. Ms Pearce provided the claimant with a new phone and advised her that she should report any problems with visits to the office. The claimant confirmed that she enjoyed her job but did not feel supported but could not confirm the basis of this belief.

September 2019 – Informal meeting

19. Further time keeping issues and the claimant's failure to properly use the 'tagging system' whilst at a service users house were raised informally with the claimant by Ms Pearce in 2019. Ms Pearce met informally with the claimant on 26 September 2019 to discuss her concerns. This resulted in a letter to the claimant that recorded the informal meeting and the importance of attending service visits on time. *"I would have the expectation that you will tag in/out of all your visits and I will be monitoring this as an outcome from this meeting. You then said that you could not get to visits for 8.00am as you had to take your daughter to breakfast club which did not open until 8.00am.. I advised that it was your responsibility*

to be at your fist visit to start work at 8.00am...you said you would see if she can go into breakfast club at 7.45am”

20. She concludes the letter *“this was an informal meeting under the disciplinary policy but if your time keeping does not improve or you do not follow the process for tagging gin/out of visits then the more formal route will be taken”*

21. This approach satisfies me that there was no personal vendetta against the claimant, instead this is consistent with Ms Pearce adopting a low level approach in the first place, to address real issues that needed managing,

November 2019

22. Further issues arose when Ms Pearce was advised by Pat Smith, Senior Reablement Officer on 20 November, that the claimant had not attended an 8.00am visit. The tagging records confirmed that the claimant was at least 15 minutes late for every shift. On 29 November the claimant called at 8.25am to advise that she was at home with her daughter as her daughter was refusing to go to school. The claimant told Ms Pearce that she could not do visits at 8.00am and was reminded that she had previously agreed to make arrangements to enable her to do so.

23. As a measure of support for the claimant Ms Pearce gave her annual leave for the rest of the morning shift.

January 2020

24. Ms Pearce met with the claimant on 7 January 2020 to discuss matters. The claimant had been late on both visits earlier that day. The claimant told Ms Pearce that she had very recently discovered that she was pregnant and was exhausted, that her living situation was difficult as she had been homeless for a year and was struggling to get a routine. She had not yet seen her GP. Ms Pearce confirmed to the claimant that she was sympathetic to her circumstances but ultimately needed to ensure that she could deliver a service for vulnerable people. The claimant was asked to update Ms Pearce once she had seen her GP.

February 2020

25. The claimant determined that she wished to terminate her pregnancy and had some absence from work because of complications that arose post-termination. The claimant returned to work on 26 February 2020.

March 2020 – Letter of Management Instruction

26. Following a meeting with Ms Pearce and Ms Stoneman Team Leader on 12 March 2020, the claimant was issued with a letter of Management Instruction. [110]. This records Ms Pearce’s reasonable wish to ensure that the claimant’s difficulties with time keeping and non-compliance with the tag system are addressed now that she is back at work. The claimant portrays this in her witness statement as an act of pregnancy discrimination as it arose shortly after her return from a complicated pregnancy termination. Even though no such claim is pursued by the claimant I reject such a possibility as it is clear on the chronology that the pregnancy and its termination are part of a chronology in which there are earlier concerns by Ms Pearce relating to the claimant’s time keeping and use of the tag system. She has consistently endeavoured to address

these concerns incrementally through the processes available to her, utilizing the lower levels of process in the first instance. The fact of the pregnancy, the termination and the absence that was necessitated because of complications do not appear to have any impact on Ms Pearce's approach to those pre-existing problems.

27. The letter of Management Instruction records the concerns as being
- Late arrival at service user visits
 - Not following correct procedures to advise of non-attendance at work
 - Not complying with tagging in system
 - Arriving too early for lunch visits
 - Not contacting the office within appropriate time scale to report lateness or non-attendance
28. The letter records an agreement to address all of these concerns and that the claimant's behaviour has fallen short of what is expected of employees. Ms Pearce writes "*I have reminded you of your obligations as a Reablement Support Assistant. Therefore I need to advise you that if there is a further incident regarding your professional behaviour and conduct, consideration may have to be given to taking formal disciplinary action against you. I will be monitoring your work ethic and time keeping*".

Tagging suspended as Covid starts

29. During the covid lockdowns the tagging systems were suspended from March 2020 and until 13 October 2020.
30. During this period, and as a key worker, the claimant continued to attend work as an RSA and was required to wear PPE whilst at work. As a key worker, her daughter was enabled to attend school during this period.

October 2020

31. The tagging system was reinstated with effect from 14 October 2020. The claimant was late for shifts on 16, 17 & 18 October and did not tag in/out correctly. Ms Pearce discussed matters with her manager and Ms Stone, Operations Manager, was commissioned to undertake a disciplinary investigation. During the period of the investigation, and as a safeguarding measure, the claimant was moved to work in the South Bristol Intermediate Care Centre

Disciplinary Investigation November 2020

32. Ms Stone wrote to the claimant on 27 November 2020 to advise her of an investigation into 6 allegations.
- Failure to follow the tagging in system in October 2020
 - Late for visits in October 2020
 - Failure to attend visit in October 2020
 - Disposal of PPE
 - In appropriate use of mobile phone whilst on a service visit
 - Bringing her daughter to a service visit and leaving her in the car
33. In her letter, Ms Stone advises the claimant that she may wish to access the Employee Assistance Programme (EAP) and further that to inform Ms Stone of any other support that that the claimant might find helpful. The

claimant did not access the EAP and gave Ms Stone no indication of any further support measures that would assist her.

34. A number of people were interviewed as part of the investigation as set out in the report. Part of the claimant's case is that one of the witnesses (Kelly Parker) was encouraged to reword her statement but I am not satisfied there is any evidence to support this possibility.
35. The investigation report [131] is dated 4 March 2021 and concludes that a disciplinary meeting should take place to consider all allegations other than that in relation to the disposal of PPE.
36. The report concludes "*TC has been clear throughout the investigation that she is unable to attend at her contracted 8.00am start time.....the panel feel there is a lack of understanding and remorse from Toni with regards to her actions, she does not consider what she had done to be wrong and the possible implications for the service and specifically vulnerable service users of colleagues. Trust is a big factor in this employment where employees are directly attending visits*"

Disciplinary Meeting 10 May 2021 with Ms Stone

37. The claimant was accompanied by Mr Brown, her TU representative. The meeting notes appear in the bundle at p144. The main issue appeared to be that the claimant could not get consistent child care to enable her to start her shifts at 8.00am. The claimant had previously had a start time of 7.00am and had had no difficulties with this but the start time had been moved to 8.00am in 2019 due to service needs. Mr Brown provided information regarding the claimant's difficult circumstances over the past three years including the death of her father, her daughter's father becoming seriously ill, domestic violence, homelessness and the claimant's own gynaecological health issues.
38. Ms Stone adjourned the meeting to check whether a change in start time could be accommodated, she asked the claimant to confirm at the next meeting that she would have childcare arrangements in place if the respondent were to offer her a post starting at 7.00am.

Meeting reconvened 17 May 2021

39. The meeting reconvened on 17 May. Ms Stone informed the claimant that there was a 21 hour post with a 7.00am start in the East Reablement Team. However, the claimant said she had resolved her childcare issues and wanted to resume her role in the South Team starting at 8.00am.
40. Ms Stone considered the claimant's conduct to be very serious and gave thought to dismissing her for gross misconduct. However taking into account her length of service, previous record and very difficult personal circumstances decided to issue her with a Final Written Warning.

Final Written Warning letter [155] 18 May 2021

41. The letter sets out "*I can confirm my decision, which I communicated to you at the time, that you be issued with a level 3 final written warning. I had seriously considered dismissal for misconduct but stopped short of this because of your recent personal difficulties around housing and domestic abuse issues, which are now resolved. However I must remind*

you that working your contractual hours for which you are paid is a contractual obligation on your part and I wish to see you fulfil this, and failure to do so is not acceptable. The reason for this level of warning is that I have taken into account your child care difficulties and you have worked for the council since 2009 and have a good record. You assured me that you now had childcare in place and after discussion with your TU Rep, confirmed you would not prefer a 7.00am start at the East team but would be able to maintain your existing working arrangements with childcare. I will also allow you a further 3 weeks to put your child care arrangements into place...during this time you will remain working in the centre before returning to your substantive role and place of work”.

42. The claimant is told that the written warning will stay in place for a year and that any further misconduct during that period, whether related to this case or not, may result in further disciplinary action which could result in dismissal.
43. The claimant is told how to appeal the final written warning but did not do so.

June 2021

44. The claimant returned to her RSA role in the South Team on 8 June 2021.

November 2021 – non-attendance and lateness

45. Ms Stone was informed in November 2021 that the claimant had been late for two visits on 7 October, including one in which two members of staff were needed for a hoist transfer, that she had failed to attend a visit on 20 October and had been late and/or not tagged in for numerous visits between 7 and 31 October.
46. Ms Pearce met with the claimant on 3 November and advised her that there was to be a fresh disciplinary investigation and that she would be suspended pending its outcome. The suspension was considered appropriate as there was concern that her conduct was putting vulnerable service users at risk.

Suspension November 2021

47. The claimant was written to on 3 November [176] to confirm her suspension during an investigation into three allegations.
- Being late on 2 calls on 7 October 2021, failure to call to advise her supervisor
 - Failure to attend two calls on 20 October and failure to call to advise that she was not able to attend the calls.
 - Being late and/or not tagging in on visits between 7 October and 31 October.
48. The claimant is told that she is being assigned Caroline Mighty, a nominated contact officer during her period of suspension and that Ms Mighty will contact the claimant. The letter sets out “*you may wish to agree the level of contact and support that would be appropriate to yourself*”. In fact Ms Mighty did not contact the claimant during her period of suspension.

Investigation

49. Ms Stone commissioned a further disciplinary investigation into these new allegations. The report, prepared by Ms Moon, [217] dated 24 February 2022 is fulsome and concluded that a disciplinary hearing should be held.
50. Part of the claimant's case is that discussions documented by Ms Pearce, which were considered by the investigation, were falsely signed by her. These relate to supervision records completed by Ms Pearce with the claimant on 7 October 2021 and 21 October 2021. I have not been satisfied that there is any basis to conclude that these documents have been falsified and find that they were not.
51. The investigation report was prepared without any interview with or any input from the claimant. The report sets out that the claimant was offered interviews on four occasions but that these did not proceed for the following reasons.
- 3 December 2021 – TU rep unavailable
 - 17 December 2021 – TU rep unavailable and not a working day for the claimant
 - 7 January 2022 – claimant was sick
 - 1 February 2022 - - claimant was sick
52. It sets out that the claimant was sent written questions addressing the matters under investigation, by letter of 1 February 2022 [205]. This was sent by email and by hand delivery. The letter sets out *“if you do not return completed questions we will be forced to proceed with the investigation process without your input”*. The claimant did not respond to the written questions.
53. The claimant had emailed the respondent on 4 January 2022 to inform them that she was signed off work with stress due stress connected with the situation at work and because of personal reasons.
54. I find from the claimant's witness statement and from the documents appearing in the bundle (letter from Victim Support 10 January 2022 [202] and Restraining Order issued by Bristol Magistrates Court 3 February 2022 [215]) that the claimant experienced incidents of domestic violence and criminal damage and subsequent court process, during the period of this investigation.

Invite to Disciplinary Hearing

55. Ms Stone wrote to the claimant on 1 March 2022 [229] to inform her that she would conduct a Disciplinary Hearing on 15 March 2022 via Teams to address the matters under investigation. The claimant was sent a copy of the investigation report and the related witness statements and was told that if she wished to present any witness statements or supporting documents to do so as soon as possible and no later than 5 working days before the hearing. The claimant is informed that the hearing may result in dismissal.
56. The claimant submitted a fit note dated 3 March [231] which confirmed that the claimant was not fit for work due to domestic stress from 26

February to 25 March 2022. The meeting scheduled for 15 March did not proceed.

57. On 24 March 2022 Ms Stone requested a report be commissioned from OH prior to the disciplinary hearing [240] being reconvened. She received advice from HR that an OH report would be relevant if there was to be an investigation meeting but that the disciplinary meeting could go ahead in her absence if she is not fit to attend. The HR advice is *“the purpose of the OH referral is so that she cannot argue that there had not been fair process as she hasn't attended the investigation meeting”*
58. I consider it relevant that the respondent recognised the importance of due/fair process in terms of proceeding with a disciplinary process in the absence of any account from the claimant of the matters under investigation. In fact the claimant was fit to attend the disciplinary meeting that eventually took place in May 2022 and wished to attend it. She did not do so as she did not receive the Teams link to join the meeting. This in turn meant that the disciplinary meeting proceeded without any account from the claimant in relation to the allegations against her.

Occupational Health Report April 2022

59. The report was commissioned by Ms Pearce to determine *Fitness to attend a disciplinary or investigatory meeting* [244]. The claimant was assessed on 13 April. The report concluded that the claimant was not fit to return to work but was fit to engage in workplace investigations with support. The report sets out some guidelines including that *“she should be able to be supported in the meetings by a work colleague or an official representative”*
60. The claimant had the support of her TU representative throughout the whole process and he attended all meetings with her.

Grievance 6 April 2022

61. The claimant raised a grievance on 6 April 2022 regarding the progress of the disciplinary process and the lack of support provided to her and the failure to refer her to occupational health.
62. An informal grievance meeting was scheduled by Teams on 28 April– an invite was sent to the claimant by Linda Gore, Team Leader, at the email address tonicc43@icloud.com. That meeting was rescheduled to 12 May.
63. An outcome letter was sent on 20 May by Linda Gore to the claimant. That addresses each matter raised by the claimant.
64. Amongst other things and in relation to the matters of grievance raised in relation to the disciplinary process that was underway, it records the following.
- Grievance in relation to not being interviewed as part of the disciplinary process when she was unwell and wishing now to be interviewed in light of the advice in the OH report. The claimant wished the disciplinary process to be suspended to let her be interviewed. Outcome: it is recorded that as the claimant had failed to provide answers to written questions she should refer her request to the hearing panel.

- The impartiality of the investigation process given that the investigator and decision maker were the same people that had conducted the earlier investigation. Outcome: Ms Stone was removed as the person who would make a decision and would be replaced by Ms Clifford, Head of Service.
65. The outcome letter offers the claimant an apology to reflect the fact that her nominated contact officer, Ms Mighty, did not contact her during her period of suspension.
66. The claimant's TU representative, Mr Brown wrote to Ms Gore on 27 May to indicate that the claimant wished to escalate part of the grievance. Ms Gore responded to ask what parts were being escalated and to confirm that if parts related to the disciplinary process then the claimant would need to appeal within the disciplinary process. No response was provided.

Disciplinary meeting 24 May 2022

67. The claimant had been written to by Ms Stone on 27 April [254a] to confirm that the Disciplinary Meeting would take place on 24 May by Teams and that she would be sent a Teams link on the morning of the hearing. She was reminded that she had already been sent a copy of the Investigation Report and witness statement. That letter sets out that Ms Stone would conduct the hearing but in light of the outcome of the grievance raised by the claimant, Ms Stone was removed as the decision maker and replaced by Ms Clifford.
68. Ms Stone's letter offers the claimant another opportunity to answer the written questions put to her as part of the investigation and asks her to respond by 18 May. The claimant did not provide any written responses and wished instead to attend the Disciplinary Hearing to address the allegations against her.
69. The claimant was sent a link for the meeting by Ms Clifford at 09.46 on 24 May. That link was sent to an email address that was no longer used by the claimant and was not the email address that had been used by the respondent to enable her to join the grievance hearing.
70. The claimant's TU Representative, Mr Brown was present in the meeting and communicating with the claimant through the Teams app. He and the claimant had met earlier that morning to discuss the forthcoming hearing, he knew that she was intending to attend.
71. The claimant did not join the hearing at 10.30. Mr Brown told Ms Clifford that he had just been in call with the claimant, that she was intending to join and that the claimant was messaging him to tell him that she did not have a link to join the hearing. The claimant's tone was frantic. Ms Clifford indicated that she would wait 10 minutes and would then start the meeting without the claimant if she had not joined. Ms Clifford made no enquiries to understand what the problem was for the claimant in joining the hearing. Mr Brown expressed his view as the claimant's TU Representative that he did not consider such a course of action to be fair. The meeting started and proceeded without the claimant being present.

72. Mr Brown had attended the meeting anticipating that he would be supporting the claimant but had not attended to present her case on her behalf.
73. Ms Clifford's evidence was and I find that she believed that the claimant had a history of lack of engagement in the process by reference to the history of the various attempts to call her to an investigation meeting and by reference to her failure to respond to the written questions. This influenced her decision to proceed with the meeting notwithstanding that the claimant was not present and without making any enquiries to understand what technical or other problems were causing the difficulty in the claimant joining.
74. The meeting proceeded to consider the management case as presented in the fulsome investigation report. This sets out the detailed reasons for findings in relation to each of the allegations against the claimant. Ms Pearce gave evidence about the claimant's failure to attend on time, or at all, her failure to use the tagging system and the significance of the impact on service users and colleagues. Although he had not anticipated having to do so and had not prepared to do so, Mr Brown outlined some of the claimant's points in her defence as best as he could from memory – these included her physical and mental health issues, that she was effectively a single parent also caring for her child's father and that the respondent had not paid due regard to policies relating to caring for a dependent.
75. Ms Clifford communicated her decision at the end of the meeting that she found the claimant guilty of misconduct. She upheld all three of the allegations against the claimant.

Dismissal Letter 25 May

76. Ms Clifford wrote to the claimant on 25 May to confirm her dismissal. She confirmed that she had taken into account the Final Written Warning which was current at the time of the misconduct and explained the basis on which she had upheld each of the allegations against the claimant. The claimant was dismissed with 12 weeks notice and was informed that if she wished to appeal she should do so within 5 working days of receipt of the letter of dismissal.
77. The respondent's position on the date on which the claimant would have needed to have been in time with an appeal was that it would need to be made by 2 June 2022.

Appeal

78. The claimant submitted an appeal against her dismissal which was received by the respondent on 7 June. The claimant was written to by the respondent on 16 June and told that as her appeal was out of time it would not be accepted.
79. The appeal was based upon the following
- Procedure was not followed
 - Reference to life events
 - That all of her evidence was not submitted as she was not able to meet with her TU representative

- That she had not been able to join the Disciplinary Hearing as she was not sent the link
 - A breach of confidentiality
 - That her team leader had personal rather than professional issues with her.
80. Ms Clifford gave evidence that had she known that she had sent the Teams invite to an email address no longer used by the claimant, that she would have requested that the appeal be considered out of time.

Submissions

Claimant

81. The thrust of the claimant's submissions were that the respondent had been too harsh on her, that her previous lengthy and good work profile means that the Final Written Warning she was given was too harsh. She submits had due process been followed she may still have her job. Her submission is that it was unfair to proceed with the disciplinary meeting in May 2022 without her present as they had no account from her regarding the allegations against her. Her position is that had she been enabled to attend the disciplinary hearing the respondent may not have dismissed her. The claimant submits that she was dealt with more harshly than others who also had tagging in problems.
82. The claimant submits that the respondent has not complied with the minimum requirements in the ACAS Code of Practice and says that it is relevant that **Ms Clifford** knew that she was trying to join the disciplinary hearing and yet proceeded in her absence. The claimant submits that the respondent knew that she attended the disciplinary meeting in 2021, knew that she wished to attend the disciplinary meeting in 2022 and that this was particularly important as she was on a final written warning.

Respondent

83. The respondent submits that the ACAS Code of Conduct on Disciplinary matters has been complied with in that there has been a thorough investigation and the claimant was given an opportunity to state her case.
84. The respondent submits that the decision to dismiss lay within the range of reasonable responses.
85. The respondent submits that by reference to **Polkey** that, in the event that I conclude there were procedural errors that render the dismissal unfair, that a fair procedure would have resulted in no different outcome. The claimant has accepted that she did not attend appointments, attended late and failed to follow tagging in/out procedures.
86. The respondent submits that in the event that I determine that a fair process would have delayed the process of inevitable dismissal that any compensation would be extinguished by her contributory conduct.
87. By reference to **contributory conduct** the respondent submits that the claimant is culpable by reference to the misconduct itself but also by

reference to her failure to engage with the disciplinary process that was addressing that misconduct.

Determination of claims.

Unfair Dismissal – determination of issues

88. The law that is applicable to the determination of the claim for unfair dismissal is clear. The case of **Birchell-v-British Home Stores** sets out a 3 stage test which is reflected in the issues set out by EJ Gibb and which I determine below.

89. Also relevant is the **ACAS Code of Practice**. This sets out that to deal with matters fairly employers should give employees an opportunity to put their case before decisions are made. This might happen through the holding of an investigatory meeting with the employee or it might happen through the collation of evidence which is then put at a disciplinary meeting. It sets out that an employer should go through the evidence that has been gathered and the employee should be able to set out their case and answer any allegations that have been made.

90. I determine the issues before me on the basis of my findings of fact.

Substantive unfairness

91. **Did the employer hold a genuine belief in the claimant's misconduct?**

92. I am satisfied that the respondent held a genuine belief in the claimant's misconduct. I reject any possibility that the respondent was motivated by any personal issues between the claimant and Ms Pearce or any other person. There was no evidence to support such a possibility. I also reject any possibility that tagging in reports were manually altered or that signatures or other documents were falsified for the same reason.

93. Having heard the evidence of the claimant I am satisfied that she has struggled to take personal responsibility for her actions as an RSA and impact of her conduct on the respondent as her employer. This is not a criticism of the claimant and I do not consider she is culpable for this as I am satisfied that her difficulty in perceiving the position of the respondent is likely to be a manifestation of the degree of turmoil in her personal life, over which she had very little if any control. She had multi layered personal challenges which she was doing her best to manage. My conclusion in this regard resonates with the Investigation Report prepared in March 2021 and referred to in my findings.

94. The history of events establishes that Ms Pearce had had concerns about the claimant's time keeping since the summer of 2018. The history of events also establishes that throughout the relevant time line the claimant was experiencing a number of very challenging personal circumstances over which she had little or no control. It therefore seems appropriate to conclude that these circumstances were relevant to the conduct issues that started to emerge in 2018, some nine years after she had started work for the respondent. Prior to that date there had been no conduct

issues and in fact on the contrary I am satisfied that that the claimant was recognised by the respondent for her good work ethic.

95. The facts establish a discussion in 2018, informal meeting in 2019 resulting in a letter recording concerns, a letter of Management Instruction in March 2020, a disciplinary process from November 2020 leading to a Final Written Warning in May 2021, a suspension and further disciplinary process in November 2021 that led to dismissal for misconduct, on notice, in May 2022.
96. Both investigatory reports are fulsome and clearly set out the basis for determining that there were disciplinary allegations that could reasonably be put to the claimant and establish a proper basis to hold a genuine belief in the claimant's misconduct.

Was that belief formed on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances?

97. Notwithstanding the procedural difficulties that I refer to below at the final stage of the second disciplinary process that led to her dismissal, I am satisfied that the belief in misconduct was formed on reasonable grounds and following an investigation that was as reasonable as was warranted in the circumstances. The investigation report prepared for the Disciplinary Hearing sets out in clear terms what investigations have taken place and all relevant lines of enquiry appear to have been followed.
98. That investigation endeavoured to conduct an investigatory interview with the claimant on 4 occasions. Those investigation meetings did not proceed either because the claimant's TU representative was not available or because the claimant was sick. It is relevant that at the time of that investigation, the claimant was suffering from stress relating both to the situation at work and also because of personal reasons relating to domestic abuse. At this time she was suspended from work.
99. The first Disciplinary Hearing scheduled for 15 March 2022 was rescheduled to 24 May 2022. This ensured that the claimant was no longer subject to a fit note for domestic stress and also that OH had provided confirmation that the claimant was fit to attend a disciplinary hearing,
100. The claimant was asked to provide answers to written questions as an alternative to an investigation meeting and was invited to submit a witness statement or any supporting evidence that she wished to rely upon in advance of the disciplinary hearing.
101. In April 2022 OH had confirmed that the claimant was fit to attend an investigation or disciplinary meeting provided she was supported by a work colleague or official representative. At all times the claimant was supported by Mr Brown. I don't accept that there is any relevance in the concern raised by the claimant that her Nominated Contact Officer did not contact her during her period of suspension. The respondent accepts that they did wrong in this regard and have apologized to the claimant. There is no proper basis to conclude that this error by the respondent had any impact on the claimant's involvement in the investigation and I am satisfied

that that it does not undermine the reasonableness of the investigation process.

Claimant's particular challenges to substantive unfairness.

102. Did the respondent have a genuine belief in the misconduct? I have set out the basis on which I conclude that they did.
103. Did the respondent carry out a reasonable investigation? I have set out the basis on which I conclude that they did.

Was the decision to dismiss a fair sanction, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

104. I am satisfied that dismissal was a fair sanction in all the circumstances. The following is relevant. The claimant was already under a live Final Written Warning for very similar matters of misconduct when the events took place. The earlier process leading to the Final Written Warning had already considered the significance of the claimant's long service and good record in determining that at that stage the disciplinary sanction would be a warning rather than dismissal. The claimant had been clear that she wished to continue working with an 8.00am start time notwithstanding that the earlier disciplinary process had explored with her whether wished to explore the option of a different start time.
105. The claimant has raised her concerns that she was treated more harshly than other employees. I can discern not basis to conclude that there is any form of unequal treatment to the claimant. She referred in evidence to other employees who had problems tagging in and out. Her particular conduct included tagging issues but also included a long history of problems with late/non attendance at visits to service users. There is no evidence before me that could support a finding that the decision to dismiss her was outwith a range of reasonable responses.
106. The claimant has submitted that the earlier Final Written Warning in May 2021 was too harsh a sanction. I address this as the claimant referred to it in her submissions. Notwithstanding that I do not consider it relevant for me to consider the fairness of any earlier disciplinary sanction, even if it were relevant, I can find no basis to determine that it was in any sense too harsh to fall outside a reasonable sanction at that stage. I would reach this conclusion because at that stage the respondent had already raised concerns about timekeeping with the claimant in 2018, had had an informal meeting about timekeeping and written to her to record this in 2019 and had sent her a letter of Management Instruction in 2020.
107. I am also satisfied that there is no basis upon which to conclude that the investigation was tainted either by personal issues between the claimant and Ms Pearce (or other work colleagues) or by the respondent altering documents that were relied upon in the investigation.
108. All of that leads me to conclude that the decision to dismiss was a fair sanction and lay within the range of reasonable responses open to a reasonable employer on the basis of the facts known to it.
109. I am therefore satisfied that in accordance with BHS-v-Birchell that the dismissal is substantively fair.

Procedural unfairness

110. There are a number of potential procedural unfairness identified in the Order of EJ Gibb which I now address.

Should the respondent have waited until she was well enough to participate in the investigatory process? The claimant had asked for the process to be put on hold as part of her grievance.

111. The respondent received OH advice in April 2022 that the claimant was well enough to participate in the investigation process with support in meetings by a work colleague or an official representative. By that stage the respondent had endeavoured on 4 occasions between December 2021 and February 2022 to set up an investigation meeting with the claimant. Those meetings had not taken place for legitimate reasons – namely that the claimant’s TU representative was not available or that the claimant was ill. The claimant was experiencing some very challenging and stressful circumstances in her personal life at that time.

112. The respondent has also sent the claimant written questions to answer as an alternative to an investigation meeting. The claimant did not reply to those questions and intended instead to attend the disciplinary to address the allegations against her.

113. By that stage it is clear that the respondent understood that fair process was important given that the claimant had not attended any of the earlier investigation meetings. This is referred to in terms by HR in an email to Ms Stone on 24 March 2022 [238]. *“The purpose of the OH referral is so that she cannot argue that there has not been a fair process as she hasn’t attended the investigation meetings”*. The advice at that stage is OH advice is needed to confirm that the claimant is well enough to be interviewed but that a disciplinary meeting could take place even if she was sick as she could send a representative in her place. The OH advice does confirm that the claimant is well enough to be interviewed, however the respondent did not thereafter attempt to set up any further investigation meeting with the claimant. Instead the respondent proceeded to the disciplinary hearing.

114. **Ms Clifford** knew from representations made to her by the claimant’s TU representative at the disciplinary hearing on 24 May 2022 that the claimant wished to attend the meeting, that she had been in a meeting with Mr Brown earlier that morning to prepare for the hearing and that she was reporting to Mr Brown at the start of the meeting that she had not received the link to let her do so. Mr Brown told **Ms Clifford** that in his view it would not be fair to proceed with the meeting without the claimant being present.

115. The ACAS Code of Conduct assists in setting out the importance of ensuring that an employee is given an opportunity to set out their case and answer the allegations against them. In the event that an investigatory meeting is not held with an employee, it becomes of particular importance that the employee is given an opportunity to put their case at the disciplinary meeting. The respondent could have chosen to set up a fresh date for an investigatory meeting once it had received the advice from OH. It chose not to and instead to proceeded to the disciplinary meeting.

116. It is my judgment that in terms of procedural fairness, the respondent was in a position to proceed to the disciplinary meeting, even without holding a separate investigatory meeting with the claimant. It had a strong body of evidence in its investigation report of matters that needed addressing given the history of matters. However, in doing so it became of particular importance in terms of procedural fairness, that that that meeting enabled the claimant to set out her case and answer the allegations against her.

Respondent failed to provide the claimant with the link to join the meeting, claimant did not attend the disciplinary hearing.

117. The respondent has provided no evidence to explain why **Ms Clifford** sent the meeting link to an out of date email address for the claimant but accepts that it did so. The respondent had successfully used her correct email address just a month earlier to invite her to an informal grievance hearing.

118. **Ms Clifford** decided to proceed with the meeting without making any enquiry of the claimant or her TU representative to find out what the problem was regarding the claimant joining the meeting. In my judgment she proceeded with an unnecessary and unseemly haste to conduct the meeting without the claimant being present. I am satisfied that **Ms Clifford** concluded that this was another example of the claimant's lack of engagement in the process, although I am also satisfied she had no proper basis to reach that conclusion given the representations made to her by Mr Brown in the meeting. The only accommodation she offered was a delay of 10 minutes to let the claimant join the meeting. A short pause to make some enquiries of the claimant would very easily have established that the respondent had simply sent the link for the meeting to the wrong email address.

119. I am therefore satisfied that the dismissal was procedurally unfair. The ACAS Code is relevant and it sets out the importance of ensuring that an employee is given an opportunity of stating their case and answering the allegations. The claimant was not given that opportunity. The earlier investigation meetings did not proceed for legitimate reasons, the respondent then did not set up any fresh investigation meeting once it had confirmation from OH that the claimant was well enough to attend such a meeting. The claimant did not provide written answers to questions that had been sent to her, she wished instead to attend the disciplinary meeting to address the allegations. **Ms Clifford** had no proper basis to conclude that the claimant was manifesting a lack of engagement in not attending the meeting as she had very clear representations from Mr Brown that not only did the claimant wish to join but that it would be unfair to proceed without her present.

Not allowing appeal out of time

120. The respondent's decision to reject the claimant's appeal as being out of time is one that was available to it on the basis of the time limits that I have been told are set out in the policy. I have considered the evidence of **Ms Clifford**, that had she known that she had sent the link to the meeting to an out of date email address that she would have asked for the appeal to be considered out of time. However on the face of the decision I

can discern to unfairness to the claimant in accordance with the principles in the ACAS Code. The procedural difficulties set with the disciplinary meeting and the decision to proceed with that meeting without the claimant being present. In any event I am satisfied that even had an appeal proceeded, it would in any event have confirmed the decision to dismiss for the reasons set out below.

Would the claimant have been dismissed in any event and to what extent/when?

121. I reject the claimant's submissions that there is any chance that her attendance at the disciplinary meeting would have resulted in any different outcome other than dismissal. I accept the submissions of the respondent that even had the claimant been enabled to attend the disciplinary hearing that there is a 100% chance that she would have been dismissed in any event.

122. The evidence against her was strong and clear and it is significant that the claimant was under a Final Written Warning for very similar conduct. I have considered all the points that the claimant has raised in her defence at this hearing and can discern nothing from those that might have been seemed relevant to a decision to dismiss, if raised at the disciplinary hearing.

123. Even had there been a short adjournment to let the link be sent to the correct email address I am satisfied that there is a 100% that the claimant would still have been dismissed.

Contributory Conduct

If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? (S123(6) Employment Rights Act)

124. My findings confirm that I am satisfied that on the facts of this case there is no contributory or culpable conduct by the claimant. I am instead satisfied that the conduct that led to her dismissal is a manifestation of a degree of turmoil in her personal life over which she had little, if any control, from 2018 onwards.

125. I reject the respondent's submission in relation to contributory conduct during the investigation process. Proper reasons are advanced for her inability to attend the investigation meetings and the claimant determined that she wished to attend the disciplinary hearing to address the respondent's questions to her.

Was the conduct of the claimant such that it would be just and equitable to reduce the basic award? (S122(2) Employment Rights Act)

126. For the same reasons I determine that it would not be just and equitable to reduce the basic award.

Claim for unpaid wages

127. The claimant's claim for unpaid wages/holiday pay is stated in her witness statement to be based on a belief that the respondent has been covering up internal errors in its payroll and that she has been underpaid.

128. From her evidence and the documents that she refers to in her witness statement and from the evidence of Ms Pearce I have made my

findings. From those I have not been satisfied that there is any proper basis to conclude that the claimant has suffered an unlawful deduction from wages.

129. This claim is therefore dismissed.

Employment Judge Christensen
Date 21 June 2023
Amended 18 July 2023

Reserved Judgment & Reasons sent to the Parties
on 03 August 2023

For the Tribunal office