EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103417/2023

Final Hearing Held at Glasgow on 27- 29 September 2023 and 7 November 2023

Employment Judge A Kemp

Ms L Gallagher	**Claimant** **Represented by:** **Mr R Clarke,** **Solicitor**
North Ayrshire Women's Aid	**Respondent** **Represented by:** **Ms A O'Donnell,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

(i) The claimant was unfairly dismissed under section 98 of the Employment Rights Act 1996.

(ii) The total sum awarded to the claimant and payable by the respondent is TEN THOUSAND FIVE HUNDRED AND TWENTY NINE POUNDS EIGHTY ONE PENCE (10,529.81), being a basic award (under reduction) of £9,139.81 and a compensatory award (under reduction) of £1,389.67.

REASONS

Introduction

1. This was a Final Hearing held in person in the Glasgow Tribunal of the sole claim made by the claimant of unfair dismissal. Dismissal was admitted by the respondent in its Response Form, which contended that the reason for the dismissal was some other substantial reason (SOSR). That was confirmed at the commencement of the Final Hearing. Initially Ms O'Donnell, very recently instructed for the respondent, suggested that the principal reason was conduct. Mr Clarke however objected to that on the basis that the pled case was SOSR. Ms O'Donnell was asked if she wished to apply to amend the Response Form and stated that she did not. Ms O'Donnell confirmed that she would retain SOSR as the reason or principal reason for dismissal the respondent contended for.

2. Case management orders had been issued on 6 July 2023. The Notice of Final Hearing was issued on 21 July 2023, stating that it would include remedy. On 21 August 2023 the Tribunal wrote to the claimant's solicitor to note that one of the respondent's witnesses was a lay member, and that the case would be allocated to a Judge who had not sat with him, Mr Muir, or had any other contact with him. The hearing was held before me, and I confirmed that I met those tests, at the commencement of the Final Hearing.

3. The claimant had prepared a Schedule of Loss which sought to have pension losses determined separately. No application was made to have the Final Hearing on the merits, reserving wholly or partly the issue of remedy, however. The Tribunal wrote to the parties on 25 September 2023 to refer to the Final Hearing being fixed to address remedy, and indicate that evidence as to pension loss may be required to be led but that the issue could be addressed at the commencement of the Final Hearing. The matter was raised, and Mr Clarke confirmed that he did not seek to secure an actuarial report on pension loss, and a large measure of agreement was then reached on losses, with the detail later confirmed separately such that the basic award was agreed, and the amount of net loss of earnings for the period to 20 July 2023 agreed, with the net weekly loss

thereafter also agreed, subject to any reductions and determination of the period of future loss, if any was thought to be due.

4. The case had been set down for three days, which proved insufficient. A further day was fixed for 7 November 2023, when the claimant's evidence was heard and submissions made. I was grateful to both agents for the professional manner in which they conducted the hearing and for their full and helpful submissions.

Issues

5. I identified the issues for determination and gave parties the opportunity to comment on them at the commencement of the hearing. Those issues are:

   (i) What was the reason, or principal reason, for the claimant's dismissal?

   (ii) If potentially fair under section 98(2) of the Employment Rights Act 1996 was it fair or unfair under section 98(4) of that Act?

   (iii) If the claim is successful to what remedy is the claimant entitled? In that regard in particular:

      (a) might there have been a fair dismissal had there been a different procedure,
      (b) did the claimant contribute to her dismissal and
      (c) If so in either or both cases, what if any reduction to the basic and/or compensatory awards is appropriate?

Evidence

6. Evidence was given by the respondent first, commencing with that of Ms Mary Beglan the Chief Officer of the respondent, followed by Mr William Muir an independent consultant, who was the investigating officer, Ms Terry Stirton an independent consultant who was the dismissing officer, and Ms Rhona Hotchkiss the Chair of the respondent who was the appeal

officer. The claimant gave evidence herself and did not call any other witness.

7. The parties had prepared a Bundle of Documents, most but not all of which was spoken to in evidence. Additional documents were added during the hearing, in particular the full documentation attached to the investigation report, and emails sent to Mr Muir by Ms Beglan which had not originally been included.

8. During the hearing Ms O'Donnell objected to a line pursued by Mr Clarke in cross examination with regard to the alleged lack of authority on the part of Mr Muir and Ms Stirton, on the basis of lack of fair notice. I stated my view that the requirement for pleading of an unfair dismissal case was limited, and that I did not consider that there had been a lack of fair notice, but that if the respondent wished time to investigate this matter that could be considered. Ms O'Donnell did not wish to seek an adjournment, but there was time taken to obtain documents towards the end of the first day, and she was permitted to speak to Mr Muir about the documents obtained on that issue before his evidence resumed.

Facts

9. I considered all of the evidence led before me, and found the following facts, material to the issues, to have been established or otherwise were agreed:

Parties

10. The claimant is Ms Louise Gallagher.

11. The respondent is North Ayrshire Women's Aid. It is a company limited by guarantee, and a registered charity. It has a board of directors who are volunteers. It provides accommodation and general support to women and children who are victims of domestic abuse. It operates about 23 properties, one of which is Drummond House which has six individual flats within it. It has about 20 members of staff.

12. Its management is led by Ms Mary Beglan as Chief Officer. Reporting to her were two Service Managers Ms Lorraine Kerr and Ms Amy Park. Also reporting to her was the claimant, who was slightly below the level of the two Service Managers in the respondent organisation.

13. The claimant was employed by the respondent as System Quality and Administrative Manager. A Job Description was issued to her setting out the key activities of her role. The claimant was employed with effect from 3 December 2002. She managed one member of staff who had an administrative role.

14. The claimant has had not any prior disciplinary matter formally raised with her during her service with the respondent, before that referred to below.

Terms of employment

15. The claimant received a statement of terms and conditions of employment and contract of employment from the respondent, which was undated and unsigned. It referred to a discipline policy.

16. The respondent operates a Discipline Policy. It commences “In order to ensure that you are treated fairly if your conduct or performance does not meet the standards required NAWA will use the following process”. It has provisions for informal action, including a letter of concern, and formal action which can include verbal or written warnings, or some other sanction including dismissal. It has examples of offences constituting gross misconduct, and confirms that if an employee commits an act of gross misconduct there may be a summary dismissal. It has provisions for investigation, including suspension, a disciplinary hearing, action and appeal.

Initial matters

17. The claimant was tasked by Ms Beglan on several occasions with setting up systems to manage matters of health and safety in around 2019 and onwards, which included fire risk assessments for properties operated by the respondent which were required on an annual basis, and PAT testing (checking integrity of electrical equipment). She was also tasked by Ms Beglan with taking the respondent through an ISO 9000 (later 9001)

accreditation process from around 2018. That involved reviewing, amending or introducing a suite of policies. These matters were raised at supervision meetings between the claimant and Ms Beglan regularly, including at one in June 2022. Ms Beglan was increasingly concerned at what she considered to be the lack of progress towards ISO accreditation and the introduction of necessary policies for it. The claimant was struggling with what was required in that regard. She sought support from Ms Beglan on occasion.

18. The respondent operated a health and safety system through an external provider named Citation which provided alerts by email from time to time. It did so to Ms Beglan's email address, as she was the person setting up the system on its introduction, but the claimant had access to it. The alerts were triggered after information was put into the system. That included when a fire risk assessment had been done for a property, after which there was an entry required for a date to follow that up. If that date was reached without another fire risk assessment an alert was made automatically.

19. In October 2022 Ms Beglan held particular concerns over the level of the claimant's performance, and that of the two Service Managers, and told them that they needed to improve, but did not commence any formal process under the discipline policy.

20. On or around 15 November 2022 the claimant had an altercation with another member of staff named Helen Worthington, after which Ms Worthington was upset. Ms Beglan spoke to the claimant about that. The claimant emailed Ms Beglan later on that date to state that she was leaving the office. Ms Beglan replied that that was OK (although that email was not before the Tribunal).

21. In November 2022 (on a date not given in evidence) a fire risk assessment was due to be carried out at Drummond House. It was not carried out in time. Ms Beglan discovered that that was the position after viewing an alert email from Citation (which was not before the Tribunal) on or around 6 December 2022. She exchanged emails with the claimant on the position on 6 and 7 December 2022. On the former date Ms Beglan stated that she had been on Citation and "got the fright of my life. Gallons of

outstanding task – I am assuming these are done but not signed off". The claimant stated that "training has come up for renewal" it had been discussed at a managers' meeting and she would get an update to her later that day. Ms Beglan replied "it wasn't training it was tasks for example putting notices up". The claimant did not reply.

22. Shortly thereafter that same day the claimant exchanged emails with Ms Kerr and Ms Park. Initially that related to another property, but the claimant then asked Ms Kerr about a fire risk assessment for Drummond House. Ms Kerr replied to state that it had been missed, but that she would go to the property later that afternoon to do it, and an environmental assessment required. Ms Kerr asked the claimant verbally not to tell Ms Beglan about that until after it had been done.

23. Ms Park emailed Ms Beglan later on 7 December 2022 to state that she had reviewed a couple of risk assessments on Citation the previous day that were overdue. Ms Kerr informed Ms Beglan orally later that same day that the fire risk assessment for Drummond House had not been carried out on time but that she had now done so.

24. Ms Beglan also discovered that some PAT testing had not been carried out when due, and that there were two televisions in the property that those living at it said did not work. She discovered that there was no clear system for reminding about fire risk assessments or PAT testing when due, or system for checking that that had been done timeously set up by the claimant. She had expected the claimant to have done so as being an important part of her role. She was very concerned that that was the position.

25. Around the last days of December 2022 or the first four days of January 2023 Ms Beglan telephoned Mr William Muir an independent HR consultant, asking him to investigate concerns she had over the claimant, and the two service managers. She did so as the service managers and herself were all witnesses to the matters, she was making the complaint, and she did not consider that the matter was appropriate to be raised with the respondent's board of directors.

26. On or around 4 January 2023 Ms Beglan emailed Mr Muir a report she had prepared outlining her concerns. They were in relation to an Asset Register not being completed, policies required for ISO 9000 not being completed, breaches of policy regarding recruitment processes and the use of an Equal Opportunities questionnaire that she had instructed should not be used from April 2021, and the lack of a fire risk assessment at Drummond House on the due date in December 2022 and PAT testing, with Ms Beglan excluded from emails in relation to them.

27. Mr Muir had worked with the respondent for about 4 years providing HR support. The respondent did not have HR support itself from any employee. There was an agreement between Mr Muir's company LBJ Consultants Ltd and the respondent with regard to the services he provided. That agreement referred to a "standard service" and that included "discipline". Mr Muir had acted as investigator, and in other cases as decision-maker or appeal officer, taking decisions on behalf of the respondent. He had also arranged that Ms Terry Stirton, an independent contractor, act in such capacities for the respondent if he was not able to.

28. Ms Beglan wrote to Ms Park and Ms Kerr on 5 January 2023 to state that Mr Muir would meet with them the following day.

Investigation

29. Mr Muir commenced his investigations. He met Ms Park and Ms Kerr on 6 January 2023. Notes of the meetings with each of them are a reasonably accurate record of the same. Mr Muir wrote to Ms Park and Ms Kerr on 6 January 2023 to state that a letter of concern should be issued to them. It was to be in relation to the fire risk assessment not having been done.

30. Mr Muir decided that the claimant should be suspended pending his investigation. That was confirmed to the claimant by letter dated 8 January 2023. It was sent out by Ms Beglan on headed paper of the respondent after being sent to her by Mr Muir.

31. In advance of meeting the claimant Mr Muir sent Ms Beglan a list of questions he intended to ask for her approval.

32. Mr Muir met with the claimant on 9 January 2023. A note of the meeting, with amendments made by the claimant, is a reasonably accurate record of it. Mr Muir informed the claimant that the investigations were into allegations of:

- "**Failure to follow management instructions**:
  a) Completing ISO 9000 documentation
  b) Failed to remove equal opportunities form from recruitment pack
  c) Failed to secure candidate scores from all interviewers from September interviews on candidate's files
  d) Failed to create and maintain an asset register
  e) Failed to create a system to manage health & safety
- **Failure to uphold NAWA data protection policy**
- **Failed to implement and maintain proper health & safety procedures."**

33. Mr Muir met with Ms Park and Ms Kerr in relation to those allegations against the claimant, and with Ms Beglan, on 10 January 2023. Notes of the meetings are reasonably accurate records of them. He then met the claimant again on 13 January 2023 to raise with her what he had been told by the other witnesses. Ms Beglan had booked the rooms used for those meetings. A note of the meeting with the claimant made by Mr Muir with amendments by the claimant is a reasonably accurate record. A day or so later he attended with the claimant at the respondent's office so that the claimant could have access to documents. He arranged that the other witnesses were not present in the office when they did so. The claimant accessed documents on her work computer, and printed off documents as she wished to. One copy of the same she kept, and one copy was given to Mr Muir. He read them all, but did not find within any of them any document that he felt supported the position of the claimant or were otherwise relevant to the matters he investigated. Those documents were not before the Tribunal.

34. Mr Muir prepared an investigation report in relation to the claimant dated 17 January 2023. It had 16 documents as attachments. In his Report Mr Muir concluded that there was some conflicting information, that the

claimant had made some admissions, that some of the matters were ones of performance, and that he believed that the claimant had failed in her duty by not reporting the missed fire risk assessment to Ms Beglan. He said that there was a need to review administration processes, and that Ms Stirton would decide if there should be a disciplinary meeting.

35. On 18 January 2023 Mr Muir emailed the claimant. He attached a letter dated 17 January 2023 to confirm that he had sent that report to Ms Terry Stirton who would decide next steps. Her suspension was continued. The claimant replied to raise the issue of Ms Stirton conducting the hearing as she had some prior knowledge of the claimant from working with her. Mr Muir had tried to find someone else to carry out the matter without success. He replied to the claimant the same day to explain that, and the claimant responded by thanking him for clarifying that.

36. Ms Terry Stirton has worked for the respondent previously over a period of about five years. She does not have any formal written agreement with the respondent. After Ms Hotchkiss became the Chair of the respondent's board, and in or around September 2022, she spoke with Ms Stirton and was given general delegated authority when acting for the respondent as a decision-maker in disciplinary matters.

37. Ms Stirton considered the investigation report from Mr Muir. She wrote to the claimant on 18 January 2023 stating "Having considered all the information, I find that your conduct has fallen well short of that required by the organisation." She invited her to a disciplinary hearing on 30 January 2023. She decided on and set out the allegations as:

> "1. Consistently failed to follow North Ayrshire Women's Aid recruitment policy; and management instructions, by including copies of the Equal Opportunities form in recruitment packs. Thus, you not only put the organisation's reputation at risk but also put the organisation at risk of a claim under the Equality Act 2010.
>
> 2. Failed to inform your line manager, Mary Beglan, that a risk assessment and PAT test at Drummond House had missed their completion date. Furthermore, when asked about this at the investigation you deliberately misled the investigation by claiming

that Lorraine Kerr requested that you did not advise Mary Beglan that the risk assessment and PAT test had been missed.

3. You claimed that you requested support from the NAWA management team which caused the delay in you being able to complete the ISO9001 project. You deliberately misled the investigation team by making this claim."

38. She informed the claimant that if the allegations were "substantiated it will constitute Gross Misconduct and could lead to a sanction of up to and including Summary Dismissal…." She informed her of a right to be accompanied, and attached the investigation report and its attachments. The letter was emailed to Ms Beglan who printed it out on headed paper and sent it to the claimant. She also booked the room for the disciplinary hearing.

Disciplinary Hearing

39. The disciplinary hearing took place on 30 January 2023. Mr Muir attended to take the note of the same, which is a reasonably accurate record of it. The claimant attended with her trade union representative. Ms Stirton offered the claimant an opportunity to proceed with another person hearing it, but the claimant did not wish to do so.

40. During the hearing the claimant said that there had been a breakdown in the relationship with Ms Beglan since 15 November 2022 when she had sent Ms Beglan an email about being unsupported by her. She said that she had been treated badly since then and had told Ms Kerr that she was "sick of this and cannot continue this". Her representative made comments about manipulation by Ms Beglan, that it was being used to get rid of the claimant, and that she had raised that concern of Ms Beglan wanting rid of her with Mr Muir. Ms Stirton said that she "was concerned that it seemed that there has been a total breakdown in the employment relationship and also trust and confidence between the claimant and other managers". The claimant's trade union representative replied that "this works both ways with her and the organisation."

41. On 31 January 2023 Ms Stirton emailed the claimant to state that she believed that she required further information. She said that she had asked

for supervision notes and the email sent in November to advise that she did not feel supported. Ms Stirton spoke by telephone with Ms Beglan, who then sent an email commenting on the matters.

42. Ms Stirton wrote further to the claimant attaching the minute of the meeting with Ms Beglan, and inviting the claimant to a further meeting. It took place on 6 February 2023. A note of it is a reasonably accurate summary. No note-taker was present at it. The claimant suggested that Ms Beglan had blown things out of proportion in an attempt to humiliate her amongst other comments.

Dismissal

43. Ms Stirton wrote to the claimant by letter dated 6 February 2023 dismissing her summarily. She referred to admissions made by the claimant and to a conflict of evidence with the other managers. She found each of the three allegations established. Under a section headed "Rationale" she stated

> Before coming to a decision I took account of your length of service and considered the points below
>
> - You admitted that you continued to add the Equal Opportunity form, to the recruitment pack and NAWA web page, when you had ben instructed not to do so by Mary Beglan
>
> - Also, you admitted not advising Mary Beglan that the fire risk assessment had been missed at Drummond which was a serious breach of Health and Safety rules, that you were ultimately responsible for maintaining
>
> - You claimed that Lorraine Kerr had asked you not to tell Mary Beglan about the missed fire risk assessment, a claim that was denied by Lorraine Kerr
>
> - You claimed that you had sought support from the other three managers to complete the ISO 9001 project, a claim that was denied by these three managers.

Considering these points, I believe that your relationship with [the respondent] is “at the point of no return” with “no reasonable prospect” of reconciliation or of a productive future working relationship due to your actions and claims listed above.”

She commented on the evidence she had seen and that the claimant could not give a reason why Ms Kerr would ask her not to tell Ms Beglan and then do so herself. She also stated that the claimant “can no longer continue in your role with [the respondent].” She was to be paid salary, pay in lieu of notice, and any holidays. She confirmed that the claimant had a right of appeal.

Appeal

44. The claimant appealed by letter dated 10 February 2023. She set out detailed grounds of appeal but did not challenge that the relationship had broken down irretrievably. Ms Rhona Hotchkiss, Chair of the Board of Directors of the respondent, replied on 20 February 2023, and identified what she understood the grounds of appeal to be. She invited the claimant to attend an appeal hearing by later (undated) letter.

45. The appeal hearing took place on 13 March 2023. Ms Hotchkiss attended with a note-taker. The claimant attended with a union representative. The note of the hearing is a reasonably accurate record of it. It was signed by both the claimant and Ms Hotchkiss.

46. After the appeal hearing Ms Hotchkiss arranged to meet Ms Beglan. She asked her about the issue of the breakdown in the working relationship that had been alleged, and Ms Beglan said that it had, or words to that effect. Ms Hotchkiss also asked about supervision notes with the claimant from June 2022. Initially Ms Beglan could not find them, but latterly she found a pen device on which she had recorded that meeting. She met Ms Hotchkiss again, and played the recording to her. There was no request for support made by the claimant at that meeting.

47. Ms Hotchkiss also met Mr Muir on one or two occasions to discuss the appeal, and she sent him a draft of her letter of decision to check.

48. Ms Hotchkiss wrote to the claimant on 27 March 2023 to inform her that her appeal had not been upheld.

Matters after dismissal

49. The claimant had been paid a gross annual salary of £29,500 with the respondent, and had pension contributions from them of 5% of salary. She was paid 12 weeks in lieu of notice by them. The claimant obtained new employment on 3 May 2023. She did not receive any State Benefits. She has a gross annual salary from that employment of £25,000. She also has employer pension contributions of 3% of salary. The net loss of earnings including pension contributions that the claimant suffered after the dismissal was £884.56 in the period to 20 July 2023. From and after 20 July 2023 the claimant has suffered and continues to suffer from a net loss of earnings including as to pension contributions of £80.37 per week.

Early Conciliation

50. The claimant commenced early conciliation in relation to the respondent on 3 May 2023. The Certificate in relation to the same was issued on 5 June 2023. The present claim was presented to the Tribunal on 16 June 2023.

Submission for respondent

51. The following is a brief summary of the submission made, both in a full written submission and supplemented in answer to one question I asked. The principal reason for the dismissal was some other substantial reason in relation to the breakdown in trust and confidence. The reasons were detailed in the dismissal letter. There were issues of gross misconduct. The claimant had not challenged the issue of the breakdown in trust and confidence in her appeal. The respondent had acted reasonably in dismissing the claimant. Any procedural failure in relation to the issue of trust and confidence had been cured in the appeal. Overall a fair process had been followed. If it was held that there was an unfair dismissal there should be reductions for ***Polkey*** and contribution of 100%.

Submission for claimant

52. The following is again a very brief summary of the submission made both in a full written submission and supplemented orally. It initially summarised the law said to apply. Reference was also made to the ACAS Code of Practice on Disciplinary and Grievance Hearings, and a related Guide. The credibility of the respondent's witnesses was challenged on a series of grounds. An email produced by Ms Beglan had been redacted, and was not a complete record of the instructions to Mr Muir. There were inconsistencies in the evidence of the respondent's witnesses that indicated that they had not been frank in giving evidence. It lacked candour in various respects. The reason for dismissal was stated in the letter of dismissal, and was an SOSR one, not gross misconduct. The dismissal was unfair. Thirty nine reasons were given for that. There should be no reduction for Polkey, and if there was to be any for contribution it should be no more than 20%. The basic award and sum for the period of loss to 20 July 2023 were agreed, and future losses should include a further 26 weeks.

Law

(i) The reason for dismissal

53. It is for the respondent to prove the reason for a dismissal under section 98(1) and (2) of the Employment Rights Act 1996 ("the Act"). In ***Abernethy v Mott Hay and Anderson [1974] ICR 323***, the following guidance was given by Lord Justice Cairns:

> "A reason for the dismissal of an employee 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."

54. These words were approved by the House of Lords in ***W Devis & Sons Ltd v Atkins [1977] AC 931***. In ***Beatt v Croydon Health Services NHS Trust [2017] IRLR 748,*** Lord Justice Underhill observed that Lord Justice Cairns' precise wording was directed to the particular issue before that court, and it may not be perfectly apt in every case. However, he stated

that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which caused him or her to take that decision.

55. If the reason proved by the employer is not one that is potentially fair under section 98(2) of the Act, the dismissal is unfair in law. Fair reasons include conduct, and some other substantial reason.

(ii) Fairness

56. If the reason for dismissal is one that is potentially fair, the issue of whether it is fair or not is determined under section 98(4) of the Act which states that it

> "(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case."

57. The respondent relies on SOSR as the principal reason for dismissal. The substantial reasons that arise in this regard do not have to be of the same type as those stipulated in s 98(2) (***R S Components Ltd v Irwin [1973] ICR 535***). Provided that the reason is not whimsical or capricious (***Harper v National Coal Board [1980] IRLR 260***), it is capable of being substantial and, if, on the face of it, the reason could justify the dismissal then it will pass as a substantial reason (***Kent County Council v Gilham [1985] IRLR 18).***

58. A breakdown in trust has been examined in a number of cases. They include ***Perkins v St George's Healthcare NHS Trust [2005] IRLR 934,*** and ***Ezsias v North Glamorgan NHS Trust [2011] IRLR 550.*** In ***Governing Body of Tubbenden Primary School v Sylvester UKEAT/0527/11*** the EAT accepted that SOSR exists but disapproved the version of it put forward by the employer. It held that in a loss of trust case a tribunal can look at the facts behind that loss and whether on all the facts the dismissal was unfair under s 98(4). In the event that there is considered to be a breakdown of trust, ***Turner v Vestric Ltd [1981] IRLR***

23 suggests that before any dismissal arising from personality differences may be considered fair the employer should reasonably believe not only that there is a breakdown in the working relationship but also that it is irremediable. That means that generally every step short of dismissal should first be investigated in order to seek to effect an improvement in the relationship. Whilst that case was one as to personality differences, its principles apply more widely to other cases of breakdown in trust between employer and employee.

59. In ***A v B [2010] ICR 849***, a case before the EAT upheld on appeal by the Court of Appeal and reported as ***Leach v OFCOM [2012] IRLR 839***, the then President of the EAT referred to the reversal of the implied term on to the employee as a form of 'mission creep which should be avoided'. He had emphasised that the employer required to consider it impossible for the employment relationship to continue. He made similar about the limitations of what is truly SOSR as a reason in ***McFarlane v Relate Avon Ltd [2010] ICR 507*** in which he said that employers seemed to see it as “an automatic solvent of obligations'” adding that “It is not”.

60. In so far as the issue of conduct is relevant, which it may be at the least when considering the issue of a reduction on the basis that a fair dismissal might have taken place by a different procedure, the law has been clarified in a number of authorities. The terms of sub-section (4) were examined by the Supreme Court in ***Reilly v Sandwell Metropolitan Borough Council [2018] UKSC 16***. In particular the Supreme Court considered whether the test laid down in ***BHS v Burchell [1978] IRLR 379*** remained applicable for conduct cases. Lord Wilson considered that no harm had been done to the application of the test in section 98(4) by the principles in that case, although it had not concerned that provision. He concluded that the test was consistent with the statutory provision. Lady Hale concluded that that case was not the one to review that line of authority, and that Tribunals remained bound by it.

61. The ***Burchell*** test remains authoritative guidance for cases of dismissal on the ground of conduct in circumstances such as the present. It has three elements

    (i) Did the respondent have in fact a belief as to conduct?

(ii) Was that belief reasonable?

(iii) Was it based on a reasonable investigation?

62. It is supplemented by ***Iceland Frozen Foods Ltd v Jones [1982] ICR 432*** which included the following summary:

> "in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;
> in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
> the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

63. Lord Bridge in ***Polkey v AE Dayton Services [1988] ICR 142***, a House of Lords decision, said this after referring to the employer establishing potentially fair reasons for dismissal:

> "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."

64. Guidance on the extent of an investigation was given by the EAT in ***ILEA v Gravett 1988 IRLR 497,*** that "at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase." It was also held in ***A v B [2003] IRLR 403*** that the more serious the allegation the more it called for a careful, conscientious and evenly-balanced investigation.

65. The manner in which the Employment Tribunal should approach the determination of the fairness or otherwise of a dismissal under s 98(4) was considered and the law summarised by the Court of Appeal in ***Tayeh v Barchester Healthcare Ltd [2013] IRLR 387***. What is required is consideration of that which is reasonable in all the circumstances, as explained in ***Shrestha v Genesis Housing Association Ltd [2015] IRLR 399.*** In ***Sharkey v Lloyds Bank plc UKEATS/0005/15*** the EAT explained that not all flaws in the procedure render a dismissal unfair, only doing so if it is or they are significant, and further added that

> "…procedure does not sit in a vacuum to be assessed separately. It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together."

66. The focus is on the evidence before the employer at the time of the decision to dismiss, rather than on the evidence before the Tribunal. In ***London Ambulance Service v Small [2009] IRLR 563*** Lord Justice Mummery in the Court of Appeal said this;

> “It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal.”

67. The band of reasonable responses was held in ***Sainsburys plc v Hitt [2003] IRLR 223*** to apply to all aspects of the disciplinary procedure.

68. Although there is an onus on the employer to prove the reason for dismissal, there is no onus on either party to prove fairness or unfairness.

69. The employee should be given reasonable notice of the allegation, and what may be relevant is exactly what the employee was charged with at

the hearing: ***Strouthos v London Underground Ltd [2004] IRLR 636.*** In that case the Court of Appeal also said the following about the relevance of length of service when assessing the reasonableness of penalty:

> " … it all depends on the circumstances. The statements in ***McLay*** and ***Cunningham*** do not, in my judgment, exclude a consideration of the length of service as a factor in considering whether the reaction of an employer to conduct by his employee is an appropriate one. Certainly there will be conduct so serious that, however long an employee has served, dismissal is an appropriate response. However, considering whether, upon a certain course of conduct, dismissal is an appropriate response, is a matter of judgment and, in my judgment, length of service is a factor which can properly be taken into account, as it was by the employment tribunal when they decided that the response of the employers in this case was not an appropriate one."

70. Whether or not a matter might be regarded as one of gross misconduct has been the subject of authority. It must be an act which is repudiatory conduct ***Wilson v Racher [1974] ICR 428.*** The question is whether it was reasonable for the employer to have regarded the acts as amounting to gross misconduct – ***Eastman Homes Partnership Ltd v Cunningham EAT/0272/13.*** If the employer's view was that the conduct was serious enough to be regarded as gross misconduct, and if that was objectively justifiable, that was a circumstance to consider in assessing whether or not it was reasonable for the employer to have treated the conduct as a sufficient reason to dismiss. What is gross misconduct is a mixed question of fact and law: ***Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT/0032/09.***

71. A finding that there was gross misconduct does not lead inevitably to a fair dismissal. In ***Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854*** the Tribunal suggested that where gross misconduct was found that is determinative, but the EAT held that that was in error, as it gave no scope for consideration of whether mitigating factors rendered the dismissal unfair, such as long service, the consequences of dismissal, and

a previous unblemished record. The law in this area was reviewed in ***Hope v British Medical Association [2021] EA-2021-000187***.

72. The Tribunal is required to take into account the terms of the ACAS Code of Practice on Disciplinary and Grievance Procedures. It is not bound by it. It includes the following provisions:

> "4. …….
>
> - Employers should carry out any necessary investigations to establish the facts of the case…..
> - Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made…..
>
> 9. 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 would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification…
>
> 12. …….. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. ……
>
> 22. A decision to dismiss should only be taken by a manager who has the authority to do so…..
>
> 23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence…"

(iv) Remedy

73. In the event of a finding of unfair dismissal, the tribunal requires to consider firstly whether to make an order for re-instatement under section 113 of the Employment Rights Act 1996 or for re-engagement under section 114. The orders are further addressed in section 116.

74. The tribunal requires also to consider a basic and compensatory award if no order of re-instatement or re-engagement is made, which may be made under sections 119 and 122 of the Employment Rights Act 1996 respectively, the latter reflecting the losses sustained by the claimant as a result of the dismissal. 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". 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.

75. Guidance on the amount of compensation was given in ***Norton Tool Co Ltd v Tewson [1972] IRLR 86.*** When assessing the amount of loss, account should be taken of the requirement to mitigate loss. The tribunal should decide when the employee would have found work and take into account any income which the tribunal then considers she would have received from that other source (***Peara v Enderlin Ltd [1979] ICR 804*; *Gardiner-Hill v Roland Berger Technics Ltd [1982] IRLR 498*).** The issues that arise are: (a) what steps were reasonable for the claimant to have to take to mitigate their loss; (b) did the claimant take reasonable steps to mitigate their loss; and (c) to what extent would the claimant have mitigated their loss had they taken those steps? That approach was confirmed by the EAT in ***Savage v Saxena [1998] IRLR 182*** and ***Hakim v Scottish Trades Unions Congress UKEATS/0047/19.***

76. In respect of the assessment of the compensatory 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 that a fair dismissal would have taken place had the procedure followed been

fair. That was considered in ***Silifant v Powell 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.

77. In ***Nelson v BBC (No. 2) [1979] IRLR 346*** it was held that in order for there to be a deduction for 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. At the EAT level the Tribunal proposed contribution levels of 100%, 75%, 50% and 25%. That was not however specifically endorsed by the Court of Appeal. Guidance on the process to follow was given in ***Steen v ASP Packaging Ltd UKEAT/023/13.)*** The contributory conduct does not need to amount to gross misconduct to be taken into account – ***Jagex Ltd v McCambridge UKEAT/0041/19***. If there has been culpable or blameworthy conduct, and if it caused or contributed to the dismissal, the third stage is to consider by how much to reduce the compensatory award on a just and equitable basis – ***Topps Tiles place v Hardy [2023] EAT 56.***

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

(v) Agency

79. The Scots law of agency has for a very long time recognised the concept of agency inferred from facts and circumstances. For example in ***Stair's Institutions*** at 1.12.12 it is stated

> "that which is inferred by signs, and is not expressed by words; as he who is present and suffereth another to manage his affairs without contradiction gives thereby a tacit mandate … ."

80. In ***Ben Cleuch Estates Ltd v Scottish Enterprise [2006] CSOH 35*** Lord Reed stated the following

> "An agency can however arise from the course of conduct by the principal and the agent, as a matter of implied agreement, where each has conducted itself towards the other in such a way that it is reasonable for the other to infer from that conduct consent to the agency."

81. Although that case was appealed to the Inner House there was no analysis of the agency point in that appeal, which is reported as ***Ben Cleuch Estates Ltd v Scottish Enterprise [2008] SC 252***. Similar conclusions as to agency had been reached in ***Royal Bank of Scotland Plc v Shanks [1998] SLT 355*.**

82. Separately in the event that there is no initial agency it may be ratified retrospectively **-** ***Robertson v Foulds (1860) 22 D. 714.***

Observations on the evidence

83. I considered that all of the witnesses were seeking to give honest evidence. The real issue, where there was a dispute, was on reliability. My assessment of the reliability of each of the witnesses is as follows:

Ms Beglan

84. Whilst Ms Beglan could not recall all details, and explained that on occasion she had difficulty with recalling matters generally, I was in general terms that it was credible. She accepted some propositions put to her in cross examination where she thought that appropriate and explained her position if she did not. I accepted that her concerns over the claimant's performance were genuine, as was her concern when discovering that a fire risk assessment had not been conducted when required. I also accepted her evidence that she had tasked the claimant with putting in place a system to manage such health and safety issues, including reminders to those to do them and checks that they had been carried out.

85. There were some inconsistencies with other evidence, such as that Ms Hotchkiss said that she had met her on two occasions in relation to the appeal, on the former of which Ms Beglan had commented on the breakdown of trust, something that Ms Beglan did not give evidence about and had contradicted that by stating that she had not otherwise been involved. I concluded that that was more of a failure in recollection than being untruthful. I did not consider that she had deliberately redacted the email she sent Mr Muir which the claimant challenged, or had failed deliberately to provide documents. Matters were I considered handled informally, which is not unusual when there is a small employer, a charity, working with an HR consultant with which it has an existing relationship.

Mr Muir

86. Mr Muir gave answers to questions in cross examination which were a little combative at times, and he had a tendency to interrupt the questioner part way through the question despite being asked not to do so on a number of occasions. He had a clear view that the process was a fair one. It was his decision to suspend the claimant, and to make mention of an application for expenses in the Response Form. I had some concerns that he did not fully appreciate the issues being raised around fairness, but his role was that of investigator, and he did not suggest that there should be a disciplinary process at all, leaving that to Ms Stirton. He did not allow much time for the claimant to comment on the documents recovered from the office on 16 January 2023, his report being completed the following day and not including any material the claimant had shown him, but his view, genuinely held in my view, was that there was nothing in them relevant to the issues he investigated. He also stated, correctly in my view, that many of the issues that had been investigated were not conduct ones but performance ones. That finding appears to me to support the view that he was at least seeking to be independent.

87. Ms Hotchkiss said in her evidence that she had had discussions with him before determining the appeal, and that he had seen the letter of her decision for review, neither of which matters he had referred to in his evidence, and on that I preferred Ms Hotchkiss. Those details were

inconsistent with his evidence earlier, but I formed the view that it was a failure of recollection not a deliberate attempt to mislead the Tribunal.

Ms Stirton

88. In general terms I accepted that Ms Stirton was seeking to handle matters fairly. She upheld the three allegations after holding the disciplinary hearing, which she had adjourned to follow up one particular matter. There was a basis on which to do so. There were two main issues with regard to her evidence. The first is that in the letter of 18 January 2023 she had used the words “I find”. That was before any disciplinary hearing. That indicated an element of pre-judgment. There are however two qualifications to that. The first is that the claimant had made some admissions by that stage as to the equal opportunities form and not informing Ms Beglan of the missed fire risk assessment when she ought to have done. The second is that there was a second disciplinary meeting after further investigation. But nevertheless, even allowing for such qualifications, using words of having made a finding at such an early stage is not indicative of fairness, and I had difficulty in accepting Ms Stirton’s evidence about her use of those words.

89. The second main issue is that the decision letter introduced what was said to be an irretrievable breakdown in trust and confidence. That had not been a matter included in the letter calling the disciplinary hearing. When asked what the principal reason for dismissal was, Ms Stirton said that it was conduct. Her letter however did not read as though that was (at least clearly) the principal reason, and the respondent had argued its case on SOSR, on the basis of an irretrievable breakdown in trust and confidence, and not on the basis of conduct. I considered that there was a conflict between the letter as written, the reason relied on by the respondent, and the oral evidence of Ms Stirton. The letter indicated that the principal reason for dismissal was a view that the employment relationship had broken down irretrievably, albeit that it did find the allegations established. That was fortified by the payment in lieu of notice, which would not be expected if the principal reason was gross misconduct, The oral evidence on the question of which was the principal reason of the two was that it was the three issues of conduct that were that principal reason. That was

an inconsistency that I considered material, and affected my assessment of the reliability of the evidence. I address that further, as well as other issues, below.

Ms Hotchkiss

90. Ms Hotchkiss was mostly clear in her recollection of detail, and firm in her evidence when challenged. She accepted some propositions put to her and explained when she did not do so. She was in general terms reliable as a witness, but that is subject to three matters on which I found that she was not. The most significant is that she was adamant that the claimant had said during the appeal hearing something to the effect that she, the claimant, had lied to Ms Beglan, although that had not been noted in the appeal hearing note that Ms Hotchkiss herself had signed electronically as a fair record. For reasons addressed below I did not consider that correct.

91. She confirmed her view that both issues of conduct and of the alleged breakdown in the working relationship led to her decision but she was not able to say which of those was the principal one. That lack of clarity did not assist the reliability of her evidence in my view.

92. She was clear in her view that the claimant had deliberately withheld detail of the missed fire risk assessment from Ms Beglan and noted that the claimant accepted that she ought to have told her. She was also of the view explained in her oral evidence that the claimant had said that she had sought support for ISO 9001 accreditation when she had known that that was not so, such that it was a deliberate falsehood, although that had not been the finding in the appeal letter. It appeared to me that there was an inconsistency in that regard, which affected to an extent the assessment of reliability.

93. She considered that the claimant's responsibility for there not having been an adequate system for health and safety matters that included a fire risk assessment was material, and that she had acted contrary to instruction in relation to the equal opportunities form on two occasions and that matters both individually and collectively were sufficient to lead to dismissal. I address that further below.

The claimant

94. In general terms I considered that the claimant gave reliable evidence. She accepted that she had been at fault in relation to the equal opportunities form, adding it to documents on two occasions when she ought not to have done so. She accepted that she should have told Ms Beglan of the missed fire risk assessment at Drummond House at the time it was discovered, although she maintained that she had been asked by Ms Kerr not to do so until after the issue was remedied. That had been her position throughout the process of investigation and discipline. She said that she had struggled with the ISO accreditation process and sought support. She had relied on others to carry out matters such as the fire rrisk assessment, but appeared to accept that her role was a form of monitoring one for health and safety matters using the online system.

95. She denied that she had accepted before Ms Hochkiss that she had lied to Ms Beglan, and on that issue I preferred the claimant's evidence. It would be very surprising that such an important matter, had it occurred, was not captured in the minutes of the appeal meeting, or referred to in the letter of decision after the appeal. Indeed the letter of decision states that a different version of events does not mean that the claimant deliberately misled the investigation, which is not exactly the same point but one related to honesty. It is I consider highly unlikely that such a comment would have been made in the letter if the claimant had admitted to Ms Hotchkiss that she had lied to Ms Beglan. In all the circumstances I accepted the claimant's evidence on this matter, and concluded that Ms Hotchkiss was not reliable in her evidence on that point.

96. The cross examination of the claimant was focussed, and some points of detail were not put to her by way of challenge to her evidence in chief. Her evidence did however, in my view, seek to downplay her own role in matters which was contrary to some of the evidence I heard, and I have taken that into account in the assessments made below.

Discussion

97. I address each of the issues that were identified above as follows:

(i) What was the reason, or principal reason, for the claimant's dismissal?

98. I was not satisfied that the respondent had proved its case that the principal reason for dismissal was the respondent's belief, held on its behalf by Ms Stirton, that there had been an irretrievable loss of trust and confidence between the parties, such as to amount to an SOSR. SOSR is what the respondent pled, and what they relied on as the principal reason when the issue was ventilated at the start of the hearing. That SOSR was not the principal reason for dismissal proved is, I consider, because that was not Ms Stirton's oral evidence. Her evidence was that the principal reason for her deciding to dismiss was her belief in matters of conduct, specifically that there had been gross misconduct by the claimant acting as alleged for each of the three disciplinary charges. Whilst her letter of dismissal did not expressly state a finding of gross misconduct, as she accepted, she said that the letter of 18 January 2023 had stated that if the allegations were upheld that would be the finding. She did find the allegations upheld.

99. Whilst it is not necessarily the case, in my view, that finding such matters as having been established does amount to gross misconduct and her comment in the earlier letter was an example of a measure of pre-judgment, her oral evidence was partly consistent with that overall background of conduct being what had been alleged. It is referred to in the letter of dismissal itself, which holds each allegation established, and refers to them under the heading "Rationale".

100. The dismissal letter, which states the irretrievable breakdown in trust and confidence as the reason, is in my view not entirely clear in what it says. It refers to not continuing in the role. It has a mix of findings as to conduct issues, and about trust and confidence. It refers to paying in lieu of notice, which is not normally consistent with a finding of gross misconduct.

101. Ms Stirton is the only witness able to tell the Tribunal what the principal reason for dismissal was, in her mind. There is at the very least ambiguity as to whether the principal reason was SOSR or conduct, and a conflict between the oral evidence she gave and the reason pled by the respondent, in my view. Conduct and SOSR are separate reasons within the statutory provision. The principal reason must be one or other of them.

It cannot be both, at least not when the respondent elected to rely on SOSR as the principal reason. She said under oath that the principal reason was conduct, which in my view was not materially altered by her answers to questions in re-examination in which she said that the findings about the conduct issues were linked to her belief that there had been a breakdown in trust and confidence. It is clear from the face of the letter that there was a link, but the issue is not that, it is which of the two potential reasons was the principal one.

102. Taking the evidence from Ms Stirton on the principal reason for dismissal being her view as to conduct as reliable however, as I consider that I should, it appeared to me that in her mind it was conduct that was the principal reason. Conduct and SOSR are separate matters within the statute.

103. I concluded that the principal reason for dismissal is not proved by the respondent to have been that of SOSR on the basis of an alleged irretrievable breakdown in the working relationship. That sense of it not being clear which of the two potential reasons for dismissal was the principal one was also fortified to an extent by the evidence of Ms Hotchkiss, who could not say which was the principal one.

104. As SOSR was the pled case and was not established by the respondent, which bears the onus of proof on this matter, it follows that the respondent has not proved a potentially fair reason for dismissal. As a result I must hold that the dismissal is unfair.

(ii) *If potentially fair under section 98(2) of the Employment Rights Act 1996 was it fair or unfair under section 98(4) of that Act?*

105. I then considered matters in the alternative, on the basis that I was wrong in that previous finding, and that the principal reason had been a belief in the breakdown in trust and confidence. That belief can at least potentially be a fair reason, as being (subject to what follows) some other substantial reason (SOSR).

106. I require to assess whether there was a fair dismissal or not under section 98(4) on such a basis. There is no onus on either party in this regard. I cannot substitute my view for that of the respondent, and must apply the

band of reasonable responses (principles I consider apply to an SOSR dismissal as well as one for conduct). The band of reasonable responses applies to all aspects of the investigation and disciplinary process, as well as to the penalty of dismissal.

107. The respondent is clearly a small employer, a charity, with no substantial resources, without an in-house HR person, which in effect contracts out HR matters. That is part of the background to take into account. I have also taken into account the ACAS Code.

108. I accepted that the respondent, through Ms Stirton, did have in fact a belief that there had been an irretrievable breakdown in trust amounting to SOSR. She said so in evidence, albeit that it was not in her evidence said to be the principal reason, but it is also referred to within the letter of dismissal. For these purposes I proceed on the hypothesis that it was the principal reason. But I did not consider that dismissal on that basis was within the band of reasonable responses.

109. Firstly I shall deal with the issue of authority. In his written submission Mr Clarke referred to authorities of English law, and I have referred above to the position under Scots Law as I understand it. There may be little difference between the two, but in simple terms agency can be inferred from the facts, or ratified after the event, if not expressly conferred. It seems to me that although the evidence on this was rather thin, it was there. Ms Hotchkiss had confirmed a general authority to Mr Muir and Ms Stirton to act in disciplinary matters in around September 2022. The disciplinary policy referred to the possibility of third parties conducting meetings and related matters. The contract between the respondent and Mr Muir's company referred to a standard service, and the evidence was that that included carrying out disciplinary matters that went up to and included dismissal. Ms Beglan had asked Mr Muir to carry out the investigation. He did so. He also decided to suspend the claimant. Ms Beglan was aware of that. He sent her the letter, she printed it out on headed paper, and then sent out the letter. That infers her conferring authority on him to do so, in my view. He had I consider authority under the law of agency. He reported thereafter, and recommended that the matter be reviewed by Ms Stirton. Ms Beglan was aware again of that.

She in effect gave her approval to that process. Whilst she did not do so in terms, in writing, she again sent out letters with regard to the disciplinary hearing on headed paper. That later included the letter of dismissal. Ms Hotchkiss heard the appeal, and upheld the decision taken to dismiss. She was satisfied that there had been authority conferred on Mr Muir and Ms Stirton. She had been aware in general terms of the process taking place. Taking both a legal, and a common sense, view of those facts, it appears to me that authority was given to Mr Muir and Ms Stirton sufficiently inferred from the facts and circumstances, and separately, should it be necessary, by ratification by Ms Hotchkiss.

110. It is true that the ACAS Code of Practice refers to decisions being taken by "the employer", and also has reference to the line manager, but firstly that is a Code to take into account rather than binding law, secondly if a decision is taken by an agent that is I consider deemed in law to be the decision of the principal, and thirdly as a matter of practice particularly in smaller organisations without internal HR support or a large management team decisions are delegated to external parties, most often to ensure fairness as those who might otherwise have done so are involved as witnesses. It is good practice to confirm that in writing, but not in my view a requirement in law. That matters were handled informally is certainly true, but that is far from unusual. Whilst a member of the board might have been approached to act as decision maker there was no requirement to do so, either as a matter of law or of fairness, and the decision to use external consultants was I consider well within the band of reasonable responses. I did not therefore accept the argument that there was no, or insufficient, authority for either Mr Muir or Ms Stirton to act as they did, or that there was unfairness in the fact that they were involved in their roles.

111. Secondly I turn to the merits of the decision to dismiss. I have concluded that it was not within the band of reasonable responses. There are a number of reasons for that, which are significant both individually and collectively:

(i) There was an indication of at least a measure of prejudgment by Ms Stirton in her letter to the claimant of 18 January 2023. It stated that she found that the claimant's conduct had fallen well short of

that required by the organisation. It is true that there had been some admissions by the claimant, and a later investigation by Ms Stirton, but to make such a finding before a disciplinary hearing was not what any reasonable employer would have done. That was so particularly using the word "well". It was the kind of evaluative judgment that should only be made after the claimant has had an opportunity to comment. No reasonable employer would have made such a statement in such a letter.

(ii) The allegations made against the claimant changed. What she was alleged to have done by the letter calling her to the disciplinary hearing was not what she was dismissed for (on this hypothesis), which was the irretrievable breakdown of the relationship. That had not been an allegation in the letter of 18 January 2023, but had been mentioned during the disciplinary hearing as noted below. The claimant had not been informed in writing of that further matter being considered, or given the opportunity to comment on it after a time for any investigation by her. This was in the context of her having said that there was a "breakdown" in the relationship with Ms Beglan, which she claimed led to her being treated less well by Ms Beglan, but it is at least not clear if it was accepted that it had broken down irretrievably. Whether or not that was so was not a question put to Ms Beglan, Ms Kerr or Ms Park by Ms Stirton. Put simply, it was not a matter properly investigated at all, and not investigated to the extent that any reasonable employer would have done.

(iii) The evidential basis for the conclusion of loss of trust and confidence was not within the investigation report. It was not explained in the letter of dismissal on what basis such a view had been formed. In her oral evidence Ms Stirton did not suggest that there was a particular evidential basis. It was her own opinion. She had not asked Ms Beglan about it. Whilst there had been reference to a breakdown in the working relationship during the meeting on 30 January 2023, made by each of Ms Stirton, the claimant and her union representative, the issue of whether or not that was truly irretrievable was not explored adequately, if at all. Nor was the

reason for any breakdown considered. The claimant and her representative were clearly suggesting that there had been steps taken by the respondent that led to it, in effect blaming them, and in particular Ms Beglan. There was no evidence before Ms Stirton that continuing that relationship was impossible. Alternatives were not explored.

The claimant's comments on trust and confidence were I consider clearly and explicitly made in the context of what she alleged to be flaws in the investigation and process, and her surprise (devastation as she put it in evidence) at being challenged in this way. She had over 20 years' service and no disciplinary record at all. Within the allegations she faced were two to the effect that she had deliberately misled the investigator, a form of dishonesty it seemed to me. I address the detail of that below, but it appears to me that in these two respects the respondent was seeking to add to the allegations to find ways to dismiss the claimant by, in effect, bolstering the allegations to include these two matters, which both enhanced the feeling of pre-judgment and that there was a desire to remove the claimant from her employment.

To dismiss on the basis of an alleged breakdown in trust and confidence in such circumstances was something that I have concluded no reasonable employer would have done. It was outside the band of reasonable responses in my opinion.

(iv) The admissions that the claimant made, and the other matters where she was believed to have been guilty of gross misconduct so far as that formed a part of the belief as to the breakdown in relationships, were not sufficient to amount to something for which dismissal was within the band of reasonable responses for that reason, in my opinion. No reasonable employer would have dismissed in such circumstances in my view. The claimant had long service, which was unblemished. That is a material factor which ought properly to have been taken into account.

The first issue is the equal opportunities form. It should not have been included, and was so twice, but that was not I consider a

serious issue of conduct. It was an error, as she acknowledged, although it was committed twice, but it is not a matter that would I consider be regarded by any reasonable employer as worthy of any action beyond a letter of concern, or another form of informal warning.

The second issue is the fire risk assessment at Drummond House which was missed, and which was not disclosed immediately to Ms Beglan. It was a part of the claimant's role to establish and operate a system for managing such health and safety issues, although she herself did not carry out the assessment or enter the detail in the system. It was her role in effect to act as a second line of defence by checking that it had been done, and done timeously and properly. She was at fault in that, as the failure to complete the updated fire risk assessment in time was missed by Ms Kerr, and by the claimant herself. She accepted that she ought to have told Ms Beglan at the time. The claimant was not however alone in being at fault in relation to the missed fire risk assessment or in not telling Ms Beglan at the time of discovery. Ms Kerr in particular was also at least partly at fault, and I consider in general terms that she was more so as she, I have inferred from the evidence, had not entered the dates for renewal in Citation, and had not done the risk assessment when due. For those failures a letter of concern was issued to Ms Kerr (and also Ms Park separately). That is an informal process, and the lowest level of penalty. There was given that a stark and striking disparity of treatment with that of the claimant, even accepting that there were other issues in relation to the claimant.

Ms Kerr did not give evidence, and I accepted the claimant's evidence that Ms Kerr had asked her not to tell Ms Beglan until the issue had been resolved. I was initially concerned that the email the claimant sent Ms Beglan on 7 December 2022 had not been candid. One was sent at 8.45 am that day referring to training issues. It was however later that day that the issue of the fire risk assessment at Drummond House was mentioned. The claimant sent one to Ms Kerr and Ms Park at 10.23 that day asking about

the one for that property, and received a reply at 10.50 to say that they had been missed, and she was going to go there that afternoon to do them (both environmental and fire were mentioned, but the focus of the evidence was the fire risk assessment). It appears to me that the claimant was not being less than candid with Ms Beglan initially, and that the issue of the fire risk assessment came a little later in the chronology that day. She was wrong not to have told Ms Beglan once it was discovered, as she accepted, but she was not being dishonest about it in my view.

The second aspect of the second allegation was deliberately misleading the investigation by suggesting that Ms Kerr had asked her not to tell Ms Beglan of the position until after it had been remedied. Ms Stirton in her letter of dismissal said that no explanation had been given for that. I do not consider that any reasonable employer would have come to such a view. Firstly there were further emails which had been exchanged which Ms Stirton did not see as they were not a part of the investigation, and would have been had there been the investigation carried out by any reasonable employer. Secondly the timings of matters are I consider particularly instructive. The claimant appeared to ask Ms Kerr to check about the fire risk assessment for Drummond, which is not the kind of message indicative of any form of cover up. Thirdly Ms Kerr states that she will attend that afternoon. Fourthly, assuming that Ms Kerr did inform Ms Beglan after she had done that, that was precisely in accordance with what the claimant said Ms Kerr had asked her. I do not consider that any reasonable employer would have concluded that the claimant had deliberately misled the investigation in this regard. It was obvious firstly that there was a conflict in the evidence, secondly that the claimant had accepted fault and was not being untruthful entirely such that one could disbelieve her for other matters and thirdly that Ms Kerr, who was the one who had the role of inputting information once the earlier assessment had been carried out had not done so. Had there been the investigation and consideration of these issues that a reasonable employer would have done, the finding would have

been that she had not deliberately misled the investigation, That was in essence the finding of the appeal.

The third allegation was of deliberately misleading the investigation team as to requesting support for the ISO 9001 work.I do not consider that there was evidence of a reasonable belief in this, nor that there had been a reasonable investigation so as to fall within the band of reasonable responses. It was clear that the claimant did struggle with it. It was a difficult, complex and lengthy exercise. It had been on going for a number of years, but without any form of performance management or discipline in relation to it. It was, she said, a matter on the agenda for each support and supervision meeting with Ms Beglan. She was not cross examined on that. Whilst it is I consider true that the recording of one such meeting she had referred to and which was investigated did not include a remark about that, the evidence was that those meetings were held regularly, normally about every six weeks or so. The investigation into this issue was I consider limited. It lacked specifics. What work had been done by the claimant was not obtained, nor were emails or other written evidence in relation to the matters that arose.

I must consider whether Ms Stirton came to her views within the band of reasonable responses. I have concluded that she did not. She appears to have considered, in very brief summary of her evidence and position in documentation, that as Ms Beglan, Ms Kerr and Ms Park had given a form of contrary evidence and as the claimant could not explain why that was, their evidence was to be preferred. It appears to me that that is not how the issue would be addressed by any reasonable employer. There had not been I consider the kind of consideration of the matter as any reasonable employer would have done, and that was so particularly in the context not only of no disciplinary process beforehand, but no performance process either, but it being acknowledged that the accreditation process had been ongoing for several years.

(v) There was I consider a clear difficulty in the relationship between the claimant and Ms Beglan from mid November 2022. They both

appeared to accept that. It appears to me likely that Ms Beglan did convey her view that the claimant should not remain an employee, and that that influenced the investigation, dismissal and appeal. She was both complainer and witness.

(vi) It is I consider most unusual, and unfair, for Mr Muir to have sent her the questions he would ask the claimant in advance of doing so. The investigation was not as full, independent, and fair as I consider it ought to have been if it was to be within the band of reasonable responses.

(vii) That Ms Hotchkiss also discussed matters with Ms Beglan at the appeal stage, and sent the investigator Mr Muir a draft of her decision, is at the least not usual. It appeared to me that the issues of fairness had not been remedied by the appeal.

112. I considered the issue of the procedure followed and did not consider that the respondent had been in material breach of the ACAS Code of Practice, assuming that it applied to what was said to be an SOSR dismissal. The procedural matters of significance are that the allegations made in the letter calling the disciplinary hearing were changed as the basis for the decision to dismiss, and the investigation was not sufficient in relation to trust and confidence. Whilst the issue was raised at the end of the disciplinary hearing to an extent the claimant had had no prior notice of that. There had however been some, and there was an appeal held later at which this issue was not addressed by the claimant at all.

113. I then considered all of the evidence in the round. Taking all of the evidence available to the respondent at the time of the decision to dismiss I considered that if there had been proved as the principal reason for dismissal a belief that there had been an irretrievable breakdown in relationships so as to amount to an SOSR it was not a reasonable belief. There was no reasonable investigation into it. I consider that no reasonable employer would have dismissed the claimant for SOSR at the time and in the circumstance that they did. Dismissal was outwith the band of reasonable responses in my view.

114. I considered that in all the circumstances the dismissal would have been unfair under section 98(4) if SOSR had been established as the principal reason for dismissal, as the respondent had contended.

115. I then considered matters separately, in the context of the combination of issues of trust and confidence, and the extent to which the claimant had been guilty of conduct. If one considers that the equal opportunities form issue was conduct, which is stretching the definition in my view, it is a minor matter that no reasonable employer would have regarded as relevant to a decision of dismissal for a long serving employee with no disciplinary record. The failure to inform Ms Beglan of the missed fire risk assessment was more significant, but in my view not near the standard for gross misconduct either alone or in conjunction with the equal opportunities form issue. The allegations of deliberately misleading the investigation were ones that no reasonable employer would have concluded were established. In my view there was not any adequate basis on which any reasonable employer could have decided to dismiss. Even if there had been a potentially fair reason for dismissal of both conduct and trust and confidence together in some way, it was not fair in my view.

(iii) If the claim is successful to what remedy is the claimant entitled? In that regard

- *(a) what losses did or will the claimant suffer as a result of the dismissal*
- *(b) might there have been a fair dismissal had there been a different procedure*
- *(c) did the claimant contribute to her dismissal*
- *(d) has the claimant mitigated her loss and*
- *[(e) did the respondent fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?*

116. The claimant did not wish to seek re-instatement or re-engagement.

117. The **basic award** was agreed at **£13,056.87**. That is subject to consideration of contribution, assessed below.

118. The **compensatory award** was partly agreed, subject to consideration of reductions. The initial loss to 20 July 2023 is £884.56. The claimant seeks

losses thereafter at £80.37 per week until 7 May 2024. I consider that that is not an appropriate period of loss in all the circumstances. No issue of mitigation of loss arose in my opinion, and was not substantially pressed by the respondent. In my view taking account of all the circumstances the appropriate period of loss after 20 July 2023 is of 26 weeks, which is a further sum of £2,089.62. The claimant also seeks loss of statutory rights at £500. I consider that that is an appropriate figure given her very lengthy service. That is a total sum of **£3,474.18.**

119. The next potential issue is whether there could have been a fair dismissal from a different procedure, often called a ***Polkey*** deduction on the basis of the authority of that name. It appears to me that there could have been a fair dismissal by a different procedure on the basis of breakdown in trust and confidence, but not conduct. In this regard I did not consider that the issues of conduct that a reasonable employer might have regarded as such, or those which I have found established as above, could have led to a fair dismissal. They were matters which could have been addressed by performance management, or by at worst a first written warning. That is different to the issue of contribution which is addressed below.

120. That leaves the issue of trust and confidence. The evidence on this was not entirely full, but it was there. The claimant in the notes of the disciplinary hearing, which she accepted as broadly accurate, stated that there had been a breakdown in the relationship with Ms Beglan since 15 November 2022. The word “irretrievable” was not used, but it is described as a breakdown. The claimant’s union representative is recorded as making comments, and there is no suggestion that the claimant disavowed them at the time, including of Ms Beglan manipulating matters, and “this was all being used to help get rid” of the claimant. The claimant is reported as saying that one of the first things she said to Mr Muir at the investigation meeting was “is [Ms Beglan] wanting rid of me?”. Ms Stirton then “stated that she was concerned that it seemed that there had been a total breakdown in the employment relationship and also trust and confidence between [the claimant] and other managers.” The representative then stated that “this was both ways.” Again there is no suggestion of the claimant disavowing that comment, which infers agreement that there was a total breakdown in the relationship. What is then I consider highly

instructive is that when the claimant presented her appeal she did not challenge the suggestion that trust and confidence had broken down irretrievably at all. She challenged it on a series of other grounds. The inference I draw from that is that the claimant accepted that trust and confidence had broken down irretrievably.

121. Whilst the reasons for that are not simple, as a mix of what are in summary faults by the claimant and faults by the respondent, I consider that there was a possibility of a fair dismissal for SOSR. There are however a number of matters to take into account in this regard. The first is that there was no proper investigation of that issue, and the views of witnesses to that issue were not properly obtained. The second is that the respondent was I consider partly at fault for the loss of trust and confidence. It made allegations that I consider were not properly founded, and were not ones any reasonable employer would have regarded as founded. The claimant's suspicion that Ms Beglan wanted rid of her was legitimate. The third is that the claimant said in evidence something to the effect that the relationship was not irretrievably broken down. Had matters been handled fairly it is not certain that the outcome would have been a fair dismissal, although I consider it very likely. The fourth is that there are limitations to the extent to which SOSR can properly be used. It is not a kind of universal panacea. But this was a small organisation, a charity, the relationship between the claimant and Ms Beglan had been seriously damaged at the very least by the matters I have referred to, and the claimant had made material allegations against her. I consider from all the evidence before me that the prospects of the claimant being dismissed fairly for SOSR had there been a proper procedure are significant. That is so especially from the fact that the claimant did not challenge that at all in her appeal.

122. I consider that in these circumstances there was a material risk of the claimant being fairly dismissed for SOSR. It would also have taken a period of time, of something of the order of one month, for a fair process to investigation and address the issue of trust and confidence before a decision would have been taken. Taking all those factors into account I assess the possibility of a fair dismissal at 50%. Whilst there would have been a lengthier period of time before termination, I do not consider it within the statutory provisions in all the circumstances to quantify this head

of loss at what the claimant's net income with the respondent would have been during that period, and I do not have the detail of the net income from the evidence. I consider that it is appropriate to reduce the compensatory award by that percentage to take account of the possibility of a fair dismissal.

123. A separate issue is whether there should be a **contributory conduct** deduction either to the basic award, or the compensatory award, or both. I considered that there should be. The claimant accepted a degree of fault. She was blameworthy to some extent. She was at fault in relation to the equal opportunities forms, albeit to a limited degree, and as she did not tell Ms Beglan of the missed fire risk assessment, an important matter, when she should have.

124. I considered whether or not the claimant could be said to be blameworthy for the breakdown in trust and confidence more widely. The first issue is that the claimant's role was to set up systems to manage health and safety. That is clear from the job title and job description. It appeared to me that Ms Hotchkiss was right to say that she had not done so properly. That was also Ms Beglan's evidence. On this aspect I consider that the evidence supports the respondent, although it was not a matter raised in cross examination to any great extent. The impression I formed from the evidence was that the claimant was not "on top" of the role in this regard in the manner she should have been. It was essentially an administrative task to check that there was a system adequately recording when important matters such as a fire risk assessment expired, that they were renewed in time, and that there was a follow up date to do so again, all within the online system. That system did not work for Drummond House, and the claimant shares the blame for that with Ms Kerr. This is a separate matter to not telling Ms Beglan about the failure. It was more of a failure of the claimant to have systems in place that did keep on top of such matters.. Whilst there had been no performance management of that, it was I consider blameworthy to an extent, but not a substantial one.

125. The second issue is the ISO accreditation. The evidence of the respondent was that the claimant was not managing that adequately, and that it was not progressing. I accept that it required input from others and assistance

to an extent, as the claimant spoke to, but it was a part of her role to manage it, and it was not being pursued as I consider it should have been. If the claimant was struggling, and needed support she had asked for but not received, which was in essence her evidence, I would have expected that to be made more formal by her, including by email to Ms Beglan for example. There was no evidence of that having been done, and no suggestion that she had done so in her evidence. Whilst the evidence on this matter was limited it was there, including from Ms Beglan and Ms Hotchkiss which I accept in this particular instance, as well as that from the claimant herself albeit again not addressed in detail in cross examination, and it is I consider indicative of again a degree of blame on the part of the claimant, but not to a substantial extent.

126. The third issue is the breakdown in the relationship with Ms Beglan. The difficulty is that the reasons for that were not explored in full detail in the evidence, and the onus of proof falls on the respondent. It appears to me that this is not a matter that has been proved such that I can take it into account in this respect. There was also some evidence of a difficulty that arose between the claimant and Ms Worthington, but the claimant was not cross examined on the detail of that, and if the breakdown was because of the poor management of concerns by the respondent more generally, that is a different question. I have left that matter out of account as the evidence on it was not I considered sufficient.

127. Taking all of the evidence that I have heard into account I consider that the respondent has proved that there was blameworthy conduct in relation to the matters I have referred to as established above, and I consider that the just and equitable level of the reduction to both the basic and compensatory awards in this regard should be, subject to what follows, 30%.

128. I then considered the two issues of ***Polkey*** and contribution together where they apply to the compensatory award. There is an overlap between them, such that to have two deductions separately at that level which would have been to 80% was not just and equitable. I considered that it was appropriate to combine them in a deduction overall of 60% in respect of the compensatory award.

Totals

129. The effect of the awards above is as follows –

(a)	Basic award	£13,056.87	
(b)	Deduction for contribution (30%)	£3,917.06	
	Net basic award		£9,139.81
(c)	Compensatory award	£3,474.18	
(d)	Deduction for ***Polkey*** and contribution (60%)	£2,084.51	
(e)	Net compensatory award		£1,398.67
(f)	TOTAL		**£10,529.48**

Conclusion

130. In light of the findings made I find that the claimant was unfairly dismissed, and make the awards set out above.

131. I have referred to certain authorities not commented upon by the parties in their submissions. I considered that it was in accordance with the overriding objective to issue this Judgment without holding a further hearing to allow such representations, but if either party considers that they have suffered an injustice by that they can make an application for reconsideration under Rule 71 and set out the submissions they seek to make on those authorities when so doing.

Employment Judge A Kemp

Employment Judge
17 November 2023

Date of Judgment
20 November 2023

Date sent to parties