EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mrs. M. Folarin-Abiodun **v** Royal Free London NHS Foundation Trust

Heard at: Watford **On**: 15-18 May 2023
Before: Employment Judge Coll

Appearances
For the Claimant: Mr A. Akinsanya, Atanda Solicitors
For the Respondent: Mr. T. Goodwin, counsel

JUDGMENT

The claim for unfair dismissal succeeds.
The claim for wrongful dismissal does not succeed and is dismissed.
The holiday pay claim succeeds in that the claimant was entitled on termination of employment to 11.7 days' holiday pay in respect of annual leave accrued but not taken as at the date of termination.
The respondent's contract claim succeeds in that the total gross overpayment amount is to be paid by the claimant to the respondent, taking into account sums for compensation for unfair dismissal and outstanding holiday pay, which will be determined at the remedy hearing.

REASONS

THE HEARING

1. This judgment and reasons was requested by Mr. Akinsanya, oral judgment having been given on the last day of the liability hearing. In addition to hearing from the claimant, I heard from the following witnesses called by the respondent. They adopted their witness statements as their evidence and were cross-examined. I asked a few questions and there was some re-examination.

    1.1. Miss Toni Mason-Hambidge – Head of Payroll and Pensions, hereafter TMH.
    1.2. Miss Sara Zulu – Senior Matron, Medical Specialities, hereafter SZ. SZ attended by CVP as she had tested positive for Covid.
    1.3. Ms Sheila Johnston – Chronic Kidney Disease and Hypertension Clinical Nurse Specialist, previously Lead Nurse Chronic Kidney Disease, hereafter referred to as SJ.

1.4. Ms Zain Jalloh – Deputy Director Clinical Operations, previously Director of Nursing, hereafter referred to as ZJ.

2. The claimant confirmed that she could be addressed or should be addressed during the hearing as Mrs. Abiodun, as Mr Akinsanya her representative was referring to her and not as Mrs. Folarin-Abiodun.

3. At the start of the first day of the hearing, on 15 May 2023, Mr Akinsanya sought for the claimant's GP records to be admitted. After some discussion about the directions for disclosure made in the preliminary hearing for case management and the reason for Mr Akinsanya's application, Mr Akinsanya withdrew his application.

4. This case was listed for 4 days but due to a part-heard case being in my list for half a day, we discussed how the timetable could be shortened to fit into 3½ days.

5. It was agreed at the start of the hearing that liability would be decided in the first instance. The revised timetable suggested that judgement on liability could be delivered from late morning on 18 May 2023. It was in fact delivered from 12.30pm 18 May 2023.

6. The respondent made an application before the hearing in writing to amend the particulars of their response to 11.7 days of untaken leave because of something discovered whilst putting the bundle together. That application had been filed and served on the claimant's solicitors, but there had been no response and it was suggested that this be decided at the start of the hearing.

7. The claimant agreed after some discussion at the outset that her outstanding holiday entitlement was 11.7 days and not 11.75 days, as in her schedule of loss.

8. At the end of 17 May 2023, which was the 3rd day of the hearing, following the conclusion of all of the evidence in the case but before submissions, Mr Akinsanya, on behalf of the claimant withdrew the claim of wrongful dismissal.

9. It is still, however, necessary for me to make findings of fact about the alleged conduct since the issue of contributory conduct remains relevant. Mr Akinsanya also said that he was not going to pursue whether the dismissal was within the range of reasonable responses. I took note of that and I deal with that at the end of my judgement.

CHRONOLOGY OF EVENTS RELATING TO DISMISSAL

10. I set out the chronology here since otherwise the detailed lists of allegations concerning procedural unfairness will not make sense. I have taken out from this chronology as much of that which is disputed as possible. In other words, I have sought to include only non-contentious, non-disputed facts.

11. The claimant was employed by the respondent as a lead nurse specialist from 4 April 2016 until 17 December 2020, when the respondent terminated her employment. The respondent gave the reason as gross misconduct.

12. The claimant was responsible for managing 4 nurses who included:

    12.1. Lydia Bbaale known hereafter as LB.
    12.2. Faustina Yeboah known hereafter as FY.
    12.3. Christopher Keefe known hereafter as CK.

13. LB and FY were based at Barnet Hospital, CK was based some of the time at Barnet Hospital, whilst the claimant was based at The Royal Free Hospital in Hampstead.

14. On 26 July 2019, whilst on sick leave, LB made a complaint by email that she was being "*indirectly bullied and harassed*" by the claimant. She referred to being asked to attend a "*sick meeting*" (the term used in her email), with the claimant, prior to her planned return in November 2019. LB did not consider this to be correct procedure and accused the claimant of causing her stress and anxiety and of triggering her sickness absence

15. SZ, to whom the claimant reported at the time, suggested mediation between LB and the claimant a number of times. The claimant did not ultimately agree (see pages 226, 255) and preferred that LB submit a formal grievance which could be the subject of a formal investigation (pages 258-259, 264).

16. The claimant wished to be provided with written confirmation that LB's allegations were unfounded. LB refused to submit a formal grievance.

17. In October 2019, SZ received a formal complaint about several matters from FY. One of those matters concerned an alleged breach of confidentiality by the claimant when FY had visited the Accident and Emergency ("A & E") department during working hours on 10 September 2019. Also in October 2019, LB made a formal complaint involving several allegations (pages 288-289, 301-309).

18. SZ commissioned Mr. Mohammed Noor, hereafter known as MN, Senior Matron to undertake an informal fact-finding. MN has since been promoted to Head of Nursing and Aesthetics Theatre Critical Care and Liver/Digestive Health division.

19. MN had a meeting with the claimant but did not interview her. He interviewed LB, FY and others having received statements from them.

20. On 27 November 2019, MN wrote to SZ saying that he recommended a formal investigation on the basis of his fact-finding concerning LB's allegation and that he would provide SZ with the statements in due course (pages 1135-1136). As a result the respondent engaged its disciplinary policy and procedure. Ms. Anne McReynolds, Divisional Director of Nursing, Transplant and Specialist Services, drafted the terms of reference, known as TOR, and

asked SJ to commission the investigation. Hereafter, Ms. McReynolds will be referred to as AM.

21. The TOR identified 6 allegations (pages 440-442):

    21.1. On 18 September 2019, the claimant refused to support the re-validation process for FY without giving a clear rationale for her refusal.

    21.2. On 10 September 2019, the claimant breached FY's patient confidentiality by calling A & E to find out whether she had attended and the details of the diagnosis after FY had reported sick at work.

    21.3. In September 2019, the claimant acted unprofessionally in withdrawing her support for LB's university course, a masters in Cancer Studies to start October 2019, and in directly contacting the university about this, without clearly communicating with and notifying LB.

    21.4. The claimant showed favouritism to CK by supporting the Advanced Clinical Assessment university module due to commence January 2020.

    21.5. On 19 March 2019, the claimant neglected her responsibilities in failing to calculate LB's holiday entitlement and in referring her to HR.

22. The claimant had sent a number of inappropriate emails specifically;

    22.1. On 15 October 2019, she told FY that she did not wish to receive her emails (page 275).

    22.2. On 7 November 2019, the claimant disclosed details of LB's mental health (pages 313-314).

    22.3. On 27 September 2019, the claimant had accused staff, SZ and Kerry Guile known hereafter as KG, of racism and/or nepotism without foundation (page 268). KG was the author of a review of the department in 2019 and that review is in the bundle.

23. ZJ appointed SJ to carry out a formal investigation. SJ interviewed a number of witnesses including the claimant, FY, LB and KG. The list of interviewees was given by AM.

24. On 3 April 2020, SJ submitted her report to SZ (pages 556-568).

25. Due to the Covid-19 pandemic, full lockdown having been introduced on 23 March 2020 and the resulting increased pressures on frontline NHS staff, the respondent implemented a temporary policy. This allowed staff facing disciplinary charges to propose and agree sanctions rather than to go through a disciplinary hearing (page 955).

26. An email from Jo Matthews, Senior Employment/employee Relations Adviser explained this. This is an important email to which I will return. Hereafter, I refer to Jo Matthews as JM.

27. On 4 May 2020, ZJ notified the claimant that she had concluded that the allegations warranted a disciplinary hearing. She asked if the claimant wished to propose an agreed sanction, under the policy mentioned above, (pages 575-576). It seems that ZJ had intended to include the investigation report with this email but had not done so. As one of the issues was whether the claimant had received the investigation report at all or late, I deal with the date of receipt in my findings of fact section below.

28. On 13 May 2020 the claimant raised a grievance which I call the 1st grievance, about the disciplinary process (pages 580-622).

29. In an email dated 20 May 2020, AM wrote to the claimant to inform her that she could "*raise the issue raised in your grievance in the forthcoming disciplinary hearing*" (page 623). That was intended to be some time in June 2020, but because of what I describe next, that was delayed and in fact happened on 7 October 2020. That is day 1 of the disciplinary hearing.

30. Before receipt of AM's email of 20 May 2020, the claimant had instructed solicitors to send a letter before action to LB alleging defamation (pages 687-701). The letter stated that there would be legal proceedings brought against LB if she did not retract the statement made to SZ, by stating that her allegations were false and unfounded, by paying £5,000 compensation and the claimant's legal costs. LB was advised not to show the letter to anyone other than her legal adviser or advisers.

31. On 19 May 2020, the claimant's representative from the Royal College of Nursing ("the RCN"), wrote to say that "*whilst Mrs. Abiodun agrees with the suggested outcomes put forward by SJ in her investigation report, she would not propose an agreed sanction*" (page 577). JM therefore confirmed that the matter would go to a formal disciplinary hearing (also page 577).

32. On or before 19 May 2020, LB notified SZ that she had received a letter from the claimant's solicitors requesting a retraction of LB's email, £5,000, the claimant's legal costs and an apology for defamation (page 660). On 20 May 2020, LB notified AM, SJ, SZ, JM, MN and Ting Ting Ma (another ER adviser) about the letter from the claimant's solicitors copying in her own solicitor and the RCN representative. LB further wrote that the claimant's defamation claim was based on LB's email complaint dated 26 July 2019 and that the claimant advised her that she, the claimant, had lost her managerial position and wanted to get it back (page 628).

33. On 12 June 2020, ZJ emailed SJ and attached a letter dated 11 June 2020 setting out new TORs arising out of the claimant's solicitors' letter to LB and commissioning SJ to investigate these new TORs:

33.1. Obtaining LB's home address and acting unprofessionally by sending her a serious legal correspondence of defamation.

33.2. Acting with intent to intimidate a witness to retract a statement.

33.3. If these were substantiated, there would be a breach of the Nursing and Midwifery Council's professional code of conduct, including but not limited to, promoting trust and professionalism.

34. On 9 September 2020, SJ submitted an addendum report on these three new TORs having undertaken her investigation and further interviews (pages 795-802).

35. On 11 September 2020, the claimant instructed solicitors to write to LB again, essentially repeating the same content (pages 785-787).

36. On 23 September 2020, the claimant was invited to attend a disciplinary hearing (pages 805-807).

37. The claimant provided 12 character references (pages 811-824) and written submissions (pages 825-855).

38. The disciplinary hearing ("DH") took place over three days, 7 October 2020, 16 October 2020 and 23 November 2020, due to sickness and witness availability.

39. After the 2nd day of the DH on 16 October 2020, the claimant issued a further grievance, which I call the 2nd grievance. She issued that on 17 November 2020, some six days before the 3rd day of the disciplinary hearing. The 2nd grievance identified concerns with the disciplinary process, the 1st grievance having identified concerns with the complaint of 26 July 2019 and MN's fact-finding about that.

40. On 20 November 2020, David Grantham, Chief People Officer, informed Millie Sims (the claimant's RCN representative) that "*any concerns about process as these appear to be are appropriate to be raised there or, following its conclusion, through any appeal if appropriate*" (page 884). "There" meant the 3rd day of the DH on 23 November 2020. I refer from now on to David Grantham as DG and Millie Simms as MS.

41. On 17 December 2020, ZJ wrote in an outcome letter that all allegations were made out, save the one concerning favouritism of CK. She wrote that there was clear evidence of bullying and harassment, conduct breaching the respondent's values and the NMC professional code of conduct. ZJ noted a failure by the claimant to reflect on her behaviour or to show remorse, a concern about a repetition of these events and a breakdown of communication with the claimant's colleagues. ZJ concluded that the claimant's behaviour amounted to gross misconduct and she dismissed the claimant summarily on 17 December 2020. The claimant did not appeal.

42. The respondent accidentally paid the claimant for the remainder of December 2020 and for January 2021. The claimant did not return this overpayment. In her view, it seems that she was keeping it for the time being and should she be awarded a sum by the tribunal, that overpayment could be off-set against any sum awarded.

THE ISSUES LIST FROM THE CASE MANAGEMENT ORDER

43. *Unfair Dismissal Section 94 Employment Rights Act 1996 ("ERA 1996")*

    43.1. It was agreed that the claimant was dismissed on 17 December 2020.

    43.2. Did the respondent have a fair reason to dismiss the claimant?

    43.3. Did the respondent follow a fair procedure in dismissing the claimant?

    43.4. Was dismissal within the reasonable band of responses available to the respondent and was the dismissal fair in all the circumstances?

44. *Wrongful dismissal - Notice Pay*

    44.1. What is the source relied on for the claimant's notice and what, in fact, was the claimant's contractual (including statutory) notice?

    44.2. Was the claimant entitled to notice pay in all the circumstances and, if so, did the respondent in fact fail to pay the claimant's notice pay as alleged?

45. *Holiday Pay*

    44.3. Did the claimant have a contractual entitlement to holiday pay from the Respondent in respect of the following?

    44.4. 10.75 annual leave days' pay

    44.5. 2 Bank holiday days' pays

    44.6. What deductions does the claimant allege were made from such entitlements and when were these due?

46. *Respondent's Contract Claim – Overpayment*

    46.1. What express or implied contractual term(s) does the respondent rely on?

    46.2. The respondent asserts that the claimant was overpaid wages to the sum of £4,504.97 after her summary dismissal. The respondent relies on express and implied terms requiring the claimant to repay the overpaid sum. The claimant asserts that she initially made overtures to refund any overpayment, however, she is entitled to hold a lien on any overpayment.

46.3. On what dates and how is the claimant alleged to have breached the above term(s)?

46.4. Is the claimant entitled to set off any overpayment, by reason of the breaches alleged above?

47. *Remedy for Unfair Dismissal*

47.1. If there is a compensatory award, how much should it be? The Tribunal will decide:

47.2. What financial losses has the dismissal caused the claimant?

47.3. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

47.4. If not, for what period of loss should the claimant be compensated?

47.5. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

47.6. If so, should the claimant's compensation be reduced? By how much?

47.7. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

47.8. Did the respondent or the claimant unreasonably fail to comply with it by failing to follow a fair disciplinary procedure?

47.9. If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion?

47.10. If the claimant was unfairly dismissed, did she cause or contribute to her dismissal by blameworthy conduct?

47.6. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

47.7. Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?

47.8. What basic award is payable to the claimant, if any?

47.9. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

47.10. Did the respondent or the claimant unreasonably fail to comply with it by [specify breach]?

47.11. If so, is it just and equitable to increase or decrease any award payable to the claimant?

47.12. By what proportion, up to 25%?

47.13. Should interest be awarded? How much?

48. At the outset of the hearing, I asked Mr Akinsanya to clarify this list of issues by specifying more detail about the alleged unfairness of the procedure. He set out the following:

48.1. MN did not interview the claimant as part of his fact-finding.

48.2. The disciplinary charges were unconnected to LB's original complaint of 26 July 2019.

48.3. Neither the fact-finding nor the investigation reports were disclosed to the claimant.

48.4. The claimant was invited to agree sanctions without having seen the investigation report.

48.5. CK was not interviewed during the investigation or the disciplinary hearing.

48.6. The claimant's grievances of 13 May 2020 and 17 November 2020 were ignored.

49. In closing submissions, Mr Akinsanya also argued that there were other areas of procedural unfairness. I accept that he did some cross-examination on these areas but he did not identify these as part of the claimant's case until this late stage.

49.1. Delay.

49.2. ZJ should have recused herself from being chair of the disciplinary hearing as she had reviewed the investigation report and decided on the next step, a disciplinary hearing.

50. In my view at that stage it was too late to say that these were part of the case. They had not been mentioned before as aspects of the claim that must be decided and therefore I do not make any findings about them.

51. At the outset and in closing submissions, the respondent denied these allegations of unfair procedure and I summarise:

51.1. MN had not interviewed the claimant only because she had walked out of the meeting with him.

51.2. It was within the range of reasonable responses for an employer to pursue disciplinary charges which were unconnected to the original complaint.

51.3. It was not appropriate to disclose the fact-finding report as this was not part of the formal disciplinary process. The investigation report had been disclosed on 12 May 2020.

51.4. The claimant had seen the investigation report before the deadline by which she was to agree sanctions.

51.5. CK was not interviewed during the investigation by SJ as it was within the range of reasonable responses for an employer to identify interviewees (and exclude him). CK was not interviewed during the disciplinary hearing as the claimant had failed to produce a witness statement in advance, as per procedure. CK had not been a witness to any of the events referred to in the TOR allegations. CK could not testify to whether he was favoured; the question was whether the claimant had given him more favourable treatment. The claimant's assertion that CK could offer evidence on the team was new, and only raised during cross-examination.

51.6. The claimant was invited to raise her grievances at the DH but failed to do so.

52. I am aware that, in summarising what both representatives have said and in the interests of brevity, I have left some things out but I have essentially attempted to illustrate what the different positions.

LAW APPLICABLE TO THE ISSUES IN DISPUTE IN THE UNFAIR DISMISSAL CLAIM

53. S.98 Employment Rights Act 1996 ("ERA 1996") states:

(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 there is more than one the principal reason for the dismissal and

b. that it is either a reason falling within (2) or..

(2) a reason falls within this subsection if it –….(b) relates to the conduct of the employee,

(3) …

(4) where the employer has fulfilled the requirements of subsection 1, the determination of the question whether dismissal is fair or unfair (having regard to the reason shown by the employer) –

a. depends on whether in the circumstances (including the size administrative resources of the employer's undertaking) the employer acted reasonably and unreasonably in treating it as a sufficient reason for dismissing the employee and

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

Misconduct

54. The classic three stage test for a misconduct dismissal is set out in *British Home stores Ltd v Burchell* [1980] ICR 303 EAT:

54.1 the respondent genuinely believed that the claimant was guilty of misconduct

54.2 the respondent had in mind reasonable grounds upon which to sustain that belief

54.3 the respondent carried out as much investigation as was reasonable.

55. The burden of proof is on the respondent to show that it believed the claimant was guilty of misconduct. The burden of proof for the remainder of the test is neutral (section 6 of the Employment Act 1980 and *Boys and Girls Welfare Society v MacDonald* [1996] IRLR 129 EAT).

56. Where there are multiple allegations of misconduct, the question for the Tribunal is not whether the acts individually amount to (gross) misconduct, or might be said to cumulatively amount to (gross) misconduct. Rather (per *Governing Body of the Beardwood Humanities College v Ham* UKEAT/0379/13/MC):

> 12…. *The focus for the Tribunal to the nature and quality claimant's conduct in totality and impact of such conduct and the sustainability of the employment relationship so the reason for dismissal purposes of section 98 employment rights act is a set of facts known to be put maybe of beliefs held by him, which goes into dismiss the as Cairns LJ famously observed in Abernethy v Mott Hay and Anderson [1974] ICR 662…*
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> *16… The question is not whether the individual acts misconduct found by the appeal panel individually or indeed cumulatively amount to gross misconduct. Rather it is whether the conduct in its totality amount to a sufficient reason for dismissal under section 98 (4)".*

57. Generally, misconduct need not be culpable or blameworthy, it may include gross negligence, and there is no need for the claimant to have been subjectively aware of the misconduct (*JP Morgan Securities plc v Ktorza* UKEAT/0311 /16 /JOJ).

58. As the question of whether the claimant's behaviour was gross misconduct:

58.1 gross misconduct, describes an act that fundamentally undermines the contract (*Wilson v Racher* [1974] ICR 428 CA) or is either deliberate wrongdoing or gross negligence (*Sandwell & West Birmingham hospitals NHS trust v Westwood* UKEAT/0032/09)

58.2 more recent authorities, however, have moved away from a purely contractual analysis - that is, was the claimant's conduct repudiatory focussing on the question of "grossness". The question is: was the conduct such that it was reasonable to dismiss; not did it amount to gross misconduct (*Hope v British Medical Association* [2022] IRLR 206 EAT)?

58.3 a series of acts demonstrating a pattern of conduct of sufficient seriousness could undermine the relationship of trust and confidence such that dismissal would be justified even if the employer is unable to point to any particular act and identify that as gross misconduct. The dismissal would be justified by the conduct which undermined the relationship of trust and confidence – not because the series of acts had added up to gross misconduct as such: *Mbubaegbu v Homerton University Hospital NHS Foundation Trust* UKEAT/0218/17.

59. Even if a Tribunal finds that the claimant's misconduct did not amount to gross misconduct, that does not necessarily render the dismissal unfair (per Langstaff J in *West v Percy Community Centre* UKEAT/0101/15/RN at paragraphs 23-24).

60. In terms of what constitutes gross misconduct, I am aware of the following cases.

61. HHJ Eady QC (as she was then) in *Burdett v Aviva Employment Services Ltd* UKEAT/0439/13/JOJ held:

> "29. What is meant by *"gross misconduct"* – a concept in some ways more important in the context of a wrongful dismissal claim – has been considered in a number of cases. Most recently, the *Supreme Court in Chhabra v West London Mental Health NHS Trust* [2014] ICR 194 reiterated that it should be conduct which would involve a repudiatory breach of contract (that is, conduct undermining the trust and confidence which is inherent in the particular contract of employment such that the employer should no longer be required to retain the employee in his employment, see *Wilson v Racher [1974] ICR 428, CA* and *Neary v Dean of Westminster [1999] IRLR 288* , *approved by the Court of Appeal in Dunn v AAH Ltd [2010] IRLR 709, CA*). In *Chhabra* , it was found that the conduct would need to be so serious as to potentially make any further relationship and trust between the employer and employee impossible. It is common ground before me that the conduct in issue would need to amount to either deliberate wrongdoing or gross negligence (see *Sandwell & West Birmingham Hospitals NHS Trust v Westwood* UKEAT/0032/09/LA)".

62. The characterisation of an act as "gross misconduct" is thus not simply a matter of choice for the employer. Without falling into the substitution mindset

warned against by Mummery LJ in *London Ambulance Service NHS Trust v Small* [2009] EWCA Civ 220, it will be for the Employment Tribunal to assess whether the conduct in question was such as to be capable of amounting to gross misconduct (see *Eastland Homes Partnership Ltd v Cunningham* UKEAT/0272/13/MC per HHJ Hand QC at paragraph 37). Failure to do so can give rise to an error of law: the Employment Tribunal will have failed to determine whether it was within the range of reasonable responses to treat the conduct as sufficient reason for dismissing the employee summarily.

63. The reason for a dismissal will be determined subjectively: what was in the mind of the employer at the time the decision was taken. Whether the dismissal for that reason was fair, however, imports a degree of objectivity, albeit to be tested against the standard of the reasonable employer and allowing that there is a margin of appreciation – a range of reasonable responses – rather than any absolute standard. So if an employer dismisses for a reason characterised as gross misconduct, the Employment Tribunal will need to determine whether there were reasonable grounds for the belief that the employee was indeed guilty of the conduct in question and that such conduct was capable of amounting to gross misconduct (implying an element of culpability on the part of the employee). Assuming reasonable grounds for the belief that the employee committed the act in issue, the Tribunal will thus still need to consider whether there were reasonable grounds for concluding that she had done so wilfully or in a grossly negligent way.

64. Even if the Tribunal has concluded that the employer was entitled to regard an employee as having committed an act of gross misconduct (i.e. a reasonable investigation having been carried out, there were reasonable grounds for that belief), that will not be determinative of the question of fairness. The Tribunal will still need to consider whether it was within the range of reasonable responses to dismiss that employee for that conduct. The answer in most cases might be that it was, but that cannot simply be assumed. The Tribunal's task in this regard was considered by a different division of the EAT (Langstaff P presiding) in *Brito-Babapulle v Ealing NHS Trust* UKEAT 0358/12/1406, as follows:

> “38. The logical jump from gross misconduct to the proposition that dismissal must then inevitably fall within the range of reasonable responses gives no room for considering whether, though the misconduct is gross and dismissal almost inevitable, mitigating factors may be such that dismissal is not reasonable. […]
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> 39. […] What is set out at paragraph 13 [“Once gross misconduct is found, dismissal must always fall within the

> range of reasonable responses …"] is set out as a stark proposition of law. It is an argument of cause and consequence which admits of no exception. It rather suggests that gross misconduct, often a contractual test, is determinative of the question whether a dismissal is unfair, which is not a contractual test but is dependent upon the separate consideration which is called for under s.98 of the Employment Rights Act 1996 .
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> 40. It is not sufficient to point to the fact that the employer considered the mitigation and rejected it […], because a tribunal cannot abdicate its function to that of the employer. It is the Tribunal's task to assess whether the employer's behaviour is reasonable or unreasonable having regard to the reason for dismissal. It is the whole of the circumstances that it must consider with regard to equity and the substantial merits of the case. But this general assessment necessarily includes a consideration of those matters that might mitigate. […]"

65. In terms of fairness a Tribunal must consider whether (i) the procedure and investigation and (ii) the decision to dismiss fell within the range of reasonable responses. In *J Sainsburys v Hitt* [2003] I.C.R., the Court of Appeal clarified that the scope of the reasonable responses test permeates every aspect of the dismissal. The objective standard of the reasonable employer should be applied as to what was a reasonable investigation. The Tribunal should ask itself whether the investigation into the suspected misconduct was reasonable in all the circumstances.

66. The EAT set out the "correct approach" considering the reasonableness of a dismissal in *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 EAT at 24-25, specifically:

    66.1 The starting point is the words of section 98(4) ERA 1996.

    66.2 The tribunal must consider the reasonableness of the respondent's conduct, not whether the Tribunal considered a dismissal fair.

    66.3 When judging reasonableness, the Tribunal must not substitute his own views as to what was the right course to adopt.

    66.4 There is a range of reasonable responses within which decisions fall: that one employer might have made a different decision does not render the respondent's decision unfair.

    66.5 The task before the Tribunal is to determine whether the respondent's decision to dismiss fell within that band. If it did, the dismissal was fair.

67. As to the investigation, the Tribunal must assess the reasonableness of what the respondent did do, not what it did not do. Assessment of the scope and nature of the investigation, like all other matters is a question of reasonableness.

FINDINGS OF FACT

68. The standard of proof that I apply when making my findings of fact is that of the balance of probabilities. Where it was necessary to resolve conflicting factual accounts, I have done so by making a judgement about the credibility or otherwise, of the witnesses I have head from based on their overall consistency and the consistency of accounts given on different occasions compared with contemporaneous documents where they exist. Where it has not been possible to rely on the credibility of any of the witnesses on a particular point, I have relied on the contemporaneous documents, of which there are many in the bundle.

69. I took into account all of the evidence presented to me, both documentary and oral.

70. I do not record all of the evidence in these reasons, but only my principal findings of fact, those necessary to enable me to reach conclusions on the issues before me.

Credibility of witnesses - oral evidence

71. I hear first from TMH. Her evidence did not shed light on the amount of holiday pay outstanding, given that the figure was now agreed at 11.7 days. I therefore, do not make any assessment of TMH's oral evidence.

72. SZ clearly did her best to assist the tribunal. Under cross-examination, SZ made a mistake about the sickness absence policy. When asked if it was a correct course of action for the claimant to invite LB to a sick meeting, she said no. She was taken to documents in the bundle which contradicted this position and she accepted that holding a sick meeting was correct. I find that this is something which SZ as a manager should have known instantly. It also fundamentally changes the nature of LB's complaint of 26 July 2019. This was a complaint about a manager following the correct procedure in managing sickness absence. SZ was also vague in her memory: under cross-examination she answered that MN had provided no report or other documents to her. MN's email dated 27 November 2019 at 1135-1136 shows that he had statements and interviews. He promised to send all the relevant documents "in due course". I would have, for example, been able to place more reliance on SZ's evidence in this respect if she had remembered that MN had produced documents but had never sent them to her.

73. SJ also clearly did her best to assist the tribunal; her evidence was inconsistent with ZJ's oral evidence on two very important points. SJ was asked a number of occasions to confirm that ZJ had prepared the TOR and on all of the occasions she had said yes. She confirmed that AM had

instructed her to undertake an investigation. ZJ said the opposite: AM had prepared the TOR and ZJ had commissioned SJ to undertake an investigation. SJ was somewhat contradictory herself. Initially she said that ZJ was interviewed, then she said she could not remember if ZJ was interviewed, then she looked across at ZJ. In addition, SJ had a restricted view of what constituted a complaint. She considered that the claimant saying that the notes of the interview with SJ were inaccurate was not a complaint. I find that that was a complaint.

74. Turning to ZJ. Again, I do not doubt the ZJ did her very best to assist the tribunal, but I observed that for the majority of the questions of which there were many, ZJ turned to her witness statement and read out the answer from her witness statement. Sometimes, this resulted in her pausing before finding the relevant section and reading it out. Occasionally she searched for an answer from the documents in the bundle, which I do not question. I was, however, concerned that the majority of her answers were only a reading of her witness statement. I draw the conclusion that ZJ could remember relatively little about this case.

75. Finally, I turn to an assessment of the claimant's credibility and again, I find that the claimant did her very best to assist the tribunal. Again, I have a mixed assessment of the credibility of the claimant's oral evidence. The claimant made points under cross-examination which were inconsistent with contemporaneous documents. First, Mrs Abiodun's point of view required a reading of the document which was not the plain meaning. For example, she said that she had asked for advice from Ms Fricker of ER before sending the solicitors' letter before action to LB. Her email to Ms Fricker asked about the obtaining of an employee's home address for the purposes of sending them a letter concerning a potential legal claim. The claimant also said that Ms Fricker was aware of which employee this was. There was however nothing in the claimant's email to indicate whom this might be. Secondly, the claimant changed her account of if or when she had received the investigation report by SJ. It was the claimant's case that she had never received the investigation, not before the letter asking to offer an accepted sanction and not before the disciplinary hearing. Under cross-examination, the claimant said that she had received the investigation report just before the disciplinary hearing on 7 October 2020. The claimant was shown an email from one of her union representatives dated 19 May 2020, which confirmed that she had discussed the report with her representative. In addition, the claimant did not immediately agree that she had seen the report before having to make the decision about whether to accept the sanction. Instead, she focussed a number of times on the fact that the email of 5 May 2020 had failed to attach the investigation report as intended.

76. Having identified all of these issues concerning each of the witnesses, I do not find the oral evidence of the witnesses entirely credible or reliable and I do not prefer one witness to the other, except where contemporaneous documents support their account. I make no criticism of any of the witnesses; this was some considerable time ago and tribunal hearings are very stressful events.

Background findings

Was there any connection between LB's complaint of 26 July 2019 and the TOR?

77. This would seem not to be directly pertinent to the issues before me. On the face of it, the allegations in the TOR are different to that in the 26 July 2019 complaint. I accept that the claimant considered that the disciplinary process had started with LB's 26 July 2019 complaint. This is understandable since LB played a key role in the TOR; two of the TORs related to complaints by LB. Yet, somewhere there was a connection in the minds of some of the people involved in the claimant's disciplinary process.

78. First, I look at whether LB considered there was a connection. In LB's email dated 20 May 2020 to various managers of the respondent including AM, LB identifies the connection when she states "*this claim is based on the email I sent to the occupational health nurse on 26 July 2019 and which SZ was copied in, as far as I am aware the investigation is still ongoing*". By "this claim", LB was referring to the defamation claim which the claimant intended to make. Therefore, in LB's mind, her complaint of 26 July 2019 is part of the subject matter of the "ongoing" investigation. She thinks it is ongoing because she does not know that the investigation report had been written. The timing is such that she is undoubtedly referring to the investigation by SJ into the six allegations under the TOR.

79. Secondly, I look at whether MN considered there was a connection. MN's email stated "*my recommendations based on these findings are that Lydia's allegations should be formally investigated*". Due to his not proof-reading his email, and I do not criticize him for that, it is not clear here whether it is one allegation or several allegations. However, if I take it that it is one allegation, then the one allegation he was tasked with fact-finding on was that made on 26 July 2019.

80. Thirdly, I look at whether ZJ considered there was a connection. The outcome letter from ZJ dated 17 December 2020 states and I quote the whole paragraph in order to put the last sentence into context:

> *"It is noted that you stated that the outcome of a fact-finding investigation that was completed at your request following an allegation of bullying and intimidation in an email from LB was not shared with you. The reason for this was that this was an informal fact-finding and therefore this document is not required to be shared. The outcome of this fact-finding was that there was evidence to substantiate the claims and therefore a disciplinary case was commissioned".*

81. So, in other words, ZJ is referring to MN's fact-finding and she is saying that after his fact-finding, in his view there was enough evidence to substantiate the claims. Even if MN's words were taken only as a spring-board for launching an investigation into other allegations, the wording in ZJ's letter and LB's email show that the allegations investigated and made the subject of a disciplinary hearing were in some form in LB's complaint of 26 July 2019. As

the statements and interviews undertaken by MN are not before me, it will never be possible to know what LB said to MN by way of allegations in addition to the allegations of 26 July 2019. Nevertheless, there is sufficient evidence in the bundle to indicate that in some way, the allegation made in the email of 26 July 2019 and what was subsequently written for or said to MN, were connected with the TOR allegations, that is the first TOR stating six allegations.

Procedural unfairness - failure of MN to interview claimant

81. I do not find there was any procedural unfairness for the following reasons:

82. The evidence is ambiguous. MN invited the claimant to a meeting on 11 October 2019. It is the respondent's case that the claimant walked out of the meeting before an interview could take place.

83. It may be that MN intended to interview the claimant but was prevented from doing so as he had not been provided with the allegations. The claimant herself confirmed that the purpose of the meeting with MN was to get a feel for the allegations against her. In any event, this was a fact-finding, which policy clearly showed was a preliminary step before a formal investigation. Even if I were to find the fact-finding interview stage flawed in any way, the investigation by SJ was thorough, she interviewed all those suggested by AM as involved in the events in the allegations or who had made a complaint, the claimant's management and the author of a review of the department into peer miscommunication. The report was also thorough and balanced. If there was any flaw in the fact-finding it was cured by the formal investigation.

Procedural unfairness, disciplinary charges, unconnected to LB's original complaint

84. Although I have found above that in some way the original complaint of 26 July 2019 was connected to the disciplinary charges, the presentation of the TOR was such as to indicate no connection. In this section, I must therefore look at whether lack of connection was unfair procedurally. It is open to a reasonable employer to start off with looking informally at one allegation but leave that allegation and deal with other allegations in the context of a formal disciplinary process. For that reason, I find that any apparent lack of connection was not a procedural unfairness.

Procedural unfairness, non-disclosure of fact-finding report

85. The respondent's case, as put forward in Mr Goodwin's comprehensive closing submission was, that there was a fact-finding report but it merely repeated what was said in MN's covering email.

86. MN's email, upon which I place much reliance and to which I have already referred, does not refer to a written report. I find that there was no written report of his fact-finding but, perhaps, the written report referred to is this

email. There were statements but there is no evidence to suggest that MN remembered to hand them over.

87. Was it an option open to a reasonable employer not to disclose this email to the claimant, given that the email gave no findings save for a recommendation for a formal investigation?

88. I recognise that the claimant had expected a fact-finding to result in something more substantial e.g. detailed findings or at least a better idea of the allegation via statements of interviewees. I also accept that, without being shown MN's email or being made aware of the content, she was left believing that information existed which was being withheld from her.

89. My decision nevertheless is that it was an option open to a reasonable employer to do this. By not having the email, the claimant suffered no prejudice as she was told in separate communications that there would be a full investigation.

Procedural unfairness relating to non-disclosure of the investigation report and, being invited to agree sanctions without having seen it

90. These two allegations of procedural unfairness are linked.

91. The email dated 19 May 2020 from the claimant's union representative (page 577) shows that the claimant had had and had seen the investigation report by that date. The same email dated 19 May 2020 shows that the deadline for agreeing sanctions had not passed and, that although the investigation report was delivered late on 12 May 2020, the claimant was able to review it with her union representative before deciding on whether to take up the respondent's offer.

92. I note the contrast between the way in which JM explained the offer of an agreed outcome sanction to ZJ and the way in which this was communicated the claimant by ZJ.

93. On 1 May 2020 (page 571) JM wrote "*I have just read the report, it would seem to me that yes, there is a case to answer for this investigation. However, I do not think this is a dismissal. The current ER process, due to the pandemic, if we do not think a dismissal then we should look at entering an agreed outcome. Would you agree with this outcome and, then look at a first or final written warning with a recommendation for the OD interventions department since there is clearly a real breakdown of working relationships?*"

94. In her letter dated 4 May 2020, ZJ wrote to the claimant in the following terms about the offer of agreed outcome sanctions "*A report has been completed, report enclosed. I am writing to inform you that I have decided that the information obtained would warrant proceedings to a disciplinary hearing, however, due to the ongoing covid -19 pandemic, processes have been slightly amended. We do not believe that the outcome to this case would warrant a dismissal. I would like to offer you the option of exercising your*

right to request a sanction under the agreed outcome process in line with section 7.1 of the trust's disciplinary policy and procedure".

95. I merely make the observation here, that if ZJ had been able to write to the claimant and her union representative more in the easily understood and less intimidating terms and phrasing used by JM, the claimant might have seen the merits of offering and accepting a sanction.

Procedural unfairness relating to failure to include CK as a witness at the disciplinary hearing

96. I found this to be a very difficult allegation to assess but in the end I have decided that there was no procedural unfairness. In coming to this conclusion I make the following findings:

97. The claimant proposed CK as a witness in order to deal with the allegation that she had shown favouritism towards him in respect of training opportunities. She confirmed in cross-examination by stating "*that was what I had in mind".*

98. I find that CK was not in a position to give evidence on whether he was actually given favourable treatment in comparison to colleagues and, in particular, LB. There was no dispute that his attendance on a university module had been approved. He could only have said that he felt favoured or felt liked. What was actually required was for ZJ to make a finding as to whether the claimant had treated him more favourably and that was something that could be elicited from the claimant, sharing her thought processes and feelings.

99. The claimant was aware in good time that all witnesses should provide a statement in advance of the disciplinary hearing in order for ZJ to assess their relevance. Relevance was the criterion for being allowed to take part. The claimant failed to produce witness statements for CK or Helen Briscoe. I am aware that there was a third witness that she wanted, but as he agreed that he was a character witness, I do not say any more about him.

100. The deadline was extended by JM to 9.00am 6 October 2020, when the claimant's union representative made it clear that they had not been able to comply with the original deadline. On 5 October 2020 i.e. the day before the revised deadline, the union representative raised concerns about disclosure of information to witnesses. Such disclosure being necessary to allow the witnesses to produce their statements, she was worried on behalf of the claimant, that this might leave the claimant open to allegations of breach of confidentiality. The claimant raised this in cross-examination but it was said that she had never mentioned this before. I find that she did through her union representative in an email and there is also an email dated 15 October 2020 which refers back to this.

101. I note that JM at 11.00am on 6 October 2020, that is after the 9.00am deadline, stated that he had been on leave and only returned on 5 October

2020 so had not read the union representative's email of 5 October 2020 raising concerns about confidentiality. In other words, he had not further extended the deadline. I do not find JM's explanation to be plausible as to why he did not reply before the deadline, given that he was back in work on 5 October 2020 and this was a very important matter.

102. Nevertheless, the claimant was well aware of the requirement to provide witness statements by the deadline. Her concern about breaching confidentiality should have been raised well in advance, in order to give time for this issue to be dealt with and the witnesses to provide statements. Therefore, in the final analysis, even though JM's lack of response on 5 October 2020 was unhelpful, the responsibility for failure to produce witness statements must lie with the claimant. I find that it was open to a reasonable employer to refuse to hear from CK because the claimant did not provide his witness statement in time.

103. The claimant said, under cross-examination, that CK would also have spoken about the team which included LB and FY. I cannot find anything in the bundle which supports that the claimant raised this at the disciplinary hearing when ZJ was deciding CK's relevance as a witness.

Procedural unfairness - failure to deal with the grievance

104. I make the following findings of fact concerning this allegation. DG clearly invited the claimant to raise any concerns about the process which was the substance of her second grievance, at the 3rd day of the DH, 23 November 2020. He wrote to the union representative MS "*it is, I believe, in all parties' interests to have the investigation report and issues and any concerns addressed through that process in hearing on 23 November 2020*" (page 884). DG was in essence echoing one of the provisions offered in the disciplinary policy and procedure, whereby the disciplinary matter and the grievance could be dealt with in the same hearing. During cross-examination of ZJ, there were questions about the disciplinary policy and procedure and I recall asking some questions myself. The disciplinary policy and procedure offered three different options for dealing with grievances:

104.1. suspending the disciplinary policy,
104.2. changing the manager to a neutral one,
104.3. or dealing with the disciplinary matter and grievance in the same hearing.

105. I asked ZJ about each in turn, whether she had discussed each of them with ER. She said that she had discussed the third option of dealing with both in the same hearing with ER but she said did not discuss the first two options. I therefore find that ZJ did not discuss each option with ER and I find that a very significant omission.

106. In the notes of the DH on 23 November 2020, the union representative clearly raises the content of the second grievance, as advised by DG, at the

end. There is a note of no questions and no comments from ZJ and the hearing ends.

107. The respondent says that ZJ dealt with the grievance allegations in the outcome letter. I accept that she dealt with some grievance allegations but I bear in mind that this was without questioning the claimant. In any event, ZJ did not deal with all the grievances.

108. It was said that the first grievance was not relevant to the disciplinary process since it concerned complaints about the complaint of 26 July 2019 and MN's fact-finding. The second grievance, however, did concern the disciplinary process and that is acknowledged by DG.

109. I have to ask myself whether it was open to a reasonable employer not to conduct a hearing into the grievance on 23 November 2020 and, thereby, follow none of the options outlined in the disciplinary policy and procedure. I repeat that ZJ said that she had taken advice from ER. DG as the Chief People Officer was in favour of this and had copied Giovanna Leeks, Head of ER, who therefore knew of DG's view. I find on the balance of probabilities that ZJ must not have taken advice on this very important point, despite the fact that she had no experience before of chairing a disciplinary hearing or if she did, she chose to ignore it.

110. I find also from the complete lack of response in the disciplinary hearing that, for some reason, ZJ did not give the grievance the serious attention that it required and that DG advised. So in other words, I find that there was a procedural unfairness in relation to the second grievance and the failure to deal with it at all, having found that it was raised in the disciplinary hearing on 23 November 2020.

111. It follows that I must also ask myself whether I can say confidently that the failure to hear the grievance made no difference to the outcome. I note that DG when discussing this phrased it in this way "*is this procedural issue so substantive that had it been done properly there would have been no dismissal*?"

112. I find that it would not have made a difference to the outcome as reading the detail of the grievances, there would have been no new information before ZJ, as to mitigation.

113. As for the areas of the unfair dismissal claim which have been acknowledged by Mr Akinsanya as ones that he is no longer running, it can be taken as read that I find that there was a fair reason for dismissal, that there was a reasonable investigation, that the respondent had a genuine belief in the claimant's guilt based on this investigation and that the aspects of alleged misconduct relied on by the respondent were such that it was reasonable to dismiss.

CONCLUSIONS ABOUT UNFAIR DISMISSAL

114. For the reasons above, I have concluded that the claimant was unfairly dismissed and I base that on procedural unfairness. The representatives will need to address me at the remedy hearing on *Polkey* and the level of deduction for contributory conduct. I was not able to hear from them about these issues after giving the oral decision because the claimant could not give Mr. Akinsanya any instructions. Mr. Akinsanya explained that the claimant would need time to recover from the emotional experience of the hearing first. The remaining issues for the remedy hearing are therefore:

    114.1. What was the percentage chance that the dismissal would have happened in any event?
    114.2. When would the dismissal have happened, had the grievance been heard?
    114.3. What should the deduction be?
    114.4. What should the further deduction be for contributory conduct?
    114.5. Were there breaches of the ACAS code of practice and if so, should there be an uplift or reduction applicable and if so, at what level?

FURTHER DEDUCTION

115. I would like to note that the whole process, as I have read through in the bundle, must have placed extraordinary pressure on the claimant and I will deal with this after I have looked at the contributory conduct. Therefore, for the purposes of establishing whether there was contributory conduct and to what extent, I must make findings on the allegations.

116. The bundle contained documentary evidence about all the allegations of gross misconduct (in the original TOR and the later TOR). Under cross-examination I heard evidence about four of the allegations, one was in the original TOR (one of six allegations) and the other three related to the later TOR which arose out of the solicitors' letter before action. I take the view that, of the allegations levelled against the claimant, the most serious three allegations concerned the solicitors' letter before action about a defamation claim. Before turning to those allegations, I consider the other allegations.

Refusal to support revalidation of FY without giving clear rationale

117. Based on the details in the investigation report and the DH record, the claimant refused to support revalidation of FY and failed to give a clear rationale for her decision.

118. On its own, I do not find that this was gross misconduct. It did not for example fundamentally undermine the relationship of trust and confidence. I do not even find it was misconduct. There were evidently difficulties between the claimant and FY, which would in large part appear to have stemmed from the fact that the claimant was concerned about FY's attendance record and her attitude to attendance. The claimant was not able to be completely detached and this was a failure in her management skills, arguably a training and appraisal issue.

Breaching patient confidentiality

119. Based on the details in the investigation report, the DH record and the claimant's oral evidence, the claimant did not believe FY was genuinely ill. She considered that it was too much of a coincidence that FY had reported in sick the very morning when she was required to administer a day-long course of chemotherapy to a patient. The claimant admitted that she had called A & E for an update.

120. There is a dispute on the facts. The claimant stated that this was to understand if and when FY might report for work as the claimant was seriously concerned about further delays to this patient's treatment (after earlier postponements). The respondent considered that the claimant had called A & E to find out whether FY was genuinely ill. The evidence was somewhat unclear. I find that the claimant asked when FY would be seen. Knowing the claimant as a senior member of staff, she was put through to a senior nurse in A & E who proceeded to disclose confidential details about FY.

121. On its own, I do find this was gross misconduct. Being suspicious and with a long history of managerial concern about FY, she deliberately set out to find out whether FY was ill. This required her to obtain confidential information. She would have known that being a senior colleague, these were likely to be disclosed readily to her. If she had telephoned, but ended the call before receiving any confidential information, that would have been different. Again, she failed to detach herself as a manager and allowed her feelings about FY and her concern about the chemotherapy patient to control her.

Withdrawing support for LB's university course and contacting the university before telling LB

122. On its own, I do not find this gross misconduct. I do not even find it misconduct. It is the prerogative of a manager to decide that it is not appropriate for a staff member to attend a course, provided that they have good reasons. It is important nevertheless that they communicate with the staff member. It is clear that there were difficulties between the claimant and LB which would in large part appear to have stemmed from the fact that the claimant was concerned about LB's attendance record and her attitude to attendance. The claimant was not able to be completely detached and tell FY before contacting the university. This was a failure in her management and communication skills, arguably a training and appraisal issue.

Failing to calculate LB's holiday entitlement

123. On its own, I do not find this gross misconduct. I do not even find it misconduct. The claimant fell short of the best managerial practice in not finding the time to do this but there may have been good operational reasons why the claimant did not have the time to do this. Alternatively, the difficult relationship between the claimant and LB might have deterred the claimant from giving this a high priority. In any event, HR were able to help. Essentially,

calculating holiday entitlements is a task HR departments do frequently; it was not unreasonable to let HR do it for LB.

Solicitors' letter before action

124. I find that the claimant by sending solicitors' letter did engage in gross misconduct for the following reasons.

125. The claimant made demands for money which in the context of a nurse's salary would have been very significant.

126. The claimant attempted to interfere with the respondent's conduct of the disciplinary process by forcing a key complainant to retract.

127. The claimant did not tell the whole story to Ms. Fricker in her email to her. She did not explain exactly what she had in mind and her email did not seek advice on the wisdom of sending a letter before action. Rather she asked how or where to obtain LB's home address. She also must have known that Ms. Fricker would have had no idea as to the identity of this employee. Ms. Fricker would, therefore, have been unable to make the link between this request concerning home address and the ongoing disciplinary procedure. Had she done so, it is conceivable that she might have sent a much stronger email to the claimant, urging her not to do anything further.

128. The claimant sent not one, but two solicitors' letters and the claimant considered that she was justified in sending the letter as her employer had done nothing to help her and her reputation was being blackened. These were not her words but how I summarise the position according to what she said.

129. I am aware from the medical evidence in the bundle that the claimant suffered mental health problems as a result of stress from the process. This process was over 8 months from when she first became aware of the email of 26 July 2019 to May 2020 when she got the solicitor to send the letter. From her knowledge, there had been a fact-finding which could have produced material, but she know very little detail. She had also gone through the rigours of an investigation and, in addition, she had been moved from her job and effectively demoted from being a manager.

130. The character references attest to the claimant's dedication and conscientiousness. I can fully understand how dreadful the situation up to May 2020 must have felt to her. Nevertheless, I find that the extraordinary pressures and mental health problems experienced by the claimant could never justify what she did in sending the solicitors' letter to LB.

131. I find that instructing the solicitor to send these letters amounted to a repudiatory breach of her contract because it undermined the trust and confidence which was inherent in her contract of employment. It was a deliberate act involving the obtaining of confidential material about another employee and the attempted coercion of this employee to make them withdrew as a witness.

Conclusion

132. Breaching patient confidentiality and sending the solicitors' letters were both gross misconduct. These contributed to the claimant's dismissal and will result in a deduction for contributory conduct, the level of which will be decided at the remedy hearing.

Wrongful Dismissal

Solicitors' letters

133. The claimant through instructing a solicitor to send a letter before action to LB was guilty of gross misconduct. The reasons why this is gross misconduct is set out above under FURTHER DEDUCTION.

134. This entitled the respondent to no longer be required to retain the claimant in their employment and to dismiss her without paying notice.

Holiday Pay

135. The respondent has calculated the sum to be repaid as follows: gross overpayment: £7,083.00 less gross holiday pay: £2,627.84 = £4,455.81. On a net basis, that is £2,964.83 (see paragraph 28 of Mr. Goodwin's closing submission dated 17 May 2023). This will need to be decided at the remedy hearing.

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Employment Judge Coll

Date: 29 July 2023

Sent to the parties on: .7 August 2023...
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For the Tribunal Office