



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102759/2023

Held in person in Glasgow on 15 to 18 August 2023

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Deliberations on 12 and 22 August 2023

Employment Judge D Hoey

Mrs E McNeill

**Claimant
Represented by:
Ms J Quinn –
Solicitor**

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Glynnhill Hotel Ltd

**Respondent
Represented by:
Mr Franklin –
Solicitor
Instructed by:
RBS Natwest –
Mentor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Judgment of the Employment Tribunal is that the claimant was unfairly dismissed, the procedure that was followed falling outside the range of reasonable responses open to a reasonable employer on the facts of this case.
2. It is not just and equitable to award any compensation. The Tribunal finds that the claimant's conduct was such as to justify her dismissal (and that the basic and compensatory awards be reduced by 100%).
3. The claim in respect of wrongful dismissal is dismissed, the claimant having repudiated her contract of employment entitling the respondent to dismiss her without notice.

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REASONS

1. The claimant raised a claims for unfair dismissal and notice pay on 14 April 2023. The claims were disputed, the respondent arguing the claimant was fairly dismissed for gross misconduct and thereby not entitled to notice pay.

Case management

2. The week before the hearing the parties had been asked to finalise a list of issues and statement of agreed facts which developed during the course of the hearing and was finalised.

3. The parties had worked together to focus the issues in this case. The parties were able to agree timing for witnesses and the parties worked together to assist the Tribunal in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost, and proportionality. The case was able to conclude within the allocated time.

Issues to be determined

4. The issues to be determined are as follows (which is based on the agreed list which has revised).

Unfair dismissal

- a. It is conceded that the claimant was dismissed but it was disputed that the claimant was dismissed for a potentially fair reason. The first issue is whether there was a potentially fair reason, namely matters relating to conduct.

- b. If the reason was conduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

- c. Was the belief genuinely held?

- d. Had a reasonable investigation been carried out?

- e. Was the dismissal procedurally fair?
- f. Was dismissal within the range of reasonable responses?

Remedy

- g. What financial losses has the dismissal caused the claimant?
- 5 h. 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?
- i. If so, should compensation be reduced? By how much?
- 10 j. Did the respondent unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?
- k. If so, is it just and equitable to increase or decrease any award payable to the claimant?
- l. If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?
- 15 m. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
- n. What basic award is payable to the claimant, if any?
- o. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

20 *Wrongful dismissal*

- p. The parties agreed notice pay amounted to 12 month's pay. The issue was whether the claimant was guilty of gross misconduct or something so serious that the respondent was entitled to dismiss without notice.

Evidence

- 25 5. The parties had agreed a bundle of 165 pages which included a few pages that were ultimately agreed should be added.

6. The Tribunal heard from Mr Scholarios (the decision maker), Mr Hendry (who chaired the disciplinary hearing), Ms Darby (who chaired the appeal hearing), Mr Johnstone (the external auditor of the respondent), Ms Nicholas (the claimant's former line manager), and the claimant. The witnesses each gave oral evidence and were cross examined and asked further relevant questions with exception of Ms Nicholas who had provided a written witness statement and gave evidence remotely due to illness.

Facts

7. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are necessary to determine the issues before it (and not in relation to all disputes that arose nor in relation to all the evidence led before the Tribunal). Where there was a conflict in evidence, the conflict was resolved by considering the entire evidence and making a decision as to what was more likely than not to be the case.

Background

8. The respondent runs a hotel with staff of around 90 or so (which fluctuated). The respondent turns over significant sums each month. The respondent was supported by an employment law advice, support, and representation team that assisted the respondent in dealing with HR and employment law related matters (including staff disputes).
9. The claimant was employed in April 2018 as a Financial Controller. She was responsible for managing cash flow and dealing with cash intromissions for the business. Initially she reported directly to her long-standing friend and then managing director, Ms Nicholas. Latterly she reported to Mr Scholarios. Mr Scholarios was appointed as a Director in November 2021.
10. The claimant was appointed to her role by Ms Nicholas who was then Managing Director. The claimant had not applied for the role and there was no formal recruitment process as such.

11. Ms Nicholas and the claimant have been friends for approximately 25 years.
12. Ms Nicholas forwarded a copy of her suspension letter to the claimant on 20 January 2022. Ms Nicholas sent the letter to the claimant by email at 11:19pm that evening. The letter, which the claimant saw on 20 January 2022, made it clear that Ms Nicholas had been suspended from work from 19 January 2022 “until further notice” “while an investigation is done into matters relating to your conduct in post and issues related to financial transactions and reports submitted to the company accountants”. Those concerns were known to Ms Nicholas as they had been discussed at a board meeting on that day. During the period of suspension Ms Nicholas was not to carry out any work duties and was not to have any contact with any other staff unless authorised.
13. On around April 2022 the claimant emailed the respondent's accountants specifying an adjustment to Ms Nicholas's monthly salary from April 2022.
14. Ms Nicholas was dismissed in May 2022. She was dismissed because (at the time) the respondent believed there had been irregularities with regard to salary payments and the absence of appropriate authorisation as to adjusted salary payments.
15. It is important to note that Ms Nicholas disputed any wrongdoing whatsoever.
16. Ms Nicholas appealed the decision to dismiss her and in late Summer/Autumn 2022 the claimant submitted evidence in support of Ms Nicholas in that appeal. The claimant understood that Ms Nicholas had been accused of wrongdoing with regard to salary payments (for which the claimant was responsible in terms of administering as financial controller). Mr Scholarios also knew what the allegations were as he had been involved in the investigation process and had concluded from the information he had seen that Ms Nicholas had adjusted her salary without the appropriate consent being in place.
17. Although Ms Nicholas was no longer Managing Director (and an employee) of the respondent, she was and remained a director of the respondent. She

had worked within the hotel for over four decades and worked on operational matters for most of that time.

18. Ms Nicholas was (and remained) a director of the respondent. The respondent has a total of three directors. At a meeting in 2017 (which the claimant chose not to attend) the two other directors decided that all senior staff recruitment decisions required to be confirmed by a minimum of two directors
19. Following Ms Nicholas's suspension in January 2022 Mr Scholarios began to line manage the claimant. Ms Nicholas had been resistant to the involvement of Mr Scholarios in the business, which had previously involved only family members. Mr Scholarios wished to introduce more scrutiny and control as to the business's finance. Mr Scholarios believed that the claimant was not as happy working for him as she had been with Ms Nicholas and he believed that the claimant was resistant on occasion.
20. One of the issues that caused friction was Mr Scholarios's desire to have more transparency as to financial transactions. To this end he wished the expenditure to be capable of being checked and accordingly required the claimant to ensure sums being expended were properly authorised with invoices being exhibited prior to payment being authorised. Mr Scholarios considered that to be good practice. The claimant had been given greater autonomy prior to Mr Scholarios taking control. Mr Scholarios was keen to make the relationship work and understood how important the claimant was to the effective operation of the respondent. He sought to assist the claimant and make it clear to her that she was valued. The claimant, however, believed that her association with Ms Nicholas had been used to treat her negatively. Regrettably that belief of the claimant impacted upon how she viewed the directors and the instructions she was given.

Claimant's contract

21. The claimant had a document entitled "contract of employment" which bears to be dated 15 November 2021 between the claimant and respondent which the claimant and Ms Nicholas signed. That contract stated that the claimant was employed as Financial Controller with a salary of £42,000 per year.

Overtime worked was to be paid at the “basic hourly rate” or time off in lieu was to be provided, solely at the company’s discretion.

22. Under the heading “statutory sick pay” the contract stated that the claimant was entitled to 6 months full pay followed by 6 months half pay and after 12 months, statutory sick pay.
23. Although there was no heading or clause between 18 and 20 it was obvious that there was a clause 19 which deals with notice of termination. (The heading appears to have been deleted in error). The contract states that the claimant was entitled to one month’s notice from the company where she had less than 2 year’s continuous service and one year’s notice where she had 2 years or more continuous service. The contract then said: “The Company may exclude these notice provisions in the event of dismissal for gross misconduct”. Payment in lieu of notice was at the company’s discretion.
24. There was no express notice period setting out what notice the claimant was required to give in the event she gave notice of termination.
25. The contract also had a garden leave clause allowing the company to place the claimant on garden leave at its discretion.
26. The contract referred to the company’s disciplinary and grievance procedure.

Claimant asked to provide a copy of her contract

27. On 27 January 2022 the claimant was asked to attend an informal meeting with Mr R Nicholas and Mr Hendry. Mr Hendry asked the claimant if staff had been issued with contracts. Mr Hendry had been tasked with investigating what contracts had been issued and to whom with a view to updating the position.
28. The claimant stated that she was not aware of staff having been issued with contracts “but new staff may have been”. She had understood that prior to October 2021 no contracts had been issued and that terms were in the staff handbook. She was asked if she had a contract and said yes and was asked to provide a copy to the respondent together with copies of the contract for Mr

Sitrrat and Mr Spence (who were senior managers whose employment had recently commenced, whom the claimant thought may have been issued with contracts).

29. Mr Hendry sent the claimant an email later on 27 January 2022 thanking her for attending the meeting and noting that she said contracts had not been issued to staff other than two senior managers who had recently joined. Despite other staff not having a contract the claimant said she had a contract which she did not have at the time but would provide to Mr R Nicholas. The claimant did not provide the respondent with her contract at that time.
30. On 6 June 2022 the respondent issued staff with proposed new contracts. Staff were asked to check, sign, and return (and raise any issue or error). The claimant replied on 17 June 2022 stating that she objected to the new contract being issued as she already had a contract in place dated 15 November 2021 which she attached.
31. The claimant attended a meeting with Mr Scholarios on 6 July 2022 to discuss the issue relating to her contract. The claimant stated that “legislation is clear that no new contract can be issued if one is in place”. She was reminded that she had been asked to send a copy of the contract she had but she had not done so. The claimant stated that she was not prepared to discuss the detail “unless on a one to one basis”. The claimant was asked if she had been offered the contracts and its terms before she started employment and she said “yes verbally” and that she had been given the contract when a recent senior manager started. Mr Scholarios noted that the terms of her contract were not the same as the others (since the claimant had a lengthier notice period) and that she had appeared to work for 3.5 years without a written document. She said that was common. The claimant said there were 2 members of the management team “with similar agreements” and she was not willing to discuss the terms unless on a one to one basis. Mr Scholarios disputed the assertion the other two staff had similar terms.
32. Mr Scholarios asked the claimant what the process for the issuing of the November 2021 contract was, as normally people would expect that to be

issued soon after joining. The claimant stated that Ms Nicholas and she had downloaded the template from the HR company. She said: “legislation had changed and we were required to issue a contract”.

- 5 33. The claimant was told that there had been agreement amongst directors as to issuing contracts, but the claimant stated she did not know about that. The claimant was advised that there was to be more direct reporting by the management team to the directors. Mr Scholarios told the claimant he was not looking for conflict and wanted a resolution. He said she was a valued employee with an important function in the business. He noted that he was
10 considering employing an administrator to assist the claimant given her workload.
34. By letter dated 1 September 2022, the respondent confirmed that the contract she had presented would be respected.

Policy documents

- 15 35. The respondent’s disciplinary procedure sets out the main standards of behaviour that employees, including the claimant, were expected to follow. Under the heading “conduct standards” employees were expected to maintain satisfactory standards of performance at work and comply with all reasonable management instructions.
- 20 36. The policy noted that the respondent aims to deal with disciplinary matters promptly and fairly. The policy noted that an employee can always appeal a decision made at a disciplinary meeting and the company would make “every effort for the appeal to be dealt with by a different manager to the person who dealt with the matter internally”.
- 25 37. The policy notes that there may be an investigation meeting which is an informal meeting which will determine whether or not a disciplinary meeting is to be convened. Meetings were not to be recorded as the company would arrange for “summary minutes” to be taken.
- 30 38. If an employee was to be invited to a disciplinary meeting, the company would set this out in writing and “set out the issues that are to be considered, how

seriously these are being viewed, the potential consequences and details”. Any sanction would be confirmed in writing and the right to appeal. If a worker appeals, the worker would be given the opportunity to state their case and a final decision would be issued.

5 *Issues as to trust*

39. Prior to Mr Scholarios being engaged, the claimant reported directly to Ms Nicholas, her close friend. The claimant had been given substantially more autonomy. Mr Scholarios, to whom the claimant reported, had had a different way of working having had experience working in other business. He wished
10 to ensure there was a process in place to double check payments that were being made such that requests for payment had accompanied to the request the invoices for which payment was being sought.

40. On 26 April 2022 the claimant had sent to Mr Scholarios a number of payments for review (comprising creditors, an international creditor and guest
15 refund). Mr Scholarios asked the claimant to let him see the accompanying invoices to allow him to review these prior to authorisation.

41. The claimant responded, “Really, this is far too time consuming!” and then stated that invoices were in a purchase ledger which could be reviewed.

42. Mr Scholarios replied apologising for taking up the claimant’s time but stated
20 that, if he is being asked to approve invoices, he needed to know what they were for and how the sums were arrived at (which was his job and that of the claimant’s). He suggested she take the invoices from the ledger and put them back when finished. He concluded: “I have tried very hard to be respectful of your position and you should try just as hard to be respectful of mine. Let’s try
25 to make this work. Kind regards”.

43. The claimant replied asking if it could await her return from holiday as she was completing the VAT return. She concluded “Agreed about trying to make this work but I sincerely feel that I am no longer trusted in my position.”

44. Mr Scholarios replied 6 minutes later stating: “If you were no longer trusted
30 we would be having a very different conversation. What cannot happen is for

necessary administration and scrutiny to be reduced in scale and scope with the sole purpose of making it manageable for only one person. I am well aware you are doing your utmost to keep up with a very challenging workload and so yes this can wait until you return from holiday. Kind regards”.

- 5 45. The claimant had been told by Mr Scholarios following Ms Nicholas’s suspension that financial transactions required to be authorised by him alone. Financial transactions meant what it said, namely any financial charge to the business (which included any change to monthly salaries).

Investigation

- 10 46. By letter dated 28 October 2022 the claimant was invited to an investigation meeting. In the letter, written by Mr D Nicholas, the claimant was advised that an investigation was ongoing “related to an internal disciplinary case”. Mr Nicholas wanted to clarify certain issues that had been raised with him during that process. He wished to meet the claimant to discuss these matters and
15 obtain the claimant’s account. The letter said the “matters are related to salary payments and contracts for staff”. Mr Hendry (HR Consultant) would be present to take notes. She was advised that she was permitted to have someone accompany her at the meeting if she wished, although they could not take part. She was told that matters should be kept confidential (breach
20 of which could lead to disciplinary action). The meeting was, however, not in any way to be treated as a disciplinary meeting.

47. The claimant attended the investigatory meeting on 31 October 2022. Mr D Nicholas was the investigator and notes were taken by Mr Hendry.

- 25 48. At the meeting Mr Nicholas said that at Ms Nicholas’s recent appeal meeting, Ms Nicholas had asked him if he was aware of a contract with the claimant. He wished to understand how the contract had come about. The claimant stated she had been approached by Ms Nicholas and had not applied for the role. She had been given an offer letter but could not remember the terms. The claimant accepted that she had been tasked in January 2022 to provide
30 a copy of her contract but had not done so until May. She also confirmed she had downloaded and completed the template in November 2021.

49. The claimant was asked why this had been done three and a half years into the role. She said that she was aware from the HR company that employees should have contracts and a new general manager was starting. She was asked if any other staff received a contract at the time and she said she was not so aware.
50. The claimant was asked to explain the process about altering director salaries. The claimant replied with Ms Nicholas' name (indicating that she knew what the discussion was about, namely about Ms Nicholas). Mr Nicholas said he recalled Ms Nicholas suggesting directors should take a reduction in salary due to the challenging circumstances. The claimant said she had no recollection, but Ms Nicholas offered to take a drop. She was asked how those changes were confirmed to her and recorded and she said she had a daily meeting with Ms Nicholas and things changed rapidly.
51. The claimant was asked if director salaries reduced in 2020 and she agreed. She was asked if there had been any notification that there would be a top up to the salary at the end of the financial year. The claimant said there had been no specific mention but that "[her] personal feeling, especially Ms Nicholas should have her salary". She confirmed none of the other directors had their salaries topped up to full salary.
52. The claimant was told that the records appeared to show that in 2018-2019 the directors received salary increases but the records showed that in 2019-2020 Ms Nicholas increased her salary with no other director receiving an increase. The claimant did not know how that had been actioned.
53. The claimant was asked if she could explain how Ms Nicholas's salary for March 2022 was higher than her salary for April 2022. An alteration had been made to Ms Nicholas's salary. The claimant said she could not explain and had "no idea". The claimant denied any knowledge as to how Ms Nicholas's salary had been altered.

Further investigation

54. Ms Mackey was appointed to work with the claimant in August 2022. Ms Mackey complained about the claimant's behaviour towards her in December 2022. The general manager at the time, Mr Murphy, met Ms Mackey and the claimant individually to discuss Ms Mackie's complaint. The claimant believed Ms Mackey had been confrontational and she had reacted and she kept herself to herself.
55. Mr Murphy then asked the claimant how a change in salary for Ms Nicholas in April 2022 had been made. The claimant told Mr Murphy there would have been an instruction to the accountants that she would have sent. She said the directors would have authorised it. She could not recall if she had a record of being asked but the accountant could confirm.
56. Following an adjournment the claimant had sent Mr Murphy some emails. Mr Murphy noted that the claimant had produced an email which was sent to the accountant from her regarding a salary change for Ms Nicholas. She was asked who authorised it and she said in response "This was to put the salary back into the usual amount as it was the end of the tax year". She was asked why it was changed from the previous month and said it was to cover a shortfall and "bringing the salary back up to the normal annual salary". It was noted that the other directors did not have their salaries changed. She was asked who asked her to change the salary in April and said Ms Nicholas had instructed her "back when the change was made to make the changes until the shortfall was made up then put the salary back to normal". She confirmed this was an instruction before April 2022.
57. The respondent runs separate monthly and fortnightly payrolls. The directors are part of the monthly payroll. In April 2022, the claimant had given Mr Scholarios fourteen payslips to review on the monthly payroll. One of the fourteen payslips was Ms Nicholas' payslip. Both the fortnightly and monthly payrolls require to be authorised through the accountants' online portal. The monthly payroll for April 2022 was authorised on this portal by Mr Scholarios.
58. The claimant produced emails dated 19 April 2022 to Mr Murphy at their meeting on 7 December 2022.

59. Ms Nicholas was not asked to contribute to the investigation and disciplinary process against the claimant.

How the issue had arisen

5 60. The issue as to the claimant's processing of Ms Nicholas's salary had arisen following a dispute that had been litigated between the respondent and Ms Nicholas. In the course of a hearing when both parties were present, Ms Nicholas had made comments about her monthly salary level and changes to it. That had occurred around October 2022 which had led Mr Scholarios to speak with the directors to consider what had happened. It was only when
10 investigations had been carried out that it became clear that the claimant had appeared to instruct a change to Ms Nicholas's salary in April 2022 which was at the time when Ms Nicholas was going through a disciplinary process in respect of unauthorised changes to her salary.

15 61. Mr Scholarios had not checked the position at the time since, although he had approved the sums the claimant had presented to him, he had taken the claimant's request by and large upon trust and approved her requests without forensically reviewing every amount. The monthly salary run rarely changed giving him little cause to consider the detail. More issues arose given the large number of fortnightly staff (which numbered over 70, with under 20 salaried
20 staff). It was fortnightly staff whose figures varied regularly in addition to the expense payments, which could often be in excess of £170,000. Sums to be paid could vary each week and Mr Scholarios wished to ensure there was a system for checking payments.

25 62. Mr Scholarios assumed that the claimant would raise any issue with him that she considered anomalous or something that required to be authorised, such as changes to salary (which is what he, fairly, had understood had been told to the claimant). As a senior and long-serving member of staff, the claimant was trusted. Mr Scholarios was clear in having advised the claimant that any change to salary payments (or other authority as to expenditure) required to
30 be obtained from him (and not from Ms Nicholas who had been suspended). It was for that reason that Mr Scholarios had not picked up that the claimant

had presented the change to Ms Nicholas's monthly salary in April 2022 as it had not been brought to his attention and he had assumed the figures the claimant presented were authorised, in the absence of the claimant seeking specific authorisation for any change.

- 5 63. At the time the claimant sought Mr Scholarios's approval for the payments in question (as a batch), Mr Scholarios did not therefore examine the individual monthly payslips as he did not consider there to be a need to compare previous monthly salary payments for each monthly paid individual in April 2022. The claimant had not raised any issue with him, and he assumed the
10 position was as it had always been and there was nothing out the ordinary.

Disciplinary hearing

- 15 64. By letter dated 9 December 2022 the claimant was invited to a disciplinary meeting. The letter stated: "As you will be aware from the letter dated 5 December from Mr Murphy, an investigation was being carried out into allegations related to a) your conduct towards a work colleague and (b) transactions related to unauthorised payment of staff wages." The letter stated that conduct such as harassment and bullying and payments made without authorisation are viewed as gross misconduct and an outcome could be dismissal.
- 20 65. The letter included a statement from Ms Mackie, notes of investigation meetings, including the meeting note of 31 October, the relevant company policy documents and emails from the accountant.
- 25 66. The claimant attended a disciplinary hearing on 20 and 29 December 2022. Mr Hendry conducted the disciplinary meetings and made findings and recommendations which were submitted to Mr Scholarios to determine. Notes were taken on both occasions. Mr Hendry was an experienced HR practitioner. He had investigated allegations of misconduct against Ms Nicholas.
- 30 67. The allegations set out in the disciplinary letter were allegations that Mr Scholarios and the directors had instructed be put to the claimant. They were

allegations with which Mr Hendry agreed (albeit the parties had omitted to include in the letter any allegation that the claimant had lied to a director on 31 October 2022 which was subsequently relied upon). Mr Hendry did not have any authority to make any decision. He was to report to Mr Scholarios who would decide what to do.

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68. At the hearing on 20 December 2022 Mr Hendry discussed the claimant's conduct towards her colleague. The meeting also explored the issue relating to director salaries. It was noted the claimant could not explain the reason for the change in Ms Nicholas's salary at the meeting on 31 October 2022 but that at the meeting on 7 December 2022 the claimant had been able to explain the process. The claimant was asked to explain how salary changes were normally notified to her and she explained Ms Nicholas would advise her prior to April 2022. She said Ms Nicholas had told her in 2020 and 2021 to reduce her salary and the shortfall was to be made up when trading improved.

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69. The claimant accepted that approval was required from the directors, but she said she received very little information from them. The claimant asserted Ms Nicholas had authorised the change and it had been arranged to be actioned at the end of the financial year 2021/2022. The authorisation was verbal.

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70. The claimant was then asked if she was aware that Ms Nicholas had been suspended from work at the time the claimant actioned the salary change. The claimant said: "No. I had no notification from the directors. I would have expected that." She was told that Ms Nicholas was not in the building and surely the claimant knew of her suspension. The claimant replied: "That would be an assumption that I would know given I had no formal notification from the directors". Mr Hendry noted Mr Nicholas was a director and surely would have informed the claimant of her suspension. There was no reply.

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71. The claimant was asked why she did not explain the process to Mr D Nicholas when she had been asked on 31 October 2022. She said she had "no idea" what he was talking about. She had said reference was made to staff not directors. Mr Hendry said directors were staff "let's not be pedantic" to which the claimant replied: "I am being pedantic".

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72. Mr Hendry asked the claimant why she did not think it appropriate or necessary to inform or consult with the directors about the change made to Ms Nicholas's salary, especially given the prevailing circumstances. The claimant said: "As I said I had no formal notification of her suspension."
- 5 73. The claimant provided Mr Hendry with documents relating to salary payments comprising an email from the claimant dated 20 April 2022 at 8:50am saying "payment attached for review" with a reply from Mr Scholarios dated 20 April 2022 at 10:04am saying "OK to proceed". There was also a digitally signed document by Mr Scholarios approving the monthly payslips dated 19 April 10 2022. Mr Hendry indicated he would consider matters.
74. Mr Hendry spoke with Mr Scholarios to investigate the matter. Mr Scholarios provided Mr Hendry with further information. He explained that the email the claimant had in fact sent for approval was a batch payment and the individual details had not been set out. He also noted that on occasion the claimant would seek approval in a very short time scale. Thus on 9 March 2022 the 15 claimant sent an email at 2:02pm on 9 March asking for approval by 2:30pm the same day for creditors, expenses, another payment and the fortnightly payroll. He had also shown Mr Hendry that the payment attached for review email of 20 April 2022 had attached the total sum that the claimant was 20 seeking approved (a sum in excess of £30,000) which had not been broken down. The claimant had not sought approval to vary the salary of Ms Nicholas.
75. On 29 December 2022 the disciplinary meeting was reconvened. Mr Hendry stated that he wished to clarify the position as to the change in salary and in particular the correspondence that had been provided. The claimant could 25 not recall when the previous changes had been made to Ms Nicholas's salary. The claimant was asked what authorisation was required to increase Ms Nicholas's salary (which was at the end of 2020, start of 2021). The claimant said that Ms Nicholas was managing director until May 2022 (and is still a director). Verbal communication as to salary would have been received.
- 30 76. The claimant said that Ms Nicholas had authorised her to alter Ms Nicholas's salary in 2020 and again in April 2022 and that no other director had

authorised it. The claimant said it was agreed it would be actioned at the new tax year in 2022. The claimant confirmed that verbal approval had been given by Ms Nicholas prior to March 2022.

- 5 77. The claimant was told that the directors had agreed from 2017 that changes required more than one director but the claimant explained she had not started until 2018 and that was irrelevant.
78. Mr Hendry asked the claimant if instead of prior to March 2022 the claimant meant prior to Ms Nicholas's suspension. The claimant replied: "No. I received no formal notification of Ms Nicholas's suspension".
- 10 79. The claimant was asked who was to authorise daily business transactions after Ms Nicholas's suspension in January 2022. The claimant said that: "I received no update other than information authorising of salaries, payments, etc were to be authorised by Mr Scholarios".
- 15 80. The claimant was asked who sends the papers to the accountant. She explained it was downloaded. She accepted that a large amount of information is submitted for approval, including salaries, invoices, and expenses which are sent to Mr Scholarios to approve. She was asked how long it would take to check those transactions and she said she had no idea.
- 20 81. Mr Hendry showed the claimant the email in which she had asked for approval within 28 minutes, but she denied giving him 28 minutes. She was shown that the email was sent by her at 2:02pm and she asked for approval by 2:30pm. She was asked if she expected Mr Scholarios to scrutinise every transaction in that time. She said yes.
- 25 82. The claimant was asked if she accepted there requires to be a "serious element of trust" on Mr Scholarios part when she seeks his approval for payments to be made. The claimant said she does her job and does it accurately.
83. Mr Hendry noted the claimant produced an email dated 20 April 2022 at 8:50am to Mr Scholarios with April salary details requiring approval which was

approved at 10:04am. The claimant said there had been plenty of time to check.

84. She was asked if the online form showed approval given one day before the change had been made. The claimant said it was not clear.

5 85. The claimant confirmed that she said she had been told verbally to reduce Ms Nicholas salary.

86. Mr Hendry then said the claimant was not aware of Ms Nicholas's suspension yet had spoken to her. The claimant did not disagree. Mr Hendry asked if the claimant was a close colleague of Ms Nicholas having worked with her for a
10 lengthy period of time, why she had not enquired after her given her absence in January 2022. The claimant said "No. That would be me jeopardising my position in the company. I am stuck between a rock and a hard place."

87. The claimant then conceded she had been in contact with Ms Nicholas "since her dismissal as managing director".

15 88. Mr Hendry noted that the issue had arisen when Ms Nicholas had been suspended. The claimant had been asked by Mr D Nicholas at a meeting in October 2022 about the matter and she had no idea about it. She had then been asked on 7 December 2022 by Mr Murphy and explained how the process had been carried out but gave no indication of being aware of the
20 transaction the claimant completed. The claimant said she had misunderstood the questions and was "side winded". She said she had "received no formal notification of Ms Nicholas suspension". She said she had checked the emails from the accountant.

89. The claimant was asked if that was credible given that she had no idea of the
25 change at the meeting with Mr D Nicholas on 30 October 2022. She said she was not clear, and neither was the discussion with Mr Murphy clear. She had searched her emails in December 2022 to clarify the position.

90. Mr Hendry suggested the claimant was not being clear as to when she remembered she was to alter Ms Nicholas's salary. She had no idea when
30 asked on 30 October and yet remembered it on 7 December. How had she

recalled it then? The claimant said it was the end of the tax year and had been authorised previously. She noted that previously she had full autonomy.

91. Mr Hendry considered what the claimant and Mr Scholarios had said to him. He provided a three page report with recommendations and findings which he submitted to Mr Scholarios. This was sent only to Mr Scholarios and not to the claimant. The report was dated 5 January 2023.
92. Mr Hendry noted that there were two allegations – conduct towards a work colleague and transactions relating to unauthorised change in salary.
93. With regard to the first allegation, he felt the claimant’s conduct had fallen short given the way the claimant had conducted herself towards her colleague, which resulted in her colleague feeling upset, humiliated, and having lost self-esteem. He concluded it could be bullying. He recommended the first allegation be upheld and recommended a programme of remedial training be set up with improved engagement and to facilitate harmonious working relationships.
94. With regard to the second allegation, which related to unauthorised changes made to salary in April 2022, it was noted that the claimant met a director on 31 October 2022 having been shown paperwork indicating the salary change in April 2022. The claimant said she had no idea as to what the change was. Then on 7 December, having been shown what she said in October, the claimant had given an explanation as to how the change would be processed but could not say who had authorised the change. The claimant had said she had been verbally instructed by Ms Nicholas sometime in the year 2020 or 2021 to change the salary in April 2022, although Mr Hendry said there was no evidence to support that. The instruction had been given before April 2022.
95. At the disciplinary meeting the claimant had said the instruction was given to her by Ms Nicholas prior to April 2022. The claimant had understood salary approval required to be given by the directors and it was Ms Nicholas who had approved the change to Ms Nicholas’s salary. The claimant’s explanation for not telling this to Mr D Nicholas was that she had “misunderstood the question”.

96. Mr Hendry concluded that the claimant had not sought the required authorisations that were in place in January 2022 and had not made any effort to notify or advise the director of the verbal arrangement that was “supposedly” in place made sometime in 2020 or 2021 with Ms Nicholas. The change the claimant made was unauthorised.
97. Mr Hendry concluded that the claimant was well aware of the transaction at her meeting on 31 October 2022 with the company director and she chose not to confirm her knowledge of this transaction to him when requested and had lied to the director.
98. With regard to outcome, the claimant held a position reliant heavily on trust and the claimant was well aware of the situation at the meeting on 31 October and chose not to inform a director of her involvement. Mr Hendry concluded that “withholding information and in essence lying to a director and altering a director’s salary without the appropriate authorisation would constitute grounds for summary dismissal”.
99. Mr Hendry noted at the end of the report: “During this investigation representatives of the HR Advisers have been advised of the process throughout and have agreed that the recommendation is appropriate in the circumstances of the alleged misconduct”.

20 *Outcome*

100. The claimant was summarily dismissed on 13 January 2023. Mr Scholarios was the decision maker. This was set out in the outcome letter which is dated 13 January 2023 and was signed by Mr Scholarios. It noted that “given the seriousness of matters the claimant’s employment was ended by reason of gross misconduct”. The letter stated that the claimant’s conduct was unsatisfactory “in the following respects”. There were then three numbered paragraphs.
101. Firstly, the claimant’s behaviour towards her colleague and interaction with other staff had fallen short of what was acceptable which was seen as particularly serious given the obligation to protect all staff from bullying and

harassment. However, the letter noted that dismissal would not be considered for that offence.

102. The second matter related to the meeting on 31 October 2022 when the claimant denied having any knowledge of a change of a director's salary in April 2022. On 7 December 2022 she was asked to provide details and confirmed she had processed the change and had been requested to do so prior to April 2022. It was concluded that the claimant was fully aware of the transaction being processed by herself without the appropriate authority in place in April 2022. She chose not to advise the company at the time of the change to the senior employee's salary who had been suspended from work at that time on matters related to payment of salaries.

103. Finally, the third listed matter was that at the meeting with a director on 31 October 2022 when requested to explain the reason for the change in salary the respondent found the claimant was dishonest and had deliberately lied in her answer.

104. The second and third points were actions considered cumulatively to amount to gross misconduct justifying the claimant's dismissal. The claimant's dismissal was immediate, and she had the right to appeal.

Appeal

105. By letter dated 18 January 2023 the claimant appealed against her dismissal. The claimant said that she always acts professionally towards other colleagues, and she suggested staff members who would testify to her participating in general chat with them.

106. She noted that the investigation was 6 months after the transaction had been processed and, having been put on the spot without information to refer to, she could not remember at the time.

107. She also said the correspondence for the December 2022 meeting "is deliberately confusing re the allegation". She said the allegation related to employee payroll which she said misled her as director salaries are on the monthly payroll not fortnightly. She was blindsided and unprepared for the

investigation when director salaries were mentioned. She had no information to hand and the information she sent to the general manager showed the April 2022 transaction. The new amount in April 2022 equated to the minimum contractual obligation of one twelfth of the annual salary. That had been carried out under an agreed instruction from Ms Nicholas many months prior to April 2022. She said: "No official communication has ever been received from the current directors re the suspension of the MD or to inform me specifically as financial controller what matters the suspension covered and if any practises should be reviewed or require amendment".

10 108. She noted that Mr Scholarios was provided with the individual payslips and approved the calculations. He was further provided with the payment amount to be paid from the bank. Both items were approved separately. That was evidence provided to Mr Hendry. Mr Hendry had said he already had the information which she said was a "deliberate significant failing by the company in conducting a fair or unprejudiced investigation".

15 109. She said that the previous process included the MD receiving individual payslips. There were only 10 or 12 payslips and it was essential a director scrutinised the transactions.

20 110. She said there had been a significant lack of communication on a variety of matters from the current director which made her feel ostracised.

Appeal hearing

25 111. The claimant attended an appeal hearing on 14 and 28 February 2023. The appeal was conducted by Ms Darby who made findings and recommendations to Mr Scholarios to determine. Ms Darby was an experienced HR practitioner. She was at the same level as Mr Hendry in terms of seniority.

30 112. The claimant was asked what the reason for her appeal was and she said she did not believe there was any justification for her dismissal. She said she was dismissed after Mr Scholarios approved the transaction and the transaction was approved by her direct manager Ms Nicholas.

113. The claimant said she would not expect a director to check the fortnightly payroll (or some 150 staff) but would expect checking the monthly payroll of between 10 and 12 people.
114. Changes to a director's salary would be via the online portal and the payslip can be viewed. Previous payslips can be reviewed. Fortnightly payroll are large amounts and there was a high degree of trust.
115. The claimant said Ms Nicholas had approved the change. The claimant said she had not been told of Ms Nicholas's suspension and all she had been instructed was that Mr Scholarios wanted to approve all payments.
116. The claimant said she was financial controller dealing with cash and cash flow. She had been responsible for issuing contracts and dealing with any dismissals with the HR company. She had been appointed directly by Mr Nicholas with whom she had a 25-year close friendship. She could not recall if there was a job description for her role. Her now direct report was Mr Scholarios albeit Mr R Nicholas had said she reported to all directors.
117. The claimant was asked whether she was aware if anyone else had a 12 month notice period and 12 month sick pay entitlement and she said no. Changes to contract were instructed by Ms Nicholas. The claimant said there was no paper trail leading to the contract, but the terms were agreed many months prior to getting it. The claimant had prompted Ms Nicholas to issue her contract when a senior employee had joined. The claimant said she had forgotten to provide it sooner as she was busy.
118. The claimant said there had been no dishonesty as she simply could not remember. She said she had been deliberately misled at the meeting with Mr Murphy on 7 December 2022 as she thought it was about fortnightly payroll and was blindsided when the discussion related to monthly staff. She had been instructed to make the change by Ms Nicholas to bring Ms Nicholas's salary back to her contractual amount. Mr Scholarios was given every payslip and approved the sums. She had given Mr Hendry the paperwork but he said he already had it.

119. The claimant then said she received no official communication about Ms Nicholas's suspension which she believed was a failing.
120. The claimant said previously the managing director reviewed each monthly payslip. Mr Scholarios had said he wished to approve transactions. She
5 complied with that instruction. She felt she had been ostracised over the year due to her close relationship with Ms Nicholas. She felt the situation was manufactured to avoid the need to follow her contract. She said no reasonable employer could conclude she was dishonest.
121. The claimant said the outcome was premeditated as her role had been
10 advertised prior to the appeal hearing. She felt caught in the middle of a family fall out and had been humiliated and undermined by the male directors.
122. Ms Darby said she would investigate matters further. Ms Darby spoke with Mr Scholarios and considered matters.
123. A further appeal meeting was convened on 28 February 2023. Ms Darby
15 asked the claimant when she first became aware of the claimant's suspension as a head of department meeting took place on 1 February 2022 when all that was mentioned was that Ms Nicholas would not be at the business for a period of time. Ms Darby asked the claimant when and how she was told of suspension. The claimant said the fact she was not in the building was
20 unusual as she was always there. The claimant had last communicated with Ms Nicholas that morning. They had chatted personally as that had happened for 25 years. The claimant said she was not invited to the meeting of heads of department. The claimant was told those not present at the meeting were told individually but she denied she had been told which she said was another
25 example of lack of communication from directors.
124. The claimant was asked how she knew about the suspension if the directors had not told her. The claimant said the claimant had texted Ms Nicholas as it was unusual for her not to be at work. The claimant thought she said she was suspended.

125. Ms Darby showed the claimant the email she had been sent from Ms Nicholas which was dated 20 January 2022. The claimant said she could not recall but if it was sent it was sent.
126. The claimant was asked when the first time was that she accessed the contract she said she had accessed and created for herself with Ms Nicholas. The claimant could not recall. In the intervening period the respondent had interrogated their IT system which appeared to show the claimant having accessed or stored a pdf contract document on 16 and 17 June 2022. That had been just before the claimant's grievance. The claimant did not recall what it was. She said she first saw her contract when one of the other manager's contract was being prepared.
127. The claimant was asked how salary changes are notified. The claimant said payslips were reviewed individually and anomalies dealt with as they arose. The claimant said she would not highlight anomalies herself.
128. The claimant pointed out a number of errors in the original minute. She said the change had been implemented to ensure the minimum contractual agreement was paid. The claimant also said she had not said she had no personal communication from the directors about Ms Nicholas's suspension but that she had no *official* communication.
129. Ms Darby said she would refer her recommendation to the directors and Mr Scholarios would communicate with her. The decision as to the outcome of the appeal would be Mr Scholarios's and his alone.
130. On 6 March 2023 Ms Darby prepared a three-page report. She noted that there were two allegations – lying to a director and processing salary change without authority. That went to Mr Scholarios and not the claimant.
131. Ms Darby noted that the claimant had not offered any explanation other than that made at the time regarding lying to a director on 31 October 2022. The claimant had confirmed she had been told by Mr Scholarios that all payments had to be authorised by him prior to submitting for payment. It was noted that

the claimant's statements as to not knowing about Ms Nicholas's suspension were "inconsistent" at best.

- 5 132. Ms Darby noted that the claimant had raised an issue about her contract that had not been raised. Ms Darby said she had spoken to individuals the claimant had mentioned and their responses had suggested the claimant had not been truthful in her explanation. She also concluded that the information from the IT system "cast doubt" on the explanation the claimant gave as to the timescales the contract was allegedly agreed. There had been no evidence of a contract having been downloaded or agreed in November 2021.
- 10 133. Ms Darby said the claimant had been dismissed for lying to a director when questioned about a change to a director's salary. Ms Darby concluded the explanation the claimant gave was not truthful. The claimant's processing of the salary change "did not confirm to authorisation sought or indeed notified in any way, shape or form to directors". Given the sensitivity at the time, given 15 Ms Nicholas had been suspended, the failure to inform the directors was concerning. The information as to the process did not support the claimant's explanation. The claimant's failure to advise the director given the sensitivity was of "serious concern".
- 20 134. Ms Darby noted that despite the claimant's "play on words" she was clearly aware of Ms Nicholas's suspension from day one and chose not to acknowledge it when questioned. She spoke regularly with Ms Nicholas and had seen the suspension letter.
- 25 135. Ms Darby did not find the claimant to be truthful particularly around the issue of her contract. Ms Darby stated that it was her belief that the claimant had produced, amended, and backdated a contract which she had completed. That gave the claimant superior conditions.
- 30 136. Ms Darby said the claimant had contradicted herself which undermined her credibility. The claimant had been untruthful and evasive and offered no credible explanation. There had been an irretrievable breakdown of trust and she thought there was no reason to alter the decision that had been taken.

137. Mr Scholarios considered the report and issued a letter to the claimant dated 7 March 2023 which he signed. The appeal was not upheld. He said that Ms Darby had heard no explanation or evidence that would materially alter the decision to dismiss. The letter said: “the reason for this decision is that following the meetings it was found that your recollection of events was at best misleading and at worst untrue in the following matters”. The decision in respect of the appeal was Mr Scholarios who considered matters himself.
138. Firstly, the claimant’s assertion on 31 October 2022 that she had no idea of the salary change was not credible given the instruction had allegedly been intimated a year or so before being processed.
139. Secondly, the documents the claimant provided purporting to show director authorisation of the salary were incomplete and deliberately misleading so as to avoid scrutiny of the transaction. The claimant’s reluctance to inform, advise, or consult with the authorising director prior to the transaction was deliberate.
140. Thirdly, in other matters discussed during the appeal the claimant had been lacking in credibility.
141. Finally, the fact a contract was drafted and downloaded by the claimant three and a half years after starting and her contradictory statements as to how the contract was agreed was of concern. There was no credible explanation as to why this was not on her computer.
142. The appeal was accordingly dismissed.

Claimant’s losses

143. The claimant had 4 complete years of service and was aged 51 at the date of dismissal. The relevant weekly rate was £643 and her basic award (which was agreed) was £3,853.
144. The claimant had secured a comparable income with another role immediately following her employment with the respondent ending. Her only financial losses, which the parties agreed, were any notice pay from the

respondent found due. If the claimant was entitled to notice pay, it was agreed the sum would be 12 x £3,500 gross (£32,150.52) plus 12 month's loss of pension (at 3%) namely £1,260. A figure in respect of loss of statutory rights had been agreed at £400.

5 **Findings for purposes of wrongful dismissal**

145. It is necessary to make separate findings in respect of what the Tribunal considers happened, on the balance of probabilities, with regard to the claimant's conduct from the evidence presented to the Tribunal.
146. In or around April 2022 the claimant made an alteration to Ms Nicholas's salary and caused the altered sum to be paid to her. That had been done as a result of Ms Nicholas having told the claimant to do so. However, at the time the claimant implemented the change she knew that Ms Nicholas had no authority to instruct her and that she ought not to have allowed the transaction to have taken place. The claimant ought to have raised the matter with her line manager at the time, Mr Scholarios, a director, having been forewarned that his consent was necessary for any financial transactions.
147. The claimant did pass the transaction alongside the other transactions to Mr Scholarios for approval but failed to raise with him that within the batch for which she was seeking his consent to enable payment she had included an altered salary payment for Ms Nicholas. While she had sought consent for the batch to be processed (which included the adjusted salary payment), the claimant had failed (and knew she had failed) to raise the specific issue as to the alteration to Ms Nicholas's salary with Mr Scholarios.
148. The claimant had carried out the transaction some months after having been told by Ms Nicholas to make the change, some (fewer) months prior to Ms Nicholas being suspended and some (fewer) months prior to issues as to the legitimacy of adjusted salary payments for Ms Nicholas being raised.
149. The claimant knew that the transaction was not permitted and when asked about it instead of explaining the position as she understood it to be, claimed to have no knowledge of it. That was not true. The claimant had been in

regular contact with Ms Nicholas who had been suspended and had regular discussions with her. Shortly before having been asked about the transaction the claimant had supported her in the course of her disciplinary process. The claimant knew that Ms Nicholas had been dismissed for financial irregularities (which included issues as to alternations of her salary, which the claimant would have processed). The claimant had also provided a written submission in support of Ms Nicholas during the appeal stage, shortly before being asked about the transaction that she said she could not recall.

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150. The claimant had also been less than candid in relation to her knowledge about Ms Nicholas's suspension. She had known about it from 20 January 2022 but had acted as if she had not known about it. She misled those speaking with her.

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151. The claimant knew about the transaction and had not been truthful when she was asked about it on 31 October 2022. She had lied to the respondent alleging she had no idea about the matter, when in fact she was fully aware of the transaction, having processed it herself and having been involved in the appeal process in relation to Ms Nicholas's alleged irregular salary payments.

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152. The claimant was a senior member of staff whom the respondent required to trust given the claimant's position as financial controller. As a result of the claimant arranging for the transaction to be processed without express consent and in the knowledge that such a transaction required consent that she had not expressly sought together with the claimant being untruthful to the respondent in denying knowledge of the transaction when asked about it, the claimant had fundamentally breached the contract of employment entitling the respondent to summarily dismiss her.

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Observations on the evidence

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153. The Tribunal found that the claimant did her best to recall matters as put to her. It was clear that the claimant found it challenging to deal with the remaining directors, particularly Mr Scholarios, when her friend of some 25 year and former boss had been dismissed. That clearly had a material impact

upon how the claimant viewed the interactions with the directors and those instructed by the directors.

154. **The claimant** was an articulate and intelligent person. She was clearly able to present her position upon being asked about it and was able to articulate herself well. She was forthright when required. If an issue arose at work with which she was unhappy, the claimant had the confidence and ability to raise the issue and stand her ground.
155. The key dispute in this case arose in relation to whether or not the claimant could recall the instruction she said she had been given by Ms Nicholas, her friend of some 25 years and close colleague, to alter Ms Nicholas's salary some months prior to April 2022.
156. The Tribunal found the claimant to be evasive in places. The claimant had sought to mask the fact that she had known about Ms Nicholas's suspension from the moment Ms Nicholas had told her. For some reason the claimant had not told the respondent that she knew of the suspension and in fact allowed Mr Hendry and (to an extent) Ms Darby to labour under the misapprehension that the claimant had not known about the suspension. The claimant was unable to explain why she had been evasive. The claimant's lack of trust and decision to misrepresent the position had an impact upon her credibility both during the disciplinary process and before this Tribunal.
157. The claimant had maintained that she had not been "formally" told about the suspension and yet in her own pleadings had stated that she had not been told "formally or informally". It was clear the claimant had been told by Ms Nicholas who was (and was known to be) a continuing director of the respondent. The claimant's repeated attempts to seek to explain her lack of knowledge as to the suspension materially affected her credibility. The claimant was not honest with regard to what she knew about this matter and had not been open with the respondent on this issue.
158. The claimant's failure to be clear and candid with the respondent was an important consideration in assessing the claimant's credibility.

159. The claimant asserted that she was nervous when she met Mr D Nicholas on 31 October and that contributed to her inability to recall the issues under discussion. The claimant said she believed the issue arising related to the fortnightly payroll and initially denied knowing or believing it related to Ms Nicholas. That was entirely implausible given the context. The claimant eventually accepted in cross examination that she was not aware of any other disciplinary issues and that she knew the issues with regard to Ms Nicholas related to salary payments. It was not likely that the claimant would not consider her processing of a revised salary payment for Ms Nicholas after Ms Nicholas had been suspended for alleged salary payment irregularities to be something that ought to be raised with Mr Scholarios. The claimant knew that Mr Scholarios required to approve any financial alterations. It was not plausible that the claimant did not realise the issue under consideration related to Ms Nicholas and that she did not know that was the position.
160. The claimant believed that the second meeting had given her time to check the position which she did by viewing emails. The difficulty was that the emails did not in fact provide anything about which the claimant had not been advised. The claimant had already known the timescale in question and it was likely to have been obvious that the issue related to Ms Nicholas's salary payments. The respondent's agent's submissions with regard to areas the claimant had not been candid were by and large accurate.
161. The claimant believed that processing the original salary payment would have been "ethically wrong" and so she believed she had standing authority from Ms Nicholas to pay the adjusted salary, even although the claimant knew Ms Nicholas had been suspended because of potential salary adjustment issues. The claimant did not consider raising this issue with Mr Scholarios. It was this which led to the issues arising. The claimant said she did not consider there to be a relationship with Mr Scholarios and herself such as to raise this issue, despite the fact Mr Scholarios was her line manager at the time in question and any change in a director's salary ought to have been brought to his attention. The claimant's failure to do so was a massive error of judgment given the context and her role in particular.

162. The claimant accepted that she knew Ms Nicholas did not have authority when suspended to give instructions but sought to rely upon the fact she had been told to make the change prior to her suspension (and before the claimant had been told that any authority to make changes required to be sought from Mr Scholarios).
163. The claimant's position was that she had been told around October 2021 time to make a change to Ms Nicholas's salary in April 2022 and that she had recalled the need to make that change in April 2022 having had no instruction with Ms Nicholas about that matter at least from January 2022.
164. The claimant had lodged papers in support of Ms Nicholas's appeal which occurred late Summer 2022. The claimant therefore knew at this time that the issues Ms Nicholas faced in terms of her disciplinary process related to Ms Nicholas's monthly salary payments. That resulted in the respondent's belief that the claimant was not truthful in saying she could not recall any issue as to her processing the payments in April to be more likely than not to be correct.
165. It was likely the claimant was speaking with Ms Nicholas about her disciplinary issues and the claimant's support of her during the appeal in Summer 2022. It was not credible the claimant had no knowledge of the issue when asked about it in October 2022. The claimant was able to recall the need to make the change some months after it had been instructed, absent, she says, any discussion about the need to do so.
166. The suggestion that the claimant was nervous which resulted in her not recalling the issue was not credible given the context.
167. The suggestion that the lack of clarity in the invite letter led to the claimant not knowing about the issue was also not credible. There was no suggestion that there were any other issues regarding disciplinary matters and the claimant had been involved in the disciplinary process pertaining to Ms Nicholas. It was more likely than not that the claimant had known what the issue was about but simply did not want to discuss it and denied knowledge.

168. The claimant had denied during cross examination that authority was needed from Mr Scholarios regarding this change. However, following further questions she eventually accepted that ordinarily Mr Scholarios required to give his consent. The claimant sought to distinguish the change in this case as she believed was right but in reality she knew changes to salary required to be authorised by Mr Scholarios (irrespective of whose salary it was). It was more likely than not to be the result of the claimant's relationship with Ms Nicholas that she processed the change and did not raise it with Mr Scholarios, hoping it would not be raised.
169. The Tribunal found **Mr Scholarios** to be measured and clear. He was candid explaining that he understood the challenges the claimant faced given her relationship with Ms Nicholas but also understood the importance of the role the claimant carried out for the respondent and the knowledge she had and her experience in working with the respondent. Mr Scholarios wanted to have a professional working relationship with the claimant and he did his best to create such a working environment.
170. Mr Scholarios also accepted that he had approved the sums the claimant had sent to him. He explained that there was no reason to consider the individual salary payments for the monthly paid in April as none had been raised as an issue. There were no reasons for him to check back on previous payments to compare. That was credible and honest. There was no reason why Mr Scholarios would not have raised an issue had he been aware of it, given his connection to the disciplinary process pertaining to Ms Nicholas.
171. The difficulty Mr Scholarios encountered was the perception of the claimant that she was being adversely treated and viewed as a result of her relationship with Ms Nicholas. She viewed her interactions with the directors, including Mr Scholarios, in a negative and suspicious manner. That affected how the claimant interacted with Mr Scholarios and was a challenge for Mr Scholarios.
172. **Mr Murphy** was clear and candid in his approach and no issues arose.
173. **Mr Hendry** had experience of dealing with people and had over a decade of experience in working with some of the directors. The difficulty that arose in

5 this case was that the invite letter had given the claimant less information than
Mr Hendry had in his head. Mr Hendry accepted in cross examination that he
had omitted to include the allegation that the claimant had lied to a director on
31 October 2022 despite that being a clear issue that had led to the
disciplinary proceedings (and given Ms Darby was clear that this was a
specific and separate) allegation. That was not a specific allegation that had
been put to the claimant in the invite letter (but was clearly a separate
allegation relied upon to dismiss the claimant and considered as such by Ms
Darby). Mr Scholarios had also understood that it was a separate allegation
10 and assumed it was included in the invite letter.

174. Mr Hendry had also spoken to Mr Scholarios to obtain an understanding of
the process as to payment of sums, given Mr Scholarios had approved the
batch payment which included the change to Ms Nicholas's April 2022 salary.
Mr Scholarios had been involved in the disciplinary process by explaining the
15 process to Mr Hendry (and in speaking with Ms Darby).

175. Mr Hendry did not consider the claimant to have told the truth and he had
indicated that the claimant had provided no evidence to support her position.
He could have verified the position by speaking with Ms Nicholas, but she had
left the business around this time. The claimant had also accepted that she
20 had not suggested the respondent speak with Ms Nicholas given the desire
not to get involved with the family dispute.

176. **Ms Darby** was an experienced HR practitioner who had sought to understand
the claimant's position. She had a long working relationship with Mr
Scholarios, having worked with him for a number of decades. She had also
25 concluded from the information presented that the claimant was not credible.
She had undertaken some inquiries to consider what the claimant had said,
and her investigations had suggested the claimant was not telling the truth.
Ms Darby engaged with Mr Scholarios during the process to ensure she
understood how the process worked (from Mr Scholarios's perspective). Ms
30 Darby had checked with Mr Scholarios who had told her that he had not
authorised the change to Ms Nicholas's salary that the claimant had
implemented.

177. Ms Darby had relied upon a number of matters in deciding that the claimant was untruthful. Not all of these specific issues had been put to the claimant, but Ms Darby compared what the claimant had said to her with what others had said. It was clear that in some respects Ms Darby was mistaken. Thus, Ms Darby had assumed the IT records showed that the claimant had not accessed a contract at the time in question. However, no steps had been taken to find out precisely where the claimant had said she had accessed the contract and the document produced did not support what Ms Darby thought it supported.
178. There was clear evidence before Ms Darby that the claimant had been evasive. A good example of that was in relation to her knowledge of Ms Nicholas's suspension. The claimant only latterly conceded that she knew of the suspension when evidence was presented to her showing she had been told by Ms Nicholas about it when she got the letter. Prior to that point the claimant had been less than clear in her position. That approach justifiably led Ms Darby to be cautious as to the claimant's credibility. There was sufficient information in light of the context to justify Ms Darby's conclusion (which supported Mr Hendry's conclusion) that the claimant had not been honest, even ignoring the errors Ms Darby made.
179. **Mr Johnston's** evidence was short and there were no issues arising.
180. **Ms Nicholas** had provided a written witness statement (with the consent of both parties) given health issues that existed at the time she was giving evidence. The attempts to elicit evidence from her remotely were challenging given the health issues she had at the time.
181. One issue that arose was when Ms Nicholas had stated she wanted to "reward the claimant for her hard work and dedication" and as a result gave the claimant a 12 month notice period in her contract. That was suggested by Ms Nicholas to amount to a "reward" (which she said was not unheard of for someone of that seniority and importance).
182. The difficulty with that part of the evidence was that the claimant had stated during the disciplinary process that she believed the terms and conditions

5 contained in the contract Ms Nicholas signed had in fact been the terms and conditions she believed she had agreed when she started her role. That was something that had been asked when discussion about the notice pay had been raised. In other words, the inference from the position set out by the claimant at the time was that the notice period was not a reward for work done during COVID but was something she had already agreed. This was something that resulted in uncertainty at best given the clear conflict in the evidence of the claimant and Ms Nicholas.

10 183. This was not something that the claimant had been asked in evidence not least since the witness statement had not been produced until shortly before Ms Nicholas gave evidence. It was suggested the claimant may have been referring to terms and conditions that applied at the time (and she may not have had her notice period in contemplation). It was more likely than not that Ms Nicholas would have explained to the claimant at the time why she was
15 being given a “reward” and why this was so. This was not a factual dispute that required to be resolved as it did not relate to the issues directly but it did affect the claimant’s credibility and supported the other conclusions that were reached.

Law

20 *Unfair dismissal*

184. The Tribunal has to decide whether the employer had a reason for the dismissal which was one of the potentially fair reasons for dismissal within section 98(1) and (2) of the Employment Rights Act 1996 and whether it had a genuine belief in that reason.

25 185. The reason for a dismissal is “a set of facts known to the employer, or it may be of beliefs held by him which cause him to dismiss the employee” Cairns LJ in *Abernethy v Mott Hay and Anderson* [1974] ICR 323 at page 330B-C.

186. The Tribunal must focus on the decision to dismiss and asks itself what fact or belief caused the employer to reach that decision.

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188. The Tribunal must focus on the decision to dismiss and asks itself what fact or belief caused the employer to reach that decision.
189. One of the potentially fair reasons is for matters relating to “conduct”. The burden of proof rests on the respondent who must persuade the Tribunal that it had a genuine belief that the employee committed misconduct and that belief was the reason for dismissal.
190. Once an employer has shown a potentially fair reason for dismissal within the meaning of section 98(2), the Tribunal must go on to decide whether the dismissal for that reason was fair or unfair which involves deciding whether the employer acted reasonably or unreasonably dismissing for the reason given in accordance with section 98(4).
191. Section 98(4) provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer): “depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.”
192. What a Tribunal must decide is not what it would have done but whether the employer acted reasonably: *Grundy (Teddington) Ltd v Willis HSBC Bank Plc (formerly Midland Bank plc) v Madden* [2000] ICR 1283. It should be recognised that different employers may reasonably react in different ways, and it is unfair where the conduct or decision making fell outside the range of reasonable responses. The question is not whether a reasonable employer would dismiss but whether the decision fell within the range of responses open to a reasonable employer taking account of the fact different employers can equally reasonably reach different decisions. This applies both to the decision to dismiss and the procedure adopted.

193. Mr Justice Browne-Wilkinson in his judgement in *Iceland Frozen Foods Ltd v Jones* ICR 17, in the Employment Appeal Tribunal, summarised the law. The approach the Tribunal must adopt is as follows:

- 5 a. “The starting out should always be the words of section 98(4) themselves.
- b. In applying the section, a Tribunal must consider the reasonableness of the employer’s conduct, not simply whether they (the members of the Tribunal) consider the dismissal to be fair.
- 10 c. In judging the reasonableness of the employer’s conduct, a Tribunal must not substitute its decision as to what was the right course to adopt.

15 In many (though not all) cases there is a band of reasonable responses to the employee’s conduct which in which the employer acting reasonably may take one view, another quite reasonably take another. The function of the Tribunal, as an industrial jury, is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which the reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, it is falls outside the band it is unfair.”

20 194. In terms of procedural fairness, the (then) House of Lords in *Polkey v AE Dayton Services Ltd* [1988] ICR 142 established that procedural fairness is highly relevant to the reasonableness test under section 98(4). Where an employer fails to take appropriate procedural steps, the Tribunal is not permitted to ask in applying the reasonableness test whether it would have

25 made any difference if the right procedure had been followed. If there is a failure to carry out a fair procedure, the dismissal will not be rendered fair because it did not affect the ultimate outcome; however, any compensation may be reduced. Lord Bridge set out in this case the procedural steps which an employer in the great majority of cases will be necessary for an employer

30 to take to be considered to have acted reasonably in dismissing: “in the case of misconduct, the employer will normally not act reasonably unless he

investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation.”

195. Where the employer relies on conduct as the fair reason for dismissal, it is for the employer to show that misconduct was the reason for dismissal. According to the Employment Appeal Tribunal in *British Home Stores v Burchell* [1980] ICR 303 the employer must show:
- a. It believed the employee guilty of misconduct;
 - b. It had in mind reasonable grounds upon which to sustain that belief;
 - c. At the stage at which that belief was formed on those grounds it had carried out as much investigation into the matter as was reasonable in the circumstances;
 - d. The employer need not have conclusive evidence of misconduct but a genuine and reasonable belief, reasonably tested. The burden of proof is on the employer to show a fair reason, but the second stage of reasonableness is a neutral burden. The Tribunal must be satisfied that the employer acted fairly and reasonably in all the circumstances in dismissing for that reason, taking account of the size and resources of the employer, equity, and the substantial merits of the case.
196. In *Ilea v Gravett* [1988] IRLR 487 the Employment Appeal Tribunal considered the *Burchell* principles and held that those principles require an employer to prove, on the balance of probabilities that he believed, again on the balance of probabilities, that the employee was guilty of misconduct and that in all the circumstances based upon the knowledge of and after consideration of sufficient relevant facts and factors he could reasonably do so. In relation to whether the employer could reasonably believe in the guilt, there are an infinite variety of facts that can arise. At one extreme there will be cases where the employee is virtually caught in the act and at the other extreme the issue is one of pure inference. As the scale moves more towards the latter, the matter arising from inference, the amount of investigation and inquiry will increase. It may be that after hearing the employee further investigation ought

reasonably to be made. The question is whether a reasonable employer could have reached the conclusion on the available relevant evidence.

197. In that case the Employment Appeal Tribunal upheld the Tribunal which found that the employer had not investigated the matter sufficiently and therefore did not have before them all the relevant facts and factors upon which they could reasonably have reached the genuine belief they held. The sufficiency of the relevant evidence and the reasonableness of the conclusion are inextricably entwined.
198. The amount of investigation needed will vary from case to case. In *Gray Dunn v Edwards* EAT/324/79 Lord McDonald stated that “it is now well settled that common sense places limits upon the degree of investigation required of an employer who is seized of information which points strongly towards the commission of a disciplinary offence which merits dismissal.” In that case the Court found that further evidence would not have altered the outcome as the employer had shown that they would have taken the same course even if they had heard further evidence. That was a case which relied upon the now superseded *British Labour Pump v Byrne* [1979] IRLR 94 principle, but emphasises that the amount of investigation needed will vary in each case. Thus, in *RSPB v Croucher* [1984] IRLR 425 the Employment Appeal Tribunal held that where dishonest conduct is admitted there is very little by way of investigation needed since there is little doubt as to whether or not the misconduct occurred.
199. A Tribunal in assessing the fairness of a dismissal should avoid substituting what it considers necessary and instead consider what a reasonable employer would do, applying the statutory test, to ensure the employer had reasonable grounds to sustain the belief in the employee’s guilt after as much investigation as was reasonable was carried out. In *Ulsterbus v Henderson* [1989] IRLR 251 the Northern Irish Court of Appeal found that a Tribunal was wrong to find that in certain circumstances a reasonable employer would carry out a quasi-judicial investigation with confrontation of witnesses and cross-examination of witnesses. In that case a careful and thorough investigation had been carried out and the appeal that took place involved a “most

meticulous review of all the evidence” and considered whether there was any possibility that a mistake had been made. The court emphasised that the employer need only satisfy the Tribunal that they had reasonable grounds for their beliefs.

- 5 200. Where there are defects in a disciplinary procedure, these should be analysed in the context in which they occurred. The Employment Appeal Tribunal emphasised in *Fuller v Lloyds Bank* [1991] IRLR 336 that where there is a procedural defect, the question to be answered is whether the procedure amounted to a fair process. A dismissal will normally be unfair where there was a defect of such seriousness that the procedure itself was unfair or where
10 the result of the defect taken overall was unfair. In considering the procedure, a Tribunal should apply the range of reasonable responses test and not what it would have done (see *Sainsburys v Hitt* [2003] IRLR 23).
- 15 201. The Court in *Babapulle v Ealing* [2013] IRLR 854 emphasised that a finding of gross misconduct does not automatically justify dismissal as a matter of law since mitigating factors should be taken into account and the employer must act reasonably. Length of service can be taken into account (*Strouthous v London Underground* [2004] IRLR 636).
- 20 202. With regard to procedural fairness the case of *G M Packaging v Haslem* UKEAT/0259/13/LA is important and was heavily relied upon by the respondent as it was argued (perhaps) to have been the “inspiration” for the way in which the current case was dealt with procedurally. It is necessary to consider it in detail as the respondent says the case is on all fours with the current case.
- 25 203. The respondent had nine employees. GM was the Managing Director, owner and sole shareholder. SH was the General Manager. LO was a sales representative. GM and LO had a heated exchange about her entitlement to commission on a particular account. Prior to that date rumours had circulated to the effect that LO and SH were engaged in a personal and sexual
30 relationship. GM was aware of those rumours but had not raised the matter with either of them.

204. One morning GM challenged SH as to what he believed he had seen the previous evening which appeared to be a liaison in the office. SH admitted that he was having an affair with LO but denied having had full sexual intercourse the previous evening or at all. GM summarily dismissed LO.
- 5 205. GM then made contact with external HR consultants, RH and received their advice. As a result, GC was appointed investigating officer in the case of SH.
206. On 18 April GM realised that a dictating machine in the office had captured the conversation between both individuals in the office on the night in question. He invited GC and another employee, to listen to the recording. It was transcribed. The claimants there speak of GM in derogatory terms.
- 10
207. An investigatory meeting took place on 18 May, taken by GC with GM as note-taker. SH again denied having sexual intercourse with LO but accepted that he had kissed her. Following that meeting he was suspended on full pay. GM gave a statement to GC as to what he had seen and his conversation with SH the following morning. On 26 April GM sent LO a letter setting out his reasons for dismissing her and telling her that she had a right of appeal. She did appeal.
- 15
208. An appeal hearing was conducted by DP of RH on 23 May. DP telephoned GC stating that it was her recommendation that LO's appeal be dismissed. Having obtained authority from GM, GC passed on that authority to DP, who wrote a letter to LO on 3 June dismissing her appeal.
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209. As to SH, he attended a disciplinary hearing before DP on 3 May and stated his case. DP then made further enquiries, after which she sought authority to dismiss him and received it via the same route as in the case of LO. She found three out of four charges levelled at SH to be made out, dismissed him summarily on 6 May by telephone and confirmed her decision and reasoning in a letter of that date.
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210. SH appealed that decision. His appeal was heard by JP of RH on 26 May 2011. Having considered the matter, she also sought and obtained GM's authority to dismiss the appeal. She did so by letter dated 3 June 2011.
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211. Focusing on the decision in the case of SH, the Tribunal concluded that, since the authority of GM was required before the dismissal and appeal outcomes recommended by DP and JP respectively were sanctioned it was GM whose reason for dismissal must be ascertained. However, the Tribunal rejected a submission that the procedure used in the dismissal of SH was flawed because GM was effectively the dismissing and appeal officer. They found that the fact a consultant brought in to deal with such matters advises the owner of the business of the decision and seeks permission to implement it does no more than reflect the reality of the situation. In an organisation of the size and administrative resources of the respondent and given the senior position of the second claimant, the actions taken to deal with the disciplinary proceedings against the second claimant were reasonable.
212. The Employment Appeal Tribunal found that the reason related to SH's conduct. The issue which fell to be resolved was whether the "reason" was that in the minds of DP and JP when, respectively, they recommended dismissal and rejection of SH's appeal to GM or whether, in sanctioning those causes of action, GM was the "mind" of the respondent for the purposes for ascertaining the reason for dismissal.
213. The Tribunal found that it was the reason in the mind of GM and not DP and JP which was the reason for dismissal. On that basis the Tribunal limited the "principal reason" in the mind of GM to the sexual activity which took place between SH and LO. The Employment Appeal Tribunal found that was an error. First, having accepted that the process undertaken by RH was a genuine and proper procedure for this small business, run by GM, to follow, it was internally inconsistent of the Tribunal to ascribe a different reason for GM for dismissing SH because he had the last word. He accepted the recommendations of DP and JP. The reason for those recommendations were theirs. Secondly, the use of the term "principal reason" represents a fundamentally erroneous approach to section 98 which requires the employer to show the reason or, if more than one, the principal reason for the dismissal. The reason is one of those falling within subsection (2) or some other substantial reason. The list of potentially fair reasons in subsection (2)

includes conduct, capability, redundancy. Thus, if the set of facts or beliefs includes both conduct and capability reasons, the question is what is the principal reason. Provided it is a potentially fair reason under subsection (2) then the reasonableness question under section 98(4) arises for determination. Here, the only reason for dismissal related to SH's conduct. That included all the matters taken into account by DP on dismissal. Moreover, even if GM is treated as the decision-maker the result is the same. The sexual activity and the tape recording were both in the minds of DP and GM at the disciplinary hearing stage. The Employment Appeal Tribunal found it to be "simply wrong" to focus solely on the sexual activity as the principal reason for dismissal. It was the whole of the conduct leading to his dismissal, an approach the Tribunal took when making its findings on contribution.

214. The Employment Tribunal found that a reasonable investigation had been carried out and a reasonable process followed. They found the dismissal of SH unfair because, in their view no reasonable employer would categorise sexual activity between two adults out of hours in a deserted office as gross misconduct justifying summary dismissal.

215. The Employment Appeal Tribunal found that the Tribunal misunderstood what is meant in section 98 by the principal reason for dismissal; secondly, having found the delegation of the disciplinary function to RH to be a genuine and proper procedure, they failed to consider the reason given by DP and JP for their respective decisions; and thirdly, they substituted their own views as to what was an appropriate sanction for that of the range of reasonable responses open to a reasonable employer.

216. The Employment Appeal Tribunal overturned the Tribunal and found the dismissal to be fair.

217. In *Charalambous v National Bank of Greece* [2023] EAT 75 the Employment Appeal Tribunal considered similar issues of fairness to those arising in the current case. In that case the dismissing officer did not meet the employee having delegated matters. The Employment Appeal Tribunal found that, while it is desirable a meeting between the employee and the dismissing officer

should take place and it is good practice, such a position was not essential in every case. It was found to be something which many employers' disciplinary procedures will expressly require and many dismissals will be found to be unfair if no such direct meeting takes place but there is no principle of law that requires such a meeting. The Appeal Tribunal found that an employee should have an opportunity to explain her position sufficiently prior to a decision being reached.

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218. In that case, the Tribunal found the claimant had two formally recorded disciplinary meetings at which she was represented by her trade union representative and was able to set out her case, comment on the evidence and advance mitigation, all of which was recorded. The Tribunal found that the dismissing officer had such matters in front of him when taking his decision. The Tribunal also found that the officer who had conducted the hearing had given the dismissing officer a recommendation for dismissal.

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219. The Appeal Tribunal also upheld the Tribunal's conclusion that the respondent's actions were reasonable in the circumstances even though the process was, in the words of the Employment Tribunal, "less than ideal".

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220. Finally, the Appeal Tribunal would have found that looking at the process of dismissal as a whole, including the appeal process, the dismissal was fair. It is relevant to note that the appeal officer was an official senior in status to the dismissing officer and he took his own independent view of the case, reaching his own conclusion that the circumstances merited dismissal.

ACAS Code

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221. In considering a claim for unfair dismissal by reason of conduct, the Tribunal is required to consider the terms of the ACAS Code of Practice on Disciplinary and Grievance matters. This sets out what a reasonable employer would normally do when considering dismissal by reason of conduct.

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222. Relevant parts of the ACAS Code (which the Tribunal has taken into account) include paragraph 3 which reminds Tribunals that size and resources should be taken into account. Paragraph 4 states that issues should be considered

fairly which includes dealing with matters promptly, acting consistently, investigating to establish the facts, informing employees about the basis for the allegation and give them a chance to put their case before a decision is made.

5 223. Paragraph 5 states that it is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts. In some cases an investigatory meeting is needed but not always. Paragraph 6 notes that in misconduct cases where practicable different people should carry out the investigation and disciplinary hearing.

10 224. Paragraph 7 notes that an investigatory meeting should not of itself result in disciplinary action.

225. Paragraph 9 states that if there is a disciplinary case to answer the employee should be notified of this in writing which should contain “sufficient information about the alleged misconduct and its possible consequences to enable the
15 employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence which may include witness statements, with the notification.”

226. Paragraph 26 states that an employee should be given the right of appeal and paragraph 27 states that the “appeal should be dealt with impartially and
20 wherever possible by a manager who has not previously been involved in the case.”

Process to be considered as a whole

25 227. The reasonableness of the decision to dismiss is scrutinised at the time of the final decision to dismiss – at the conclusion of the appeal process (*West Midland v Tipton* [1986] ICR 192). This was confirmed in *Taylor v OCS* [2006] IRLR 613 where the Court of Appeal emphasised that there is no rule of law that only a rehearing upon appeal is capable of curing earlier defects (and that a mere review never is). The Tribunal should consider the disciplinary
30 process as a whole and apply the statutory test and consider the fairness of

the whole disciplinary process. If there was a defect in the process, subsequent proceedings should be carefully considered. The statutory test should be considered in the round.

Basic award

- 5 228. This is calculated in a similar way to a redundancy payment. The basic award is subject to reduction where the conduct of the employee before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to do so (section 122(2) Employment Rights Act 1996).

10 **Compensatory award**

229. This must reflect the losses sustained by the claimant as a result of the dismissal. In respect of this award it may be appropriate to make a deduction under the principle derived from the case of *Polkey*, if it is held that the dismissal was procedurally unfair but a fair dismissal would have taken place had the procedure followed been fair. That was considered in *Silifant v Powell* 15 [1983] IRLR 91, and in *Software 2000 Ltd v Andrews* [2007] IRLR 568, although the latter case was decided on the statutory dismissal procedures that were later repealed. The case of *Ministry of Justice v Parry* [2013] ICR 311 is relevant too. The Tribunal must consider all the circumstances in 20 deciding whether it is able to assess the chance of a fair dismissal (see *Frew v Springboig St John's School* UKEATS/0052/10). Further, if an employer wishes to advance a *Polkey* argument, it should be supported by evidence (*Compass v Ayodele* [2011] IRLR 802).

230. At paragraph 54 of the Judgment, the Employment Appeal Tribunal in 25 *Software 2000* summarised the legal principles and it is worthwhile quoting them in full (but it must be read bearing in mind the statutory procedures were abolished as was section 98A): "The following principles emerge from these cases:

- 30 a. In assessing compensation, the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience

and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

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- b. If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).
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- c. However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.
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- d. Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.
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- e. An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.
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- 5 f. The s.98A(2) and *Polkey* exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.
- 10 g. Having considered the evidence, the Tribunal may determine
- 15 i. That if fair procedures had been complied with, the employer has satisfied it - the onus being firmly on the employer - that on the balance of probabilities the dismissal would have occurred when it did in any event. The dismissal is then fair by virtue of s.98A(2).
- 20 ii. That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.
- 25 iii. That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case.
- iv. Employment would have continued indefinitely.
- v. However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored.”

231. In *Polkey* it was stated that in some cases where the procedure adopted was unfair the dismissal could still be fair. That would apply in limited cases usually where it can be said from the facts that following a fair procedure would be utterly futile or useless. In *Duffy v Yeomans* [1995] ICR 642 the Court of Appeal found that it was not necessary for the employer to have applied their

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mind to this question but it is unusual for a procedurally unfair dismissal to be found to be fair (see *Nabili v Norfolk* UKEAT/39/16 and *Afzal v East London Pizza* [2018] ICR 652).

5 232. In *Jagex v McCambridge* UKEAT/41/19 the Employment Appeal Tribunal held that on the facts of that case the dismissal had been substantively and procedurally unfair and the Tribunal's reasons showed that no reasonable employer would or could fairly have dismissed the claimant for what he did. In such cases there was no need to consider the *Software 2000* principles in detail. It was inherent in that decision that fair procedures would not have
10 made the dismissal fair. The Tribunal had erred, however, in concluding that gross misconduct was required to justify a reduction for contributory fault since the correct test is to consider whether the conduct was culpable, blameworthy, foolish or similar, which could include conduct that falls short of gross misconduct or even a breach of contract.

15 233. The amount of the compensatory award is determined under section 123 and is "such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

20 *Mitigation*

234. The leading authority in this area is *Wilding v BT* [2002] ICR 107. That case confirms that the onus is on a wrongdoer to show that the claimant failed to mitigate their loss by unreasonably refusing an offer of reemployment. It is not enough to show that it would have been reasonable for the employee to take
25 those steps since it was necessary to show that it was unreasonable for the innocent party not to take them. It is only where the wrongdoer can show affirmatively that the innocent party has acted unreasonably in relation to the duty to mitigate that such a defence can succeed. This was considered in *Cooper v Lindsey* UKEAT/184/15 where Langstaff P noted that there is a
30 difference between acting reasonably and not acting unreasonably. It is not

for the claimant to show that what he did was reasonable. The central cause is the act of the wrongdoer.

235. Lady Wise considered this issue in *Wright v Silverline* UKEATS/8/16 where she noted that the Employment Judge had erred in adopting a starting point of considering whether the employee's conduct was unreasonable and by failing to make it clear that the onus is on the wrongdoer to show that the employee failed to mitigate their loss. The onus is not neutral and it is for the respondent to show that the claimant acted unreasonably.

Reduction of the awards

236. The Tribunal may separately reduce the basic and compensatory awards under sections 122(2) and 123(6) of the Act respectively in the event of contributory conduct by the claimant but the tests are different.

237. Guidance on the amount of compensation was given in *Norton Tool Co Ltd v Tewson* [1972] IRLR 86. In *Nelson v BBC (No. 2)* [1979] IRLR 346 it was held that in order for there to be contribution the conduct required to be culpable or blameworthy and included "perverse, foolish or if I may use a colloquialism, bloody minded as well as some, but not all, sorts of unreasonable conduct." Guidance on the assessment of contribution was also given by the Court of Appeal in *Hollier v Plysu Ltd* [1983] IRLR 260, which referred to taking a broad, common sense view of the situation, in deciding what part the claimant's conduct played in the dismissal. The Employment Appeal Tribunal proposed contribution levels of 100% (employee wholly to blame), 75% (employee mainly to blame), 50% (employee and employer equally to blame) and 25% (employee slightly to blame). That was not, however, specifically endorsed by the Court of Appeal and there is no reason a Tribunal has to follow these guidelines as they are a matter of common sense. The more serious and obviously 'wrong' an employee's conduct, the higher the deduction is likely to be.

238. A Tribunal should also consider whether there is an overlap between the *Polkey* principle and the issue of contribution (*Lenlyn UK Ltd v Kular* UKEAT/0108/16).

239. Thus, if the Tribunal finds that the employee has, by any action, caused or contributed to his dismissal, it shall reduce the amount as it considers just and equitable. There need be no causal connection between the dismissal and the conduct when a Tribunal considers a reduction to the basic award.

5 240. A deduction for contributory fault under s 123(6) can be made only in respect of conduct that persisted during the employment and which caused or contributed to the employer's decision to dismiss. It follows that the employee's conduct must be known to the employer prior to the dismissal.

10 241. In *Nelson v BBC (No 2)* [1979] IRLR 346 the Court of Appeal said that three factors must be satisfied for the tribunal to find there to be contributory conduct. The first of these is that the conduct must be culpable or blameworthy. The second is that it must have caused or contributed to the dismissal. The third is that it must be just and equitable to reduce the award by the proportion specified.

15 242. In *Steen v ASP Packaging Ltd* [2014] ICR 56 (Langstaff P presiding) the Employment Appeal Tribunal stated that the application of those sections to any question of compensation arising from a finding of unfair dismissal requires a Tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault; (2) having identified that it must ask whether that conduct is blameworthy—the answer depends on what the employee actually did or failed to do, which is a matter of fact for the Tribunal to establish and which, once established, it is for the Tribunal to evaluate; (3) the Tribunal must ask for the purposes of section 123(6) of the Employment Rights Act 1996 if the conduct which it has identified and which
20 it considers blameworthy caused or contributed to the dismissal to any extent. If it did cause or contribute to the dismissal to any extent then the Tribunal moves on to the next question; (4) this is to what extent the award should be reduced and to what extent it is just and equitable to reduce it. It will likely be an error of law if the Tribunal simply states its conclusion as to contributory
25 fault and the appropriate deduction for it without dealing with these four matters. The court said that there is no need to address these matters at any greater length than is necessary to convey the essential reasoning and of its
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nature a particular percentage or fraction by which to reduce compensation is not susceptible to precise calculation but the factors which held to establish a particular percentage should be, even briefly, identified.

5 243. In *Steen* a finding of 100% contributory conduct was said to be an unusual finding but a permissible finding. A Tribunal should not simply assume that because there is no other reason for the dismissal therefore 100% contributory fault is appropriate. It may be the case but the percentage might still require to be moderated in the light of what is just and equitable: see *Lemonious v Church Commissioners* UKEAT/0253/12.

10 244. In terms of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, if an employer unreasonably fails to comply with the ACAS Code the compensatory award can be increased by up to 25%. If an employee has unreasonably failed to comply with the Code, the compensatory award can be reduced by up to 25%. The Employment Appeal
15 Tribunal has held that the Tribunal take into account the absolute value of any uplift, rather than just the percentage value (see *Acetrip Ltd v Dogra* UKEAT/238/18).

20 245. If a claimant has received certain benefits, including Job Seeker's Allowance (as in this case), the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 apply. This means that the respondent must retain a portion of the sum due until the relevant Government department has issued a notice setting out what the claimant is to be paid and what is to be refunded to the Government.

Breach of contract and wrongful dismissal

25 246. Under the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 a Tribunal can award a claimant damages for breach of contract where the claim arises or is outstanding on termination of employment. The cap of the award that a Tribunal can make is currently £25,000.

30 247. For claims of breach of contract for notice pay, such as in this case, where an employee has been dismissed by reason of breach of contract for gross

misconduct, the Tribunal requires to make findings from the evidence it has heard to determine whether or not the claimant was as a matter of fact in breach of contract such that the respondent was entitled to terminate the contract summarily. If the employer did not have grounds that entitled it to dismiss the employee summarily, notice pay can be awarded (subject to the rules as to mitigation).

248. In *British Heart Foundation v Roy* UKEAT/49/15 the Employment Appeal Tribunal (Mr Langstaff, President, as he then was) noted, at paragraph 6: “Whereas the focus in unfair dismissal is on the employer’s reasons for the dismissal and it does not matter what the Employment Tribunal thinks objectively probably occurred, or whether in fact the misconduct actually happened, it is different when one turns to the question either of contributory fault for the purposes of compensation for unfair dismissal or for wrongful dismissal, There the question is indeed whether the misconduct actually occurred.”

Submissions

249. Both parties made detailed written submissions which were supplemented orally with both parties making relevant submissions in relation to each other’s submissions. The Tribunal has taken into account the full submissions from the parties and refer to these, as appropriate, below.

Decision and discussion

250. The Tribunal spent a considerable period of time considering the evidence that had been led and the submissions made by both parties which were fully taken into account. Both parties had produced written submissions to which the parties made supplementary oral submissions and were able to comment on each other’s submissions and answer questions arising. Although the submissions are not reproduced in full they were fully taken into account and are on the Tribunal file.

Unfair dismissal

Reason for dismissal

251. While it was conceded that the claimant was dismissed it is disputed that the claimant was dismissed for a potentially fair reason. The Tribunal is satisfied that the reason - the set of beliefs held by the respondent that caused it to dismiss the claimant - was a potentially fair reason; matters relating to the claimant's conduct.

252. The respondent dismissed the claimant because the respondent believed that the claimant had been dishonest (in denying knowledge about the transaction in April 2022) and because the claimant had processed an alternation to Ms Nicholas's salary when she had been told approval was required from Ms Scholarios and no such approval was sought. That was for matters relating to the claimant's conduct, something she had done.

253. The Tribunal did not accept the claimant's agent's contention that there was a hidden reason for the claimant's dismissal and that the real reason was something other than her conduct. The Tribunal was satisfied from the evidence that the reason for her dismissal was her conduct.

Reasonableness of dismissal

254. As the claimant was dismissed for a potentially fair reason, the Tribunal must now consider the fairness of the dismissal and assess whether the respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. There are a number of separate elements to this issue.

Genuine and honest belief

255. The Tribunal is satisfied that the respondent genuinely and honestly believed that the claimant had been guilty of conduct that entitled them to end her employment. This was clear from the evidence of Mr Scholarios who genuinely and honestly believed that the claimant had lied and processed a transaction that she knew not to be authorised. There was no subtext as alleged by the claimant.

Reasonable grounds for that belief

256. The respondent argued there was “voluminous evidence” that the claimant acted dishonestly. It was argued the respondent reasonably believed that the claimant had lied to a director on 31 October 2022 by failing to advance the explanation she later relied on when it would have been reasonable for her to do so if that later explanation was correct, whereas the claimant contended the opposite was true.
257. The respondent further submitted that the claimant, despite initial denials, knew that the transaction reducing Ms Nicholas’s salary in April 2022 was without appropriate authority and chose not to advise the respondent of the change of salary in the full knowledge of Ms Nicholas’s suspension and the circumstances surrounding that suspension, whereas the claimant denied there was any irregularity; that she was carrying out a longstanding instruction from a director; and that she carried out that instruction by seeking and obtaining approval in the same manner as she had always done.
258. The claimant had argued that it was “business as usual” and she had continued to process salary as she had always done. She argued that the instruction by Mr Scholarios was not clear enough to have required her to alert him to the transaction in question.
259. The Tribunal carefully considered the evidence that was presented to the respondent at the time and all the parties’ submissions. It is important that the analysis as to reasonable grounds is based upon what the respondent knew at the time (and not subsequently).
260. From the information before the respondent, there was sufficient evidence to entitle the respondent to conclude that the claimant was guilty of conduct entitling the respondent to bring her employment to an end to justify a conclusion that there were reasonable grounds for that belief.
261. The first of the two reasons for her dismissal was that the claimant had processed a salary alternation for a director without extant approval. The Tribunal is satisfied that there were reasonable grounds for the respondent’s belief that the claimant’s assertion that she could rely upon Ms Nicholas’s instruction to be insufficient and that instead the claimant ought to have

heeded the instruction she accepted she had received from Mr Scholarios and not processed any salary adjustment without his consent. Given the context, it was not “business as usual” as the claimant’s agent argued.

5 262. The claimant knew there were serious disciplinary issues being raised against Ms Nicholas in relation to her salary payments and alterations to her salary. That in itself ought to have raised a concern in the claimant’s mind as to whether or not any authority Ms Nicholas had issued was still extant. It was simply not plausible for the claimant not to have understood that an instruction from Ms Nicholas about changing her salary would remain valid despite Ms
10 Nicholas having been suspended for alleged irregularities in connection with her salary payments (and alterations thereto) and the claimant knowing about such action. Further from what the claimant had been told by Mr Scholarios she ought to have raised any change in salary payment with him as her line manager. There was no reasonable basis for the claimant assuming she had
15 extant authority to do what she did, given the context of this case, particularly the proceedings being taken against Ms Nicholas, the claimant’s knowledge and the discussion Mr Scholarios had with the claimant. There was no reasonable basis to believe the authority of Ms Nicholas remained valid.

20 263. The Tribunal considered the claimant’s agent’s submission that it was inconceivable that Mr Scholarios had not checked the position in light of the context. However, the evidence was clear that Mr Scholarios trusted the claimant. There was no reasonable basis for him to double check what she had submitted with regard to director salary payments. Mr Scholarios was dealing with a large number of issues and the Tribunal did not accept it was
25 more likely than not that he had checked or ought reasonably to have checked the position. Mr Scholarios had trust in the claimant and as she had not raised any specific issue in this regard proceeded on the reasonable basis that there was nothing “out the ordinary” that required his specific consent.

30 264. The Tribunal considered the claimant’s agent’s submission that Mr Scholarios had not been clear with Mr Hendry and Ms Darby as to the approval process. While there was some uncertainty around this, the conclusion that was reached was fair and reasonable. A reasonable employer would have been

able to fairly and reasonably conclude that the claimant had known she ought to have sought Mr Scholarios's specific consent to process the salary change. The lack of knowledge as to the detailed process did not alter that fact.

5 265. The respondent had reasonable grounds for the belief that the claimant had processed a salary change for Ms Nicholas without consent in circumstances where consent ought to have been sought.

10 266. The second reason for her dismissal related to the claimant's alleged lie in not knowing about the issue. Having assessed the information available to the respondent, the Tribunal is satisfied there was a reasonable basis for the respondent to believe the claimant had in fact lied when she said she did not know about the issue at all.

15 267. The claimant was a very close friend of Ms Nicholas (and had been for 25 years) and spoke with her regularly. The claimant knew the issues Ms Nicholas was facing. The claimant supported Ms Nicholas, not least in providing formal input (by way of written evidence) in support of Ms Nicholas' appeal. That was not long before the claimant was asked about the transaction in question. It was implausible that the claimant had no knowledge of this issue, and it was more likely than not that the claimant hoped that simply saying she failed to recall anything would result in no further action.
20 There was a reasonable basis for the respondent believing that the claimant did not tell the truth when denying knowledge of the transaction in question given the context.

25 268. The Tribunal considered that there was merit in the claimant's agent's criticism of Ms Darby's evidence in cross examination when she made it clear that she had concluded the claimant was not truthful in a number of respects and had the allegations before the claimant been different the outcome may have been different. But the issue in this case was whether the claimant had lied about not knowing about the relevant transaction. The Tribunal concluded that there was a clear and fair basis for Ms Darby's conclusion (which mirrored
30 that of Mr Hendry) that the claimant had not been truthful in this regard. The fact Ms Darby believed the claimant not to be truthful in other respects (which

may have been a belief that was not fairly or reasonably supported) did not alter the conclusion from the evidence that the claimant had not been truthful about this allegation. The Tribunal is satisfied that even if Ms Darby had properly considered the other matters (and even if she found the claimant to have been truthful in other respects) the outcome as to this allegation would have been the same and reasonably so.

Fair investigation

269. There were 2 opposing positions in this regard. The respondent argued that it carried out such investigation as was reasonable. The claimant argued the investigation was unreasonable and unfair.

270. It is not clear precisely what the respondent ought to have done to investigate matters further. In this case the claimant said she had extant authority. The respondent's position was that even if the claimant had been told by Ms Nicholas to implement a change to her salary, that authority had lapsed when Ms Nicholas had been suspended on grounds of alleged financial irregularities with her salary. There was little point speaking to Ms Nicholas since the respondent's position was that any consent given by Ms Nicholas did not alter their position. Even if Ms Nicholas confirmed that she had given the claimant authority, it was not reasonable for the claimant to have considered that authority to have remained valid given the context.

271. There were no other reasonable steps that could have been taken. Mr Scholarios was clear in having told the claimant his consent was expressly required for any change to salary. It ought to have been obvious that any previous instruction from Ms Nicholas had ceased to have effect given the context.

272. The fact Mr Scholarios had approved the batch payment was not a response to the charge in question. It ought to have been obvious to the claimant at the time that she was in a position of trust. While Mr Scholarios reasonably wished a mechanism to be in place to ensure transactions were capable of being checked, that did not mean every single transaction would be verified.

273. The specific transaction in question related to the salary of a director. There was no reason why Mr Scholarios ought to have checked the payments the claimant was asking be made to the directors. She had not raised any issue and the monthly salaries were normally consistent. Absent any issue being raised, it was reasonable for Mr Scholarios to proceed in the way he did. While some employers may well have scrutinised every single transaction. An equally reasonable employer could have acted as Mr Scholarios did in this case give the context.

274. A similar position exists in relation to the alleged lie. There were no further steps the respondent could take to assess whether the claimant was not telling the truth when she alleged she could not recall the transaction in question. Looking at matters from the information the respondent had, they had carried out as much steps as were reasonable by asking the claimant to explain the position. While the procedure with regard to this particular allegation was seriously lacking (as set out below) the respondent had investigated the matter. The claimant had denied the allegation and her position at the appeal hearing (by which time the allegation had been set out clearly) had not changed. Her position remained that she denied it. There was no further investigation that could have been undertaken.

275. The position with regard to the procedure undertaken is, however, different.

Procedural fairness

276. Then Tribunal then turned to consider whether the procedure that was adopted in this case was fair, falling within the band of reasonable responses. There were a number of specific challenges to the procedure which the Tribunal considered although the respondent's agent submitted the process was carried out in an "exemplary fashion completely in line with the ACAS Code".

277. Firstly, the claimant's agent argued that there had been a failure by the respondent to establish the full facts of the case before the disciplinary process was progressed. This is contrary to paragraph 4 of the ACAS Code. It was argued that the respondent failed to include the allegation of lying to a

director in the letter inviting the claimant to the disciplinary hearing and failed to carry out any investigation into the allegation.

278. This was a significant failure by the respondent. Mr Hendry conceded that he had not included the allegation of lying in the disciplinary invite letter. Although
5 Mr Scholarios suggested it was contained within the invite letter, it is clear that this allegation had not been set out. The suggestion that the allegation of lying was somehow “implicit” in the allegations set out is not accepted given the specific reasons for deciding to dismiss the claimant, which were clearly based on two separate acts of the claimant – her processing the transaction
10 and her lying to a director. The claimant’s submissions in this regard have merit and this was a significant procedural failing.

279. The claimant did know by the appeal stage what the allegation was and had the chance to put any further response forward and there was no further evidence she had. Her position was that she had not lied. Nevertheless the
15 failure to make this allegation clear at the initial stage of the process was a serious failing by the respondent. While it was initially submitted that this was included in the invite letter, it was conceded that it was not. Ms Darby made it clear in her outcome letter that she considered there to be 2 specific allegations, one of which was the allegation that the claimant had lied. That
20 was not what the disciplinary invite letter said and not what the claimant understood the position to be. There was no reasonable basis for the claimant to have understood lying to a director was a specific allegation she was facing. That was a serious procedural failure.

280. Secondly, it was argued that Mr Hendry had been present at the investigatory
25 and disciplinary hearings and Mr Scholarios was the “complainer” in respect of the second allegation and had made the decision to dismiss and refuse the appeal.

281. The Tribunal considered this issue carefully particularly in light of the
30 Employment Appeal Tribunal decisions referred to above. It is important, in assessing the fairness of the dismissal, to look at the process of dismissal and to consider the size and resources of the employer. The respondent in

the current case is not a small employer and to that extent the situation is different from that set out above. The respondent had a board of directors and an HR and employment law advice consultancy. The fact Mr Hendry was present at an investigatory meeting did not, of itself, and without more, suggest a failure given his purpose was to take notes.

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282. Of greater concern was the fact that Mr Scholarios had been involved in each stage of the process. He was a material witness in respect of the facts. He required to be spoken to by both Mr Hendry and Ms Darby to ensure they understood how the process worked (from Mr Scholarios's perspective). He was involved in the issue since it was to whom the claimant had sent the details that led to the transaction. Of greater concern was the fact that both Mr Hendry and Ms Darby had made recommendations to Mr Scholarios for him to determine how to proceed. In other words, it was his decision, using the recommendations as he wished, as to what happened.

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283. The Tribunal must take account of the size and resources of the employer. In this case the respondent was a medium sized enterprise with a board of three directors who had engaged the services of an employment law advice and representation consultant.

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284. The Tribunal also took account of what the disciplinary policy said. It was clear that ordinarily a more senior manager would hear the appeal. That did not happen in this case as Ms Scholarios made the decision in respect of both deciding to investigate and in the disciplinary and appeal outcomes.

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285. There was no explanation as to why Mr Scholarios required to be the decision maker in respect of the disciplinary hearing and appeal stages having also been involved in the investigation process. The other directors were, to an extent, involved also in the process but there was at least the potential to have involved a different (and arguably more senior) director in the appeal process. There were other directors who were more impartial having had less input in the facts under consideration.

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286. That is an important failure that is relevant in assessing the fairness of the dismissal particularly when viewed alongside the disciplinary policy and sets this case apart from those in the authorities above.
287. The claimant's agent also argued that there was a breach of paragraph 7 of the ACAS Code that says If there is an investigatory meeting this should not by itself result in any disciplinary action. This was because the respondents pursued disciplinary action against the claimant because of one answer to one question at an investigatory meeting on 31 October 2022, of which the claimant had little prior knowledge and only very limited idea of its purpose.
288. Of itself the Tribunal did not consider this challenge to have merit. It was open to the respondent to convene a meeting and ask the claimant questions to allow them to understand the claimant's position. Given the context of this case it was obvious what the issues related to and the claimant did know that it related to Ms Nicholas's situation.
289. The claimant's agent argued that paragraph 9 of the Code was breached which states that if it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It was noted that at no point was the allegation of lying to a Director put to the employee in advance of a hearing and neither was she put on notice that if found guilty, it could result in dismissal.
290. The Tribunal found this challenge to have merit. The allegation of lying to a director was a very serious charge. It ought to have been something that was clearly and specifically set out in the invite letter to ensure the claimant was under no illusion whatsoever what was being alleged and to allow her time to consider her position and usefully present her response.
291. The final challenge was that paragraph 27 of the Code states that an appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case. The appeal hearing itself was conducted by someone who was not involved in the case, but the ultimate

5 decision was made by Mr Scholarios, who was involved in several aspects of the investigation; and who also made the decision to dismiss. This is an important point and one which is taken into account. This was a major breach of procedural fairness since the person who was ultimately deciding what to do was the person who had chosen to dismiss. Those who had made recommendations to Mr Scholarios did just that – their clear evidence was that they had discussions with Mr Scholarios and provided him with their view on the material before them but ultimately Mr Scholarios was deciding what to do. There was no more senior manager (or more impartial person) considering matters at the appeal stage.

10 292. The Tribunal has to consider whether or not the dismissal was procedurally fair from all the information before the Tribunal (and the respondent at the time). The Tribunal is not satisfied that the procedure that was followed in this case was a procedure that a reasonable employer would have followed from the facts. There are a number of reasons for this.

15 293. Firstly, the allegations made against the claimant were extremely serious. While there could be no doubt that the claimant was aware of the allegation of failing to raise the issue as to the change in the director's salary, the allegation of lying to a director had not been fairly set out. This was a very serious matter and suggesting dishonesty is not something that can or ought to be implied. The failure to properly set this out was a very significant procedural failure in this case. The allegation itself had not specifically been set out nor investigated, as such. It was something Mr Hendry decided to find following the disciplinary hearing and ought to have been something about which the claimant was given fair notice in advance of the hearing, to ensure she understood the severity of that allegation and prepare for it prior to the disciplinary hearing.

20 294. Secondly the way in which the disciplinary procedure was followed did not fully take into account the provisions of the ACAS Code. While in this case the respondent's procedures did not expressly state who should deal with the relevant stages, it is implicit that a different person should be responsible for

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investigating and the disciplinary and appeal stages. That is an essential requirement of fairness.

295. The Tribunal takes into account the cases above together with the Code. The size and resources of this employer are relevant and must be contrasted with
5 the employer in the authorities above. In this case the respondent had a significant high value business with 3 directors. The involvement of Mr Scholarios at each stage, the investigation, disciplinary and appeal stage, created risks of partiality. It was self-evidently his decision to dismiss the claimant and refuse the appeal, evidenced not least by his signature in the
10 letters. He considered what Mr Hendry and Ms Darby had recommended but decided himself what to do. This was not simply a “rubber stamping” exercise. He was ultimately deciding whether to uphold his own decision to dismiss the claimant, having been involved in the investigation process. This was particularly problematic as one of the allegations was that the claimant had
15 not implemented an instruction or at least had acted against an instruction that Mr Scholarios himself had given the claimant. For Mr Scholarios himself to be the decision maker of both the dismissal and appeal creates manifest unfairness which was unnecessary given the context of the organisation.

296. The difficulty with the procedure was that Mr Scholarios was essentially
20 making a decision as to whether or not to uphold his original decision. That created a risk of partiality which could have been avoided. Whilst Ms Darby may well have recommended something that she had considered, ultimately Mr Scholarios was not simply rubber stamping what she said but considering his decision. There was no explanation given as to why another director had
25 not been involved at the appeal stage and there were others who were less connected to the issues in this case which was what the disciplinary procedure suggested. That materially differed from the above cases. The provisions of the ACAS Code did not appear to be considered at least expressly. In this case the Tribunal has assessed the matter taking into
30 account the facts of this case and the Code.

297. The Tribunal took into account the respondent’s agent’s submissions including that it has been recognised that there can never be no bias given

the size of organisations and the fact staff are in daily contact with each other. It is also correct to note that the claimant was given the opportunity to fully set out her case, at least by the appeal stage when both allegations had become clear. However, procedural fairness is an inherent part of treating a reason for dismissal as fair in all the circumstances which include the size, resources and policy of the respondent and the ACAS Code requires to be considered.

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298. Finally in terms of the disciplinary procedure a more senior manager, where possible, should have been involved in deciding the appeal. Instead someone of a similar standing to the person who dealt with the disciplinary hearing was appointed to consider matters, with Mr Scholarios in reality making his own mind up at both stages, with the benefit of the reports he had received. That was not fairly consistent with the disciplinary procedure.

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299. The Tribunal is careful to avoid substituting its decision for that of the employer and makes an assessment as to what a reasonable employer could do and assess the respondent's procedure in context as against that yardstick.

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300. The case law makes it clear that there are cases where the dismissing officer does not require to have contact with the employee and a dismissal can be fair where there is an otherwise fair procedure (and where the process is "less than ideal". In the *Bank of Greece* case this happened at the initial stage and then an independent and more senior officer (to that of the dismissing officer) considered matters afresh. That is different from the current case. In *Haslem* the employer was significantly smaller. The facts were also different given the nature of this case and the factual backdrop.

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301. Similarly in *Haslem* the Employment Appeal Tribunal made it clear that whilst in that case the dismissal was fair, there can be cases where failure of the dismissing officer and appeal officer to engage with the employee and otherwise follow a fair procedure could be unfair, but it can be fair for an employer to delegate to a third party the process and accept the recommendations. In that case the decision to dismiss and dismiss the appeal had specifically been delegated to the individuals involved. That was the

opposite of the case here since Mr Scholarios had expressly retained the ultimate decision. This was not a case that he had delegated to Mr Hendry and Ms Darby authority. Instead, both individuals accepted they had been tasked to consider the issues and report to Mr Scholarios and that was the end of the matter. It was clearly Mr Scholarios's decision once he had considered what those reporting to him had to say. Mr Scholarios was not simply "rubber stamping" what was presented to him but instead considering what the outcome should be. He was considering what those whom he had appointed had found and recommended and making his own mind up as to what he wanted to do. Both Mr Hendry and Ms Darby accepted that it was Mr Scholarios's decision to dismiss the claimant and his appeal, which happened to concur with what they had recommended but that need not have been so. That is a fundamental distinction from the position in *Haslem* which can be distinguished from the current case.

15 302. The current case fundamentally differs from those cases on the facts. In the current case the procedure that was followed did not comply with the ACAS Code. There were very serious procedural failings. The failure to make the lying allegation clear prior to the disciplinary hearing is a serious failure given the context. Similarly, the fact the same person was essentially making the decision, albeit with the involvement of third parties is relevant since that person was involved in a material way in each stage of the disciplinary process. Had the failures in this case only been the involvement of Mr Scholarios at each stage the position and outcome may have been different, but the Tribunal must look at all of the facts in deciding whether or not the procedure that was followed fell within the range of reasonable responses which includes the respondent's policy, resources and equity.

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30 303. From the unique facts of this case (including the circumstances that led to dismissal and the nature of the respondent and its size and resources) the procedure that was followed in this case was not a procedure that fell within the range of reasonable responses open to a reasonable employer. The procedure that was followed fell outwith the range of reasonable steps that could be taken.

304. The Tribunal considered whether this case fell within one of the exceptional cases that even although the procedure was unfair, the dismissal was nonetheless fair. The Tribunal decided that this was such not a case. While it could perhaps be argued that providing the claimant with the allegation of
5 lying prior to the disciplinary hearing would have made no difference whatsoever (since there is and has been nothing else the claimant has said that would have changed the outcome) the same cannot be said about the involvement of the same director at each stage of the process. It cannot be said that having an impartial appeal process (the decision maker not
10 assessing their own decision) would have been utterly futile in terms of changing the outcome.

305. The dismissal is accordingly unfair.

Decision to dismiss within range of reasonable responses?

306. The Tribunal also considered whether the decision to dismiss fell within the
15 range of reasonable responses notwithstanding the dismissal being unfair due to the procedure that was followed. The respondent argued that the claimant's position as Financial Controller required an extremely high degree of trust, and that the claimant had so undermined that trust that no sanction short of dismissal was appropriate. The claimant argued that there has been
20 no such breach and that in any event, no sanction short of dismissal was ever in the Respondents' contemplation.

307. Had there been no procedural issues, on the facts the Tribunal would have been satisfied from the evidence before the respondent that their decision to dismiss fell within the range of responses open to a reasonable employer. The
25 claimant had made it clear that she had progressed with a transaction that she had ought to have known consent was required. She had not done so, and she instead included the change to Ms Nicholas's salary within a batch to be processed without raising it with Mr Scholarios (at a time when the director in question had been facing a disciplinary investigation as to irregularities with regard to her salary payments). The claimant had not told
30 the truth during the investigation process alleging she had no recollection of

her processing the transaction when the claimant had giving support for the director during her disciplinary process (the director being her friend who had been dismissed) which occurred shortly before being asked about it. In light of the information before the respondent at the time and in light of the claimant's senior position, the decision to dismiss fell within the range of reasonable responses open to the respondent.

308. The Tribunal carefully considered the claimant's agent's argument that in fact there was no genuine belief in the guilt of the claimant and each of the dismissing and appeal officers had made so many errors with regard to the claimant that it was not reasonable for them to genuinely believe the claimant was guilty of the allegations. It was argued that the credibility of both witnesses was so badly affected by their failure to properly understand the issues in this case that the dismissal fell outwith the band of reasonable responses.

309. The Tribunal did not accept that criticism of the individuals. While both individuals had made errors, ultimately the claimant admitted that she had processed the transaction. While she argued that she had told the truth, from the information before the respondent at the time, it was open to them to conclude that the claimant had not been honest. Even if the claimant's agent's arguments are correct, there was still sufficient information before the respondent that would have resulted in a reasonable employer concluding that the claimant was guilty of conduct entitling the respondent to end her contract summarily.

310. It is notable that no information has been provided by the claimant, even at this stage which would have shown that there was a complete answer to the allegations. The claimant knew about the requirement to seek consent from Mr Scholarios (even if she argued she did not feel she had to). The claimant also disputed not telling the truth but that was a matter for Mr Scholarios ultimately to assess which he did.

Remedy

311. The decision to dismiss the claimant was unfair as a result of the procedure that was followed in this case. The dismissal was unfair and so the Tribunal considered what remedy should be awarded in this case.
312. With regard to the compensatory award, the claimant sought a sum equivalent to her notice pay. The claimant had reasonably mitigated her losses and suffered no financial loss as such (albeit was seeking a sum equivalent to notice pay (including pension loss) and a sum in respect of loss of statutory rights).
313. The first issue that arises is whether there was a chance that the claimant would have been fairly dismissed if a fair procedure had been followed, or for some other reason. The respondent argued that following a fair procedure would have made no difference to the outcome and the claimant argued procedural unfairness was fundamental and insurmountable.
314. The Tribunal assessed the procedural failings in this case and the facts carefully in light of the authorities. The Tribunal concluded that it could not be said that there were no steps that the respondent could have taken that would have avoided the claimant's dismissal. While it could be said that had the respondent properly and correctly set out the specific allegations prior to the dismissal, that would not have made any difference to the outcome and the claimant knew by the appeal stage about this allegation and in any event had no further information to change the position, this was not a case, however, that one allegation alone was said to justify dismissal. It was the combination of both acts of misconduct. It could not be said that the following of a fair procedure with regard to the dismissal process would have made no difference. There was a chance, albeit a slim chance, that the involvement of another director (or someone less partial) could have avoided dismissal.
315. The Tribunal considered that on balance it could not be said that the involvement of an impartial (or less partial) third party making the decision on appeal would necessarily have resulted in the same outcome. In other words, it cannot be said that following a fair procedure would have made no difference to the outcome or that it would have been utterly futile.

316. The Tribunal considered, however, that given the nature of the allegations and the evidence, it was highly likely that even if another person (who was least less partial) has decided the outcome of the appeal, the outcome would have been the same. It was highly likely that another director would have concluded given the claimant's seniority and given the evidence that was presented at the time, that the allegations would still have been upheld and dismissal would still have followed. The Tribunal considered that there was a 90% chance that the outcome would still have been the same had a fair procedure been followed. The respondent's submission that there was a 100% of a fair dismissal was not upheld given the facts of this case.

317. The Tribunal finds that there was an unreasonable failure to comply with the ACAS Code. The respondent had significant HR and employment law support and was a medium sized enterprise. The failures are set out above with regard to the procedural matters, particularly the procedure with regard to the lying allegation and Mr Scholarios's involvement at each stage (and the absence of a more impartial person at the appeal stage). It would have been just to increase any award by 15% given the nature of the procedural failings in this case which were significant. The failure to set out the specific allegation of lying is important. The absence of an impartial person determining the appeal and the procedure that was followed in this case was also significant given the importance of being fair to an employee whose job is at risk.

Contribution

318. The Tribunal next considered whether the claimant caused or contributed to her dismissal by blameworthy conduct. The respondent argued that the claimant's obfuscation, dissemblance, dishonesty, and failure to follow lawful instructions as required by the Handbook, contributed to her dismissal. The claimant denies she contributed in any way to her dismissal and submitted the outcome was predetermined and nothing she could have done or said would have changed the outcome.

319. The Tribunal considered this issue in the stages required by the authorities.

320. Firstly, the Tribunal identified the conduct in question. The claimant had arranged to process a change to a director's salary payment when it ought to have been obvious that there was no valid authority to do so. She had also been dishonest in denying knowledge of the transaction

5 321. Secondly, the Tribunal asked whether that conduct is blameworthy. The Tribunal found that the conduct was something for which the claimant was responsible. It was a deliberate action on the part of the claimant. She knew about the transaction and that it related to a salary payment of the director who had been suspended and who was in the midst of a disciplinary process
10 about adjusted salary payments. She knew the director had been suspended. She had been told that financial transactions required to be approved by Mr Scholarios. While she may have had standing authority from the direction in question, that director had been suspended. Consequently, the authority to process the transaction was no longer applicable and it was obvious that any
15 change to her salary (even if previously authorised) had to be raised with Mr Scholarios. The claimant did not do so expressly and did not raise any concern with Mr Scholarios about the change she was proposing. She then denied knowing about this transaction when in fact she was aware of the specifics given the context. The claimant was entirely blameworthy on the
20 facts.

322. The Tribunal considered that such conduct caused the dismissal. The Tribunal found no evidence to support the claimant's argument that there was an ulterior motive and that the respondent wished to remove the claimant for her role and this reason was not a genuine reason. On the contrary the
25 Tribunal found that the respondent genuinely wished to retain the claimant and while accepting there was a degree of awkwardness given the claimant's relationship with Ms Nicholas, the respondent wished to work with the claimant to ensure the relationship worked. The respondent sought to work with the claimant in this regard. Regrettably the claimant did not see that as
30 genuine and viewed matters suspiciously which may account for her lack of candour in her dealings with the respondent. Ultimately the only reason for her dismissal was her conduct and nothing else.

323. The final question is to what extent the award should be reduced and to what extent it is just and equitable to reduce it. The Tribunal concluded that the claimant was culpable and her conduct was such as to justify a 100% reduction in any compensation that would otherwise be due. That is because
5 the claimant was 100% to blame for her dismissal. The claimant was a valued and trusted member of staff whom the respondent wished to retain. The claimant, by her actions, acted in such a way so as to result in trust being destroyed. Her actions went to the root of the employment relationship.

324. While a reduction of 100% is relatively rare, the Tribunal must consider the
10 nature of the conduct and its effect. In this case it is just to find that the claimant was 100% to blame. The Tribunal considered that such a reduction was entirely just and equitable on the facts.

Basic award

325. The parties had agreed the basic award. The respondent argued that the sum
15 should be reduced to nil for the same reasons as above.

326. The Tribunal concluded that although the tests are different and the deductions to a compensatory award are not always the same as those applied to the basic award, on the facts of this case, the Tribunal concluded that it would not be just and equitable to make any basic award as a result of
20 the claimant's conduct. It is reduced by 100%.

327. In light of the claimant's conduct, although the dismissal is unfair, it is not just and equitable to award any compensation.

Wrongful dismissal/notice pay

328. From the evidence presented to the Tribunal, the Tribunal is satisfied the
25 claimant was guilty of repudiatory conduct that entitled the respondent to summarily dismiss the claimant. On the evidence before the Tribunal the claimant had fundamentally breached the contract by failing to seek specific consent for an alteration to a director's salary payment, when she knew that director was in the midst of a disciplinary process considering the legitimacy
30 of altered salary payments and the claimant knew her then line manager had

sought consent of any financial payments. The claimant also knew, given the context, about the transaction and concerns about it and was not truthful when she was asked about it by a director. She falsely claimed not to know about the matter when in fact she was fully aware of the issue given the context.

5 The combination of both matters amounted to conduct that entitled the respondent to summarily dismiss the claimant.

Summary

329. From the evidence presented to this Tribunal, the Tribunal finds that the claimant was unfairly dismissed and, in the circumstances, it is not just and
10 equitable to make any financial award. The claim in respect of wrongful dismissal is ill founded and is accordingly dismissed.

15 **Employment Judge: D Hoey**
Date of Judgment: 31 August 2023
Entered in register: 04 September 2023
and copied to parties