EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondent**
Alessandra Colli		**LCUK Richmond Ltd**

Heard at: London South (by CVC)
On: 21, 22 February and 11, 12 June 2024

Before: Employment Judge G Phillips

Appearances

For the claimant: In person

Respondent: Ms G Nicholls, of Counsel

JUDGEMENT

1. The Claimant's dismissal was procedurally unfair.
2. Even if a fair and proper investigation and procedure had been followed here, the Claimant would still most likely have been dismissed on the basis of a breakdown of trust and confidence and on that basis any award of compensation should be made for a period of 4 weeks, with thereafter an 80% reduction to reflect the slight chance that dismissal might not have resulted.
3. The Claimant's conduct contributed to her dismissal to the extent of 50% but that it would not be just and equitable in the light of the finding at 2. above, to make any further reduction to the compensatory award in regard to that.

REASONS

Introduction

1. This hearing took place remotely by CVC.

2. I shall for ease refer to the parties as the Claimant and the Respondent. References below to (i) section numbers are to the Employment Rights Act 1996 (ERA"), unless otherwise stated; and (ii) rule numbers are to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended.

3. I had a witness statement from the Claimant and witness statements from Mr Amador, Ms Preece, Ms Preedy on behalf of the Respondent. The Claimant also submitted a written statement from a colleague, Yasmin Motakef, but she did not give evidence and no weight was attached to her statement. In addition, I had an agreed bundle of relevant documents ("the Bundle"). Where I refer to any pages in that Bundle, they will be referred to by their page number as [xx]. I had written and oral submissions from both parties. I have not summarised the parties' submissions in this document, as the hearing was recorded.

4. The Claimant brings claims through her ET1 Claim Form dated 14 July 2023 unfair dismissal, sick pay, holiday pay and wages act / breach of contract claims in terms of wage arrears. The Claimant subsequently withdrew her claim for sick pay. The Claimant says that she was dismissed by the Respondent because she raised concerns about her wages, which says had been consistently underpaid. The Respondent denies any underpayment of wages or holiday pay and says that the dismissal was fair, and that it dismissed the Claimant because there had been a breakdown of mutual trust and confidence which amounts to some other substantial reason. If the Tribunal finds the dismissal was procedurally unfair, the Respondent submits that the Claimant's conduct contributed to her dismissal. The Respondent denies that it owes the Claimant any money in respect of unpaid wages, or holiday pay.

Issues

5. As identified at the PHCM on 8 January 2024, the issues I had to determine were as follows:

6. Unfair dismissal**.** Dismissal was not in issue.

   a. What was the reason or principal reason for the dismissal?
   b. Was that a potentially fair reason for dismissal?
   c. In accordance with section 98(4) Employment Rights Act1996, in all the circumstances, including the Respondent's size and administrative resources, and equity and the substantial merits of the case
      i. did the Respondent act reasonably or unreasonably in treating that reason as a sufficient reason to dismiss the Claimant - was dismissal a fair outcome?
      ii. Was a fair procedure followed?
   d. If the dismissal is found to be unfair, what remedy should be awarded? (If remedy arises for consideration, the Respondent submits that issues of "*Polkey*" and contributory conduct arise).

7. Unlawful deductions from wages

   a. Did the Respondent make unauthorised deductions from the Claimant's wages and, if so, how much was deducted?

8. Breach of contract

    a. Did this claim arise or was it outstanding when the Claimant's employment ended?
    b. Did the Respondent fail to pay the Claimant wages for any period?
    c. Was that a breach of contract?
    d. How much should the Claimant be awarded as damages?

9. Holiday Pay

    a. What was the claimant's leave year?
    b. How much of the leave year had passed when the Claimant's employment ended?
    c. How much leave had accrued for the year by that date?
    d. How much paid leave had the Claimant taken in the year?
    e. Were any days carried over from previous holiday years?
    f. How many days remain unpaid?
    g. What is the relevant daily rate of pay?

10. Wages Act and holiday pay.

    a. Was the Claimant underpaid by the Respondent? If so, in what amount.

Procedural background

11. The case was originally listed as a one-day full merits hearing for 8 January2024. In October 2023, the Respondent made an application for that hearing to be postponed and converted to a three-day hearing. The Claimant agreed that one day was insufficient and consented to the application. The application was considered on Friday 5 January 2024 and refused because the Judge considering the application, on the information provided at that time, concluded that one day would be sufficient. The parties had assumed that the uncontested application would be granted. In the event, the one-day full merits hearing on 8 January 2024 was postponed on the morning of that date, because it was found that the case was not ready for hearing. The CMO recorded that "There was a late flurry of activity between the parties because statements had not been exchanged and documents were not ready. Whilst statements were exchanged on Saturday, the Claimant tells me that hers is incomplete because she had insufficient time to include everything that she wished to." The Claimant also indicated that she wanted to include 230 timesheets in the hearing bundle because she felt these were pivotal to her claim for wages and the calculations, she had made setting out what was owed. The Claimant indicated that she regarded the dispute over wages as central to why she was dismissed. As these documents could be relevant to her claim, time was needed for these to be provided to the Respondent and consolidated into a revised hearing bundle. As a result, it was agreed that the full merits hearing needed to be postponed and the hearing was converted to a private preliminary hearing for case management purposes.

12. The Claimant confirmed at this time that she was no longer making a claim in respect of her sick pay and that claim was dismissed upon her withdrawal (there is an error in the CMO at paragraph 9 which refers to the withdrawal of the *holiday* pay claim, but it is clear from subsequent references – see para 11, and

    the Judgment sent to the parties 10 February, that the holiday pay claim was not withdrawn, it was the sick pay claim).

13. The hearing was rescheduled to be heard in February 2024. However, as set out in more detail in the Case Management Order made on that date, that hearing had to be postponed for procedural fairness reasons, as the Claimant had not had adequate time to familiarise herself with the Main Hearing bundle and so was not properly prepared for the hearing. The hearing was stopped while one of the Respondent's witnesses Mr Amador had already been giving evidence for over 4 hours. There was a discussion with Ms Nicholls as to the best way to proceed. Understandably, her client was reluctant for the hearing to be postponed for a second time. It was agreed that a sensible way to proceed was to finish the first day's hearing early and to allow the Claimant time to familiarise herself with the Main Bundle and the location of key documents. It was agreed that on this basis, the hearing would restart at 10.00 on the 22nd for its second day, in the hope that at the least all the live witness evidence could be completed.

14. In the event, when the hearing resumed the next morning, 22 February, the Claimant applied for a postponement. She said she needed time to familiarise herself with the Main Bundle. Ms Nicholls opposed the postponement of the hearing. She said any further delay would cause significant prejudice to the Respondent, let alone that further additional costs would be incurred. Ms Nicholls pointed out that if there was an adjournment, it would not be fair to leave Mr Amador under oath and unable to discuss the case. She said that it would be best to try and continue with the hearing. Ultimately, I decided there was no way round the fundamental lack of fairness caused by the problems the Claimant had with the Main Bundle, other than to adjourn. I released Mr Amador from his oath and obligation not to discuss the case.

15. This hearing is the continuation of the full merits hearing from February.

Background facts

16. The Respondent is a laser, skin care & cosmetic clinic. It is part of the LCUK group, which operates over 200 clinics as individual franchises. LCUK also provides through its head office, HR services to individual franchises. The Claimant was employed as an aesthetic therapist, initially with the Kingston Laser Clinic franchise, from 12 April 2021. The Clamant left Laser Clinic Kingston on the 23rd of September 2021 with a P45. The reason for the Claimant's departure is not, in my judgment, material for the purposes of this claim**.** The Claimant started working for the Respondent at the Richmond branch of Laser Clinics on 24 September 2021 and remained working there until her dismissal on 8 June 2023. On or about 12 November 2021, Mr Amador became the owner of the Respondent. The Claimant's salary at this point was £14 per hour [514].

17. The Claimant raised a serious concern at the start of the hearing in February about the bona fides of the version of her Contract of Employment document in the Bundle [67-9]. The Claimant questioned whether this was a forgery. She said this document was key to a lot of the issues that had arisen regarding her holiday entitlement, hours and wages. It was subsequently confirmed by the Claimant at

    the 13 June hearing that there had been confusion over the date of this document. While the document appeared to have been signed on 3 November 2021, in fact the day and the month were the other way round, so it was dated 11 March 2021, which the Claimant accepted was the date she would have signed her contract with Laser Clinics, Kingston. She therefore dropped her concerns about the Contract.

18. Clause 8 of the Contract of Employment that the Claimant signed with Laser Clinic, Kingston on 11 March 2021 [67-69], which also formed the basis for her employment with the Respondent, deals with holidays. It says the holiday year runs from 1 January to 31 December. It says that employees are entitled to be paid for bank holidays, plus 20 days holiday, plus 1 day for a birthday. Clause 31 of the Contract of Employment is headed "Variation". It stated that "The employer reserves the right to make reasonable changes to any of your terms and conditions of employment. Changes to your terms and conditions of employment will be notified to you in writing before the date upon which they come into force."

19. In December 2021, after Mr Amador became the owner and manager of the Respondent, he promoted the Claimant to a Team Leader [97, 221]. The Claimant's salary increased from £14 to £14.50 per hour [515].

20. On 10 April 2022, Mr Amador wrote to all staff to say he was introducing a new combined HR, Holiday and Payroll system [105] to replace the existing system. This focussed on the fact that holiday pay would be calculated by a new method**: "**We will move to calculate all colleagues' holiday entitlement in hours, rather than days, to reflect their current working pattern. Your annual holiday entitlement will be calculated by multiplying the number of actual hours of work you perform each week by 5.6. This is inclusive of your entitlement to the 8 normal bank holidays in England. As you know, the Company does not operate a standard five-day working week. This method of calculating holiday reflects the flexible working patterns of our colleagues." "The plan is to move to this new system with effect from 1 April 2022 and we will write to you again to confirm once it is in place. The above calculation of your leave will be applied from the start of this holiday year – 1 January 2022." The Claimant, who was on sick leave at this time, says in fact the new system didn't start operating until sometime in June.

21. From March – June 2022, the Claimant had a slipped disk and was on sick leave. She had a phased return to work [108]. She said it was agreed that if she experienced pain, she was to let Mr Amador know. On 12 August 2022, the Claimant having worked on 11 August, texted Mr Amador to say that she her leg was hurting, and she would be off sick the next day. She says Mr Amador questioned whether she was really in pain, and they argued about this. On 14 August, Mr Amador emailed the Claimant and said: [119] "*you were sent home*

after refusing to finish the Returning to Work Meeting following your absence yesterday. You left the room in the middle of the meeting and refused to continue …". The Claimant disputed Mr Amador's version of events. She says she left to get some water, that Mr Amador followed her out of the room, and she felt uncomfortable. There was subsequently a meeting with Rachel Lally (area HR manager) to resolve the issues that had arisen.

22. On 4 / 5 October 2022, [137] the Claimant raised with Mr Amador questions about the accuracy of the way her hours – and resulting pay – were being calculated by the IWS system [134]. Mr Amador says that because of this, he reviewed the Claimant's hours and noticed that she appeared to have been late into work on a number of occasions, so he decided to call her for a meeting to discuss her timekeeping and to go through her hours [134-6]. That meeting took place on the evening of 8 October. He said that on the day of the meeting he "caught the Claimant lying" about her arrival time. He says he confronted her about this, that she got angry, and she walked out of the meeting. The Claimant disputes Mr Amador's version of events. She disputes that she was late arriving at the office on 8 October. She said in her evidence that the meeting was in a room where she was alone with him, that the meeting got heated, that she felt uncomfortable and intimated and that it was an inappropriate place and way to conduct a meeting of this sort. She accepts that she told Mr Amador's girlfriend, who also a friend of hers, after this that he was "arrogant". Mr Amador says she also called him disgusting [139-143].

23. There was a meeting on 19 October with HR which discussed both the Claimant's concerns about the calculation of her pay and what had happened on 8 October [146, 150-154]. Mr Amador emailed HR on 20 October [154] and noted "*It is really challenging for me to manage her expectations as she will always claim I said or promised something when I didn't. This situation is wearing me off and it is affecting the environment in the clinic with other team members*." On 26 October, a reply was sent to the Claimant by Alannah Dennis [Head of HR Resources, UK for Laser Clinic] about her how her holiday entitlement was calculated [157].

24. The Claimant continued to raise her concerns about the calculation of her pay with Mr Amador [[167] - 30 November]. Mr Amador indicated he would investigate matters [168].

25. On 2 March, the Claimant returned to work after time off sick. She says she met Mr Amador in the hallway, who told her that she needed to complete a Return to-Work form. Mr Amador says that in addition, he tried to raise with the Claimant issues that he had with her timekeeping [176-7]. The Claimant says that this was not a formal meeting and there was no discussion of any performance issues. Mr Amador subsequently sent a "letter of concern" to the Claimant on 3 March [176] "regarding your recent performance."

<u>The Grievance</u>

26. In February and March, the Claimant raised the issue of the calculation of her wages again with Mr Amador, in particular over discrepancies in recording and

over the way the system rounded up or down the hours worked, which she said was unfair. Mr Amador says this was looked into by him [217-219]. Further emails were exchanged between them in early March [182 onwards].

27. On 6 March [191], Mr Amador sent a further explanation to the Claimant about her hours and how they had been calculated and responded to various other concerns that she had raised; he accepted that she was owed for over 2 hours

    of unpaid time. He says a new rule and system was then implemented going forward regarding clocking in and out.

28. On 6 March 2023 [184], the Claimant emailed HR raising a grievance about her wages and 6 other matters. She also raised further questions with Mr Amador about the calculation of her pay [193-201]. Mr Amador replied on 8 March and attempted to clarify the calculations [217-8, 206-8]. The Claimant responded [195] to say that Mr Amador could "stop wasting my time now" as she was in talks with HR, and that "it was outrageous" that he could be "so dishonest" and at [196] said that she felt that the fact that he was manually altering start times, was "fraud and I want this investigated."

29. Allison Preece (an external HR Consultant working for HR Department, an external human resources adviser used by Laser Clinics UK head office) was asked to investigate the Claimant's grievance. Ms Preece says in her witness statement [# 6] that she arranged to speak with the Claimant on 7 March [183] and spoke to her on 10 March. She said she tried at this stage to resolve matters informally but, on 10 March, a formal grievance was submitted in writing by the Claimant [222, 181].

30. On 13 March, the Claimant was invited to attend a formal grievance meeting on15 March with Ms Preece, to discuss her grievance [222-232]. Ms Preece explained to the Claimant, the process she would adopt and set out the 7 matters which it was agreed should form the basis of the Claimant's grievance. As part of the grievance investigation, Ms Preece interviewed Mr Amador on 16 March [233-262].

31. The outcome of the grievance was sent to the Claimant on 22 March [263-265]. Ms Preece went through each of the 7 heads of complaint. She concluded that 3 of the Claimant's grievances should not be upheld and that the remaining four would be upheld in part. As far as the wages issue was concerned, Ms Preece found that Mr Amador had not communicated how he was making adjustments manually to reflect time in the clinic that he considered not to be working time; she said that these changes should have been communicated. It was also noted by Ms Preece that on some occasions the Claimant had not always been clocking in or out properly. Ms Preece noted that Mr Amador had said he would make payments for any discrepancies noted in the documentation. It was also confirmed that the Claimant should have been sent a written confirmation of her promotion to Team Leader. The Claimant's complaint that her holiday had not been accrued while she was absent following an injury was not upheld. Ms Preece found that holiday had continued to accrue during this period. A fourth point about a failure to pay commission and to agree changes in the commission

structure was partially upheld. It was agreed that communication about the impact of the changes could have been clearer. A fifth point on pay rises was not upheld. The Respondent say that pay rises were discretionary and the Claimant was paid more than other staff. A sixth point on the calculation of holiday pay was not upheld: the Respondent said it calculated holiday pay in accordance with government guidance. A seventh point about a backdated recording of a health and safety training date was partly upheld on the basis that it was confirmed it had been backdated, but there was no evidence as to when the training took place or that this was done fraudulently. Subsequently, Mr Amador sent out a note to all staff (seemingly incorrectly dated 19 April 2019 [268, 271-2]) clarifying the clocking in and clocking out arrangements. This explained that the system automatically rounded time up or down to the nearest 5 minutes based on a 2 ½ minute split.

32. On 22 March, the Claimant sent an email to Ms Preece, apparently in response to her outcome letter, saying her most important concerns had not been included and raised several other matters with Ms Preece, in particular about Mr Amador [266]. She accused Mr Amador of, among other things, "fraudulent and deceitful altering of my hours worked". It stated that "trust has been broken" between myself and my manager Frances Amador". Ms Preece replied to explain [#25] that as these matters had not been raised before, she could not deal with them; she said the Claimant could appeal, someone else could look at it and her further points could be considered in such an appeal.

33. On 23 March, Mr Amador emailed the Claimant about a specific item of timekeeping [270]. The Claimant in her oral evidence said that Mr Amador was making accusations and creating problems for her. She said, "he had a problem with me".

34. Other than the email of 22 March, there did not appear to be any documents in the Bundle formally recording the details of the Claimant's appeal against the grievance outcome. However, there is no dispute that she did appeal and on 27 March she emailed to ask about the next steps [273]. The Respondent says it made several attempts to invite the Claimant to attend a meeting to discuss her appeal [295-7]. Jennie Britten (an external HR consultant at HR Department) emailed to say the appeal had been received and asked for availability for a meeting. A meeting was initially arranged for 31 March, but this was postponed because of problems with the Claimant's representative. A further meeting was arranged for 4 April, but this too was postponed because of issues with the Claimant's representation. Thereafter, the Claimant was on leave until 22 April [302-303]. The Claimant says that throughout this period of leave, Mr Amador was continually emailing her, trying to set up a meeting.

35. The appeal was eventually heard on paper by Nicola Evans (an external Consultant working for HR Department) after an exchange of emails with the Claimant [308-314] in which Ms Evans asked her to comment on the various matters that she was appealing about. There was no physical hearing regarding the appeal. On 1 June, the grievance was rejected by Ms Evans [314].

<u>The dismissal process.</u>

36. At the same time as discussions were taking place about the hearing of the Claimant's grievance appeal, Mr Amador was attempting to set in motion a meeting with the Claimant to discuss her employment with the Respondent.

37. Mr Amador says that during the discussion with the Claimant on 2 March after the Claimant's return from sick leave, he also discussed some issues that he had with her timekeeping [176-7]. The Claimant says that this was not a formal meeting and there was no discussion of performance issues. Mr Amador wrote a note to HR on 3 March, which referred to "a meeting with [the Claimant] yesterday. He said "*she said she knew what I was going to talk about as she was aware I had spoken with other members of the team for the same reason. She quickly apologised and admitted she needs to get better and be at work on time. In the same conversation, she raised concerns about discrepancies in her worked hours versus paid hours. I asked her to give me more details of the discrepancies and she will send them via email. As this is not the first time speaking with Alex about timekeeping, I want to issue a letter of concern and document this conversation*."

38. Ms Preece in her witness statement [#4] said that on 3rd March, Mr Amador asked for advice from HR Department on how to deal with a member of staff with poor timekeeping [177]. She said she advised him to have a meeting, to explain the issues and send a letter of concern. She then drafted a letter of concern for Mr Amador. She said everything seemed to unravel after the meeting on 2 March, which led to the Claimant submitting her grievance.

39. On 3 March, the letter of concern was sent to the Claimant by Mr Amador [176]. He wrote "*regarding your recent performance. As discussed in the meeting I have concerns about your timekeeping, over the last two months you have arrived for work late on several occasions. This is an issue that I have previously raised with you.*" This referred to the "meeting" on 2 March at which it was said these matters had been discussed. It referred to the need for improvement and to monitoring. The letter specifically said it was not part of the disciplinary process.

40. The Claimant replied on 4 March [180-182] "*Below is not exactly what you explained to me. I have concerns in yourself which I have raised with yourself however you continue to do*. "She referred to a need to "*resolve the inaccuracies in my hours being changed*". She wrote "*Shame you need to once again make this personal and not professional.*" She set out what she said was a "*list of my concerns which I've raised numerous times however you still choose NOT to resolve*". She ended the email by saying "*Your broken promises of what we initially had conversations about is disappointing that you are a dishonest person*." Mr Amador replied to say, "*I will log this with HR and get back to you as soon as I hear back from them"*. The Claimant replied to say "[*answers I need urgently regarding my PAY deductions] needs to be rectified before I attend my next working shift. An urgent meeting needs to be arranged to address my concerns on pay especially before I return back to work on Tuesday the 7th of March 2023*."

41. On 4 April [299], Alannah Dennis [Head of HR for the Laser Clinics group] emailed various people, including Mr Amador, to see if the Claimant could do a

meeting over the next couple of days: “If she is not available or responsive, we will proceed with terminating her contract”. (Ms Dennis was not available as a witness at the tribunal hearing). On 5 April [295] Remy Morland [HR consultant with HR Department] in an email to various people, copied to Alannah Dennis, pointed out that there was a risk of an unfair dismissal claim because of the close proximity of the Claimant’s 2-year anniversary date. Ms Dennis replied to say, “We have discussed the risks with Francis, and he is happy to proceed”.

42. On 6 April, there was a discussion between Mr Amador and HR on the basis that the Claimant did not at that point in time have two years’ service [291], and so there was no obligation to carry out a disciplinary process. On 6 April, Mr Amador was sent a script to use for a dismissal meeting [290-292]. This referred to the Claimant “not engaging” with the appeal process, as well as concerns about her “conduct at work”. Mr Amador was advised that this was a risky route to take as the Claimant might be able to bring an unfair dismissal claim.

43. On 6 and 7 April, Mr Amador emailed the Claimant to try and arrange a meeting with her on 7 April [297]. On 11 April [294] Remy Morland, in an email to Alannah Dennis, said that she had spoken with Mr Amador about arranging a meeting with the Claimant “on Friday, but that is her day off”; “he said he had invited her to a meeting, but she had not attended”. “Francis has confirmed in his email that he would like to proceed with dismissal”. “As previously mentioned, as her two year anniversary is tomorrow it is a very risky option to take. However, if you would like to continue with dismissal then we can draft a letter to send to Francis for Alessandra confirming that she was invited into a meeting, did not attend and a decision was made in her absence”.

44. On 20 April, [301] Mr Amador emailed the Claimant and invited her to attend meeting on Saturday 22 April via video conference “to discuss your employment with the Clinic”. The Claimant replied on 21 April, [306] asking Mr Amador to confirm what the meeting is about. She says if the meeting relates to the grievance appeal, she is dealing with Jennie Britten in HR and is waiting for an answer from her. She asks for an explanation about the possibility of ending her employment and asks what the grounds are for any potential dismissal. Mr Amador replied [306] to say it is not about the grievance, that he will chair the meeting and the purpose is to “discuss your employment with LCUK Richmond and your decision not to engage with the appeal process”. The Claimant replied [305-6] to say there is a “miscommunication’ around the appeal and that she is being “falsely accused” of not engaging in the appeal process. She says she would like someone from HR to be present as well as a witness for herself. On 21 April, Mr Amador cancelled the meeting and said the Claimant would not be expected to attend work until further notice but will be paid [305].

45. The appeal of the Claimant’s grievance was dealt with in mid-May and on 1 June, Ms Evans wrote to the Claimant rejecting her appeal [315-6].

46. On 6 June, Alannah Dennis held a meeting with the Claimant to discuss “her employment with the Respondent” [355]. The “script” of this meeting (although the Claimant questioned this, there were no other notes made available by the Respondent), says, “Following the grievance process that has been carried out

in the last few months in relation to issues with the Clinic Director, we have determined that the relationship is such that it is not possible for you to continue to work together due to a complete breakdown in trust and confidence in the working relationship between you and the Clinic Director". "I regret to inform you that Laser Clinics is proposing to terminate your employment with us". The Claimant was given the opportunity to comment on what had been said. She said she loved her job and would "love to repair" what had happened. She said she hadn't done anything wrong. Ms Dennis said she would consider the Claimant's responses and would arrange a further meeting with her to discuss her decision [356].

47. On 7 or 8 June 2023 (the "script" refers to "our meeting yesterday"), Alannah Dennis held a short video call with the Claimant when she informed her that "we have made a decision to end your employment with Laser Clinics – Richmond. This means that your employment with us will end today" [350]. The Claimant was told that she would be sent written confirmation of the outcome of the meeting and would not be expected to work her notice but would be paid in lieu of this.

48. On 9 June, Ms Dennis emailed the Claimant [341] attaching "your meeting outcome letter". There is an incomplete letter dated 9 June 2023, addressed to the Claimant, which states "*further to the meeting on 6 June regarding the complete breakdown in trust and confidence in the working relationship between you and the Clinic Director*", advising her that a decision has now been made "to terminate your employment". It also said the Claimant would be given two weeks' notice, which she was told she was not required to work out, and her last day of employment was stated to be 8 June 2023 [318].

49. On 19th June, the Claimant appealed against her dismissal [318-9]. Although this was a day out of time, her appeal was accepted. The appeal was heard by Ms Preedy, (an external HR Consultant working for HR Department), who invited the Claimant to an appeal meeting on 26 June [321,322-327]. Ms Preedy also had available to her the scripts for the meetings between the Claimant and Ms Dennis on 6 and 8 June [355, 350]. She also spoke with Ms Dennis on 4 July [# 13, 342]. The decision to dismiss the Claimant was upheld by Ms Preedy and the Claimant was informed of the decision in writing on 7 July [348, 343-4, 3489]. Ms Preedy also had an exchange, separate to the appeal, with the Claimant about her hours and holiday [338-9].

The unfair dismissal claims.

Law

50. Other than as specified below, neither party referred me directly to any relevant law or cases. Although the relevant statutory provisions are reasonably well known, as the Claimant was in person and unrepresented, I think it is appropriate to set them out here in some detail. The summary below is my own and is included so that parties know and understand the principles that I have applied in reaching my decision.

51. As far as the unfair dismissal aspects of the case are concerned, the material statutory provisions are set out in s 98 ERA. This is included in Part X of ERA, which is entitled "UNFAIR DISMISSAL". Chapter 1 of Part X is entitled "RIGHT NOT TO BE UNFAIRLY DISMISSED". According to s 98(1), in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) (which includes at (c) "relates to the conduct of the employee) or *some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*. (my emphasis added).

52. The onus is on the employer to show that the dismissal is for one of the five permitted reasons. If the employer cannot show that the dismissal was for one of these permitted reasons, the dismissal will be unfair. Where the reason for the dismissal falls within one of the five permitted reasons, the tribunal will then go on to decide whether the employer acted reasonably in all the circumstances (s 98(4)) in dismissing this employee for this reason.

53. It was said by Cairns LJ in *Abernethy V Mott Hay & Anderson* [1974] lRLR 213, at 215, that: "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be a set of beliefs held by him, which cause him to dismiss the employee." That formulation by Cairns LJ was approved by the House of Lords in *Devis v Atkins* [1977] ICR 662. It is not for the employment tribunal to consider the substance of the employer's reasons at the s 98(1)(b) stage (provided they are more than "whimsical or capricious" [*Harper v National Coal Board* [1998] IRLR 260]). It is important not to conflate the questions of whether there was a potentially fair reason for dismissal with the question as to whether it was a fair dismissal in the circumstances. They are two separate stages of the process. As Griffiths LJ observed in *Kent County Council v Gilham* [1985] ICR 233, if on the face of it the employer's reason could justify the dismissal, then it passes as a reason and the enquiry moves on to s 98(4) and the question of reasonableness.

54. "Some other substantial reason" ("SOSR") is not limited by the other four reasons. The employer may show any substantial reason outside the four as the reason for the dismissal of an employee holding the position held, but the onus proof is on the employer to show that it is a substantial reason that could justify the dismissal. Provided the reason is not 'whimsical, unworthy or trivial', it will suffice. In *Scott and Co v Richardson* (UKEAT/0074/04), the EAT held that what the employer had to demonstrate to the tribunal was that it reasonably believed in the reason it advanced.

55. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) (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 it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case. The burden of proof in establishing the reasonableness of the dismissal is neutral and

the test is an objective one - *Boys and Girls Welfare Society v Macdonald* [1996] IRLR 129.

56. Case law also makes clear that "a decision to dismiss must be within the band of reasonable responses which a reasonable employer might have adopted" (see eg *Iceland Frozen Foods v Jones)*. Tribunals should not, when considering these matters, look at what they would have done in the circumstances but should judge, on the basis of the range of reasonable responses test, what the employer actually did. The appropriate test is whether the dismissal of the Claimant lay within "the range of conduct that a reasonable employer could have adopted".

57. I raised the case of *Perkin v St George's Healthcare NHS Trust* [2005] EWCA Civ 1174 with Ms Nicholls. In that case, the Trust decided to summarily dismiss Mr Perkin on the basis that due to his conduct and behaviour he could no longer fulfil his role as Finance Director. They further commented that in any event considering the personal attacks he had made during the disciplinary hearing they did not see how he could ever work again with the Chief Executive and others. Mr Perkin commenced proceedings against the Trust for unfair dismissal. The decision of the Employment Tribunal and Employment Appeal Tribunal, which was upheld by the Court of Appeal, was that there was a fair reason for the dismissal; and that while personality alone cannot be ground for a dismissal, if the employee's personality exhibits itself in such a way that it results in a breakdown of confidence in the employee and this actually or potentially damages the running of the employer's business then, if made out by the employer, it may form the basis of a potentially fair reason for dismissal. There was some discussion in the case as to whether the dismissal there was on the ground of conduct or whether it was for some other substantial reason. Lord Justice Wall considered this case fell more into the SOSR ground than conduct. The original tribunal had assessed the fairness of the decision to dismiss with reference to the three-stage test in *British Home Stores v. Burchell* [1978] IRLR 379 (namely that the employer must have genuinely believed the employee was guilty of the misconduct (relevant to reason), his belief must have been formed on reasonable grounds and there must have been a reasonable investigation). *Burchell* is usually considered to be relevant only to conduct related dismissals. However, the Court of Appeal were of the view that the "range of reasonable responses" test had a more general application, including when dismissing an employee for some other substantial reason such as a breakdown in trust and confidence. A tribunal will have to determine in such a case whether the employer had reasonable grounds following a reasonable investigation for deciding that trust and confidence has been damaged.

58. In *Leach v Office of Communications* [2012] EWCA Civ 959, Mr Justice Underhill had stated that the EAT did not find the terminology of 'trust and confidence' particularly helpful. He observed 'a growing trend among parties to employment litigation to regard the invocation of "loss of trust and confidence" as an automatic solvent of obligations', which he said it was not. The Court of Appeal in that case noted that the duty of trust and confidence was an obligation "at the heart of the employment relationship and was not a convenient label to stick on any situation in which the employer feels let down by an employee or which the employer can use as a valid reason for dismissal whenever a conduct reason is unavailable or inappropriate".

59. As referred to me by Ms Nicholls, an example of a case where the employer relied inappropriately on the 'loss of trust and confidence' mantra is *Handshake Ltd v Summers EAT 0216/12,* where the EAT held that an employment tribunal was entitled to find on the facts that a disagreement about salary and bonus did not result in a breakdown of trust and confidence so as to amount to SOSR. Ms Nicholls said that on the facts this case was a long way from the *Handshake* case. Here, she said, both parties considered that the relationship had broken down. As cited by the IDS Employment Law Volume on Unfair Dismissal, in *Handshake*, "S was employed in a small company in the senior management team, which consisted of three people. There was disagreement between the parties as to S's entitlement to part of the share capital of H. Attempts were made to resolve this but without success. Eventually, S's solicitors wrote to H asserting that their client was 'losing all trust and confidence in respect of his employment'. H invited S to a meeting at which H stated that it believed that the relationship had 'completely broken down' and become unworkable. S was subsequently dismissed. The tribunal concluded that the real reason for the dismissal in the mind of the decision-maker was not a loss of trust and confidence but a power struggle over the terms of S's contract, bonus and shares. It found that if S had signed up to new terms, then he would probably not have been dismissed. On appeal, the EAT upheld the tribunal's decision, observing that it could not be right that an employee, even a senior one, who opens up a debate leading to a dispute over a term of his or her employment was by that alone acting in breach of the duty to maintain trust and confidence. It acknowledged that the manner in which such a dispute is conducted could amount to a breach of trust and confidence. However, in *Handshake*, the tribunal did not find anything repudiatory in the way in which the debate was conducted to indicate that trust and confidence had evaporated. Although the relationship was said to be souring, on the evidence, life was in fact going on much as before: the parties were able to continue their work and were simply disputing how much money S was entitled to".

60. As far as any compensatory award is concerned, s 123(1) provides that the compensatory award shall be 'such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal'. Under this subsection, a tribunal can effectively reduce the compensatory award (but not the basic award) to reflect general considerations of fairness. The cases where tribunals may decide that it is just and equitable to reduce compensation under this head fall into two areas, one of which includes.

    - cases where the dismissal has been rendered unfair solely because of procedural failings in the dismissal procedure, but the tribunal is satisfied that the employee could nevertheless have been fairly dismissed at a later date or if the employer had followed a proper procedure.

61. The latter type of reduction is commonly known as a 'Polkey deduction' after a case in which the House of Lords confirmed that such a reduction was possible — *Polkey v AE Dayton Services Ltd 1988* ICR 142*.* This case decided that while an employer should not be able to argue in a procedurally unfair dismissal, that

it would have made 'no difference' to the outcome if a fair procedure had been followed, such as to render the dismissal fair, the 'no difference rule' should live on as regards compensation: the question of whether the employee ultimately suffered any injustice — i.e. whether the procedural irregularities really made any difference — was to be taken into account when assessing compensation. In *Polkey*, which was a redundancy case, there was no prior warning or consultation, which rendered the dismissal unfair. Even before *Polkey*, an unfairly dismissed employee's compensation was sometimes limited to the period between dismissal and the time the employment would have been fairly terminated in any case, for example where they would have in any event have been made redundant. When applying the *Polkey* principle, a tribunal should consider not only how long a fair procedure might have taken but also whether there was a real chance that the Claimant might have remained in employment if a fair procedure had been followed.

62. Tribunals will be expected to consider making a *Polkey* reduction whenever there is evidence to support the view that the employee might still have been dismissed if the employer had acted fairly. In reaching its conclusion, the tribunal needs to consider both whether the employer could have dismissed fairly and whether it would have done so. In *Thornett v Scope 2007 ICR 236,* the Court of Appeal held that a tribunal's task when assessing compensation for future loss of earnings will almost inevitably involve a consideration of uncertainties. Any assessment of future loss is by way of prediction and therefore involves a speculative element. A tribunal's statutory duty may involve making such predictions and tribunals cannot be expected, or even allowed, to opt out of that duty merely because their task is a difficult one and may involve speculation. Subsequent cases such as *Software 2000 Ltd v Andrews* [2007] ICR 825*,* have held that if the employer contends that the employee would or might have ceased to have been employed in any event had a fair procedure been adopted, the tribunal must have regard to all relevant evidence. However, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable 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. Ultimately, the burden of proving that an employee would have been dismissed in any event, lies on the employer.

63. In any case where the employer has dismissed for a substantively fair reason but has failed to follow a fair procedure, the compensatory award (but not the basic award) may be reduced — potentially to nil — so long as it can be shown that a fair procedure would have resulted in a dismissal anyway. The logic for a nil award (or to express it differently, a 100 per cent reduction) is that any procedural failure that served to render the dismissal unfair made absolutely no difference: the outcome would have been the same even if a fair procedure had been adopted.

64. A further assessment that a tribunal may have to carry out in an unfair dismissal case, is whether to make a reduction to any award on the basis that an employee has 'caused or contributed' to his or her dismissal. The basis for making *Polkey* reductions under s.123(1) and reductions on account of employees' contributory

conduct under s123(6) are different. The evidence that may be relevant to whether or not an employee has 'caused or contributed' to his or her dismissal may not be the same as that relevant to assessing what is 'just and equitable' to award.

65. In some cases, a tribunal may have good grounds for making both types of reduction. For example, it might find that there was a 50 per cent chance that the employee would have been dismissed even if a fair procedure had been followed and also that the employee was 20 per cent to blame for the dismissal.

in the first place. In *Rao v Civil Aviation Authority* [1994] ICR 495*,* the Court of Appeal rejected the contention that the making of both deductions would amount to a double penalty for the employee. The Court held that the proper approach in these circumstances is first to assess the loss sustained by the employee in accordance with s 123(1), which will include the percentage deduction to reflect the chance that he or she would have been dismissed in any event, and then to make the deduction for contributory fault. In deciding the extent of the employee's contributory conduct and the amount by which it would be just and equitable to reduce the award for that reason under s 123(6), the Court made it clear that the tribunal should bear in mind that there has already been a deduction under s.123(1): a tribunal should 'stand back' and looked at the matter as a whole in order to avoid any double counting and ensure that the final result was overall just and equitable.

66. The provisions for the reduction of both the basic and compensatory awards on the grounds of contributory conduct by an employee are contained in s 122(2) and s 123 (6). This ground for making a reduction is commonly referred to as 'contributory conduct' or 'contributory fault'. The statutory language used in the two sections differs. Section 122(2) allows 'any conduct of the complainant before the dismissal' to be taken into account when assessing the basic award. This contrasts with the position under s.123(6) regarding the compensatory award, which states that "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding", so here if the tribunal finds the conduct in question caused or contributed to the employee's dismissal, it *must* reduce compensation. The EAT in *Optikinetics Ltd v Whooley* [1999] ICR 984*,* held that the less restrictive language in s.122(2) gives tribunals a wider discretion on whether or not to reduce the basic award on the ground of any kind of conduct on the employee's part that occurred prior to the dismissal and that this discretion allowed a tribunal to choose, in an appropriate case, to make no reduction at all to that award.

67. In *Nelson v BBC (No.2)* [1980] ICR 110*,* the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct under s 123(6):
    - the conduct must be culpable or blameworthy.
    - the conduct must have actually caused or contributed to the dismissal; and

- it must be just and equitable to reduce the award by the proportion specified.

68. Only the blameworthy conduct of the employee is relevant when considering whether compensation should be reduced under s.123(6), not that of the employer. The EAT in *Sanha v Facilicom Cleaning Services Ltd (*EAT 0250/18) stressed that the words 'culpable' and 'blameworthy' are synonyms, not alternatives: *culpable* just means 'deserving of blame'. In determining whether particular conduct is culpable or blameworthy, the tribunal must focus on what the employee did or failed to do, not on the employer's assessment of how wrongful the employee's conduct was (*Steen v ASP Packaging Ltd* 2014 ICR 56*).* The Court of Appeal said that it could also include conduct that was 'perverse or foolish', 'bloody-minded' or merely 'unreasonable in all the circumstances. Whether the conduct is unreasonable will depend on the facts. The most typical forms of blameworthy conduct are 'misconduct' in the conventional sense — e.g. disloyalty, dishonesty, taking a holiday without permission or acting in competition with the employer. But s123(6) can also cover wider forms of conduct where, for example, the employee manages to aggravate a situation or precipitate the dismissal.

Discussion and Conclusion – unfair dismissal

69. <u>What was the reason or principal reason for dismissal</u> <u>and was it a potentially fair reason</u> <u>under 98(2)?</u> The Respondent has to establish the facts which show the reason or principal reason for the dismissal. Provided the employer can do so, section 98(4) then kicks in. The reason is the set of facts known to the Respondent or the set of beliefs held by it that caused it to dismiss. The Respondent says that the reason for dismissal of the Claimant here was some other substantial reason, namely a breakdown of mutual trust and confidence, which is a potentially fair reason under s 98(2). The Claimant suggests that the real reason for dismissal was either that she was being dismissed for misconduct because of her time keeping (which is also a potentially fair reason under s 98(2)) or that it was because she had brought her grievance (which would not be a potentially fair reason under s 98(2)). On the evidence, there was I thought, a further potential underlying reason for dismissal, being considered by the Respondent, namely that the Claimant had not co-operated with the appeal process:
    a. On 5 April, Lara Chioccarello a Human Resources Coordinator at the HR Department, emailed Jennie Britten and others to say "Please draft a script for Francis to dismiss her based on the fact that we have arranged her appeal meeting twice and then she hasn't been willing to carry on with the appeal meeting on the various options provided to her while she has been signed off from work on paid leave."
    b. On 6 April, Mr Amador was sent a possible "script" to use for a dismissal meeting [290-292], (which was on the basis that the Claimant did not have two years' service) which included the following:

> Whilst we have done all we can to support you, you have chosen not to engage with the appeal process and therefore have no option but to bring an end to our employment relationship.

c. Mr Amador [306] replied to a question from the Claimant as to what the meeting he wishes to have is about, to say the purpose is to "discuss your employment with LCUK Richmond *and your decision not to engage with the appeal process*" (my emphasis).

70. However, as far as this possible "reason" for dismissal is concerned, it appeared to me that it did not advance to be a matter that the Respondent considered, because after the Claimant replied [305-6] to say there is a "miscommunication' around the appeal and that she is being "falsely accused" of not engaging in the appeal process, Mr Amador cancelled the meeting [305] and this subject was not mentioned again. In the event, I do not therefore find that this was the reason or principal reason for the Claimant's dismissal**.**

71. On the evidence, in my assessment, the fact that the Claimant had raised grievance was undoubtedly part of the background reason for her dismissal**.** It was not of itself however, in my judgment the principal reason for her dismissal. In my judgment, the fact of the grievance, and the language and nature of some of the accusations contained within it – especially the matters raised on 22 March that made personal accusations against Mr Amador – provide context for and serve as evidence of the breakdown of the relationship of trust and confidence between the Claimant and Mr Amador that the Respondent relied upon. The dismissal was not in my judgment predicated on the bringing of the grievance, although there was evidence that this was the "tipping point" for Mr Amador in his relationship with the Claimant. In the "script" of the 6 June meeting held by Alannah Dennis with the Claimant [355], it was stated: "Following the grievance process that has been carried out in the last few months in relation to issues with the Clinic Director, we have determined that the relationship is such that it is not possible for you to continue to work together due to a complete breakdown in trust and confidence in the working relationship between you and the Clinic Director".

72. I considered whether the reason or principal reason for dismissal could be said to be misconduct in relation to timekeeping as suggested by the Claimant. As I was reminded by Ms Nicholls' reference to *Ezsias v North Glamorgan NHS Trust* [2011] IRLR 550, the EAT has pointed out that tribunals must be alert to employers using 'some other substantial reason' as a pretext for dismissal when conduct is the real concern. The EAT emphasised in that case that courts must be aware that reliance by employers on 'trust and confidence' carries a danger of omitting the procedural safeguards that would apply to a conduct dismissal.

73. In my judgment, on the facts here, while there were clearly issues being raised by Mr Amador about the Claimant's time keeping, and this remained an ongoing matter of concern for him, I do not believe, on the evidence, that this was the reason or principal reason for the Claimant's dismissal**.** On the facts, while a letter of concern was sent to the Claimant about timekeeping, there was no

evidence this was taken any further and the letter said it did not form part of any disciplinary procedure.

74. Some the language used by the Respondent in places does suggest that there were extant matters of concern that might be said to be matters of conduct: for example, accusations that the Claimant:

    a. verbally insulted Mr Amador on a number of occasions, including in Augustand October 2022 and March 2023, including calling him dishonest.
    b. refused to engage in conversations with him,;
    c. that her conduct was “unprofessional and unacceptable”;

75. Ultimately, however, these matters, in my judgment, were matters the Respondent saw and regarded as working relationship issues and not as conduct issues. There can be a fine line between something that is treated as a matter of misconduct and something that is regarded as a breakdown of trust, and an employer may be able in some circumstances, quite appropriately, to go down route when considering a dismissal.

76. The Claimant herself clearly regarded the relationship as having broken down, although she hoped it could be “repaired”.

77. Overall, I was satisfied that the Respondent was not simply using the rubric of ‘some other substantial reason’ here as a pretext to conceal to avoid a conduct reason for Ms Colli’s dismissal and did genuinely see it in terms of a breakdown of the relationship of trust and confidence, and as such I find that that was the principal reason for dismissal, taking account of in particular:

    i. The Claimant at [195] said to Mr Amador that he could “stop wasting my time now” as she was in talks with HR, and that “it was outrageous” that he could be “so dishonest”. ii. On 22 March [266], the Claimant sent an email to Ms Preece, raising a number of other matters beyond her initial grievance which accused Mr Amador of, among other things, “fraudulent and deceitful altering of my hours worked”. She stated that “trust has been broken” between myself and my manager Francos Amador”;
    iii. In response to a question in cross-examination about Mr Amador raising further concern about timekeeping in his email of 23 March [270], the Claimant in her oral evidence said that “Mr Amador was making accusations and creating problems for her”. She said, “he had a problem with me”;
    iv. At the 6 June 2023 meeting held by Alannah Dennis with the Claimant[355], the “script” states: “Following the grievance process that has been carried out in the last few months in relation to issues with the Clinic Director, we have determined that the relationship is such that it is not possible for you to continue to work together due to a complete breakdown in trust and confidence in the working relationship between you and the Clinic Director”;
    v. The partly drafted email dated 9 June 2023, addressed to the Claimant, refers to “further to the meeting on 6 June regarding the complete

breakdown in trust and confidence in the working relationship between you and the Clinic Director";

vi. Ms Preedy in her letter of 7 July regarding the outcome of the appeal hearing [149] noted that "Yes, you believe the breakdown in trust was a result of the Clinic Owner's actions" (although she found that there was nothing to suggest this was the case).

78. There is a logistical issue here, in that the decision to dismiss was ultimately taken by Ms Dennis, who worked for head office HR and not the Respondent, rather than Mr Amador. Given that it was his relationship with the Claimant that was in issue, had he made the decision to dismiss it would no. doubt have been criticised as inappropriate. There is some suggestion that Ms Dennis, as decision maker, simply stepped into Mr Amador's shoes. In so far as this might raise any issues, I regard this as a procedure and process issue rather than undermining the fact of or genuineness of the belief that was held by the Respondent.

79. I am satisfied therefore that while on the facts there were several potential reasons for Ms Colli's dismissal by the Respondent, the principal reason for her dismissal in this case was the culmination of all these matters, which had caused from Mr Amador's perspective, a breakdown of mutual trust and confidence. This amounts in my judgment to some other substantial reason (and not misconduct), and is a potentially fair reason within s 98(2)).

80. I was also satisfied that this was a genuinely held belief on the part of Mr Amador, for the reasons already set out earlier and that (despite the lack of any proper investigation – see below) the Respondent had reasonable grounds for the belief that caused it to dismiss for this reason. It was clear that Mr Amador found Ms Colli's attitude, tone and language towards him in regard to the matters she was raising, unacceptable and disrespectful of his authority as manager and owner of the clinic, to the extent that it was seriously adversely affecting his ability to manage her.

81. That being the case, I moved on to assess whether dismissal for that SOS Reason was fair and reasonable.

82. <u>Was the dismissal fair and reasonable.</u> In making this assessment I must take account of section 98(4), which states that:

> Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair. (having regard to the reason shown by the employer) -

a. (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 it as a sufficient reason for dismissing the employee, and

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

83. I also reminded myself that case law also makes clear that the test to be applied is whether a decision to dismiss falls "within the band of reasonable responses

which a reasonable employer might have adopted" (*Iceland Frozen Foods v Jones)*. This means that I must not, when considering these matters, look at what I might have done in the circumstances but should judge, on the basis of the range of reasonable responses test, what the Respondent actually did. The appropriate test is whether the dismissal of the Claimant lay within "the range of conduct that a reasonable employer could have adopted". This "range of reasonable responses" test applies to both the substantive reason and the procedure.

84. Breaking s 98(4) down further, it involves looking at two separate matters of substance and process.

85. Was the reason given, substantively, sufficient to justify dismissal? In my judgment, it was. There were no real alternatives to dismissal once the Respondent determined there was a breakdown in trust and confidence. There were no alternative roles pr working arrangements that could have been considered. The clinic was a small establishment, where everyone worked in close proximity. From Mr Amador's perspective, Ms. Colli's attitude to his decisions and instructions was adversely affecting his ability to manage the business. Dismissal in this case was, in my judgment, clearly within the range of reasonable responses.

86. Was there procedural unfairness. I then considered, as suggested by the Court of Appeal in *Perkins*, (which Ms Nicholls accepted could possibly be included as part of the reasonableness assessment), steps two and three of the approach adopted in *Burchell,* namely:

> i. Were those beliefs formed after a reasonable/sufficient investigation? ii. Was a fair procedure followed?

87. Were those beliefs formed after a reasonable/sufficient investigation? In my judgment, there was no reasonable or sufficient investigation here. The decision to dismiss was made it appears by Ms Dennis. She was not available to give evidence and the Claimant could not therefore question her, but there was no evidence in the Bundle that suggested that she conducted any sort of sufficient investigation, beyond speaking – informally - to and taking instructions from Mr Amadaor. While there was a short discussion with the Claimant on 6 June [355], there was no proper interview with the Claimant to ascertain the facts or put any specific matter that the Respondent was relying on to her. There is nothing to suggest any other members of staff were spoken to.

88. Was a fair procedure followed? In my judgment, a fair procedure was not followed here. Ms Colli described it as a "shambles". There were several flaws in the process that was followed which in my judgment were such, when reviewed collectively, to take the process that was adopted here, outside what might be a fair procedure, including:

    i. Mr Amador himself made a number of attempts to set up a meeting with the Claimant, on short notice, before and during her annual leave to discuss the possible termination of her employment.

ii. the Claimant was not told by Mr Amador in any of his emails between6-8 April [293-4] what the potential reason for dismissal was or what matters were being relied upon for the possible termination of her employment.
iii. On 20 April, [301] Mr Amador emailed the Claimant to invite her to attend a meeting (on Saturday 22 April via video conference) "to discuss your employment with the Clinic".
iv. As stated above, there was little investigation by Ms Dennis – or any ofher HR colleagues prior to the 6 June meeting with the Claimant.
v. it appears that Ms Dennis was actually acting on Mr Amador's instructions /wishes that the Claimant be dismissed.
vi. no adequate or proper notice appears to have been sent to the Claimant prior to the 6 June hearing with Ms Dennis.
vii. the meeting on 6 June was at best cursory; there was not a full hearing of all the evidence at the hearing.
viii. Ms Colli did not know what the detailed allegations against her to what were as the underlying causes might be of the breakdown in trust and confidence and she had no opportunity to bring witnesses and documentation to support her case and to contest the matters that the Respondent was relying upon.

ix. Ms Dennis worked in the Human Resources and was not an operational manager.
x. there is considerable evidence to suggest that Mr Amador had already decided that he wanted the Claimant to be dismissed and so this was a predetermined matter:

1. On 4 April [299], Ms Dennis emailed various people, including Mr Amador, and said "If [the claimant] is not available or responsive, we will proceed with terminating her contract. 2. On 5 April [295] Remy Morland [HR consultant with HR Department] in an email to various people, copied to Alannah Dennis pointed out that there was a risk of an unfair dismissal claim because of the "close proximity" of the Claimant's 2-year anniversary date. Ms Dennis replied to say, "We have discussed the risks with Francis and he is happy to proceed".

3. On 6 April 2023, [293] Mr Amador emailed the Claimant, (while she was on leave) and stated, "The purpose of this meeting is to discuss "and maybe bring an end to our employment relationship".
4. On 6 April, Mr Amador was sent a possible "script" to use for a dismissal meeting [290-292], (which was on the basis that the Claimant did not have two years' service) which included "we therefore have no option but to bring an end to our employment relationship" and "We are therefore, following a procedure, where we are confirming bringing your employment to an end and pay you in lieu of notice due to the reasons outlined previously."
5. On 7 April, Mr Amador wrote in an email to Remy Morland, copied to Alannah Dennis [200], "We would like to proceed with the termination of the contract. We have done all we can to support this case, but Alex has chosen to stop

communicating leaving us with no other option but to terminate her contract with immediate effect";

6. On 11 April, Remy Morand wrote [294] that "Francis has confirmed in his email that he would like to proceed with dismissal".

89. The Court of Appeal in *Taylor v OCS Group Ltd* held that where a first hearing is defective, an appeal can cure the defect if the appeal is comprehensive. According to Smith LJ, 'what matters is not whether the internal appeal was technically a rehearing or a review but whether the disciplinary process as a whole was fair'. In this case, while there was an appeal, and there was some limited opportunity given to Ms Colli to make her case as to why her dismissal was unfair, this was not sufficient in my judgment to cure the many inadequacies of the initial process that have been identified above.

90. In the circumstance, I therefore find that this was a procedurally unfair dismissal.

91. Did Ms Colli by her blameworthy conduct cause or contribute to her dismissal? Ms Nicholls submitted that if the tribunal found there to be procedural unfairness, then the Respondent would argue, applying the *Polkey* doctrine, that (i) even if a fair procedure had been followed, the Claimant would have been dismissed in any event, it just might have been a short time later. She said further, that (ii) in any event, the Claimant's language, attitude and tone was such as to amount to blameworthy contributory conduct, which should result in at least a 50% reduction in any compensation that was awarded.

92. I have summarised above the background law and principles that relate to "*Polkey*" and contributory fault. Where arguments on this front are made, a tribunal should first consider what the outcome would have been had a fair procedure been followed. A similar exercise should then be carried out in relation to the reduction for contributory fault, and confirmation given that the tribunal had 'stood back' and looked at the matter as a whole to avoid any double counting and ensure that the final result was overall just and equitable. If a different percentage was to apply to the reductions in the compensatory and basic awards, the basis for that conclusion should also be set out.

93. Considering first then, the *Polkey* argument advanced by Ms Nicholls, my view is that even if a fair and proper investigation and procedure had been followed here, the Claimant would still most likely have been dismissed on the basis of a

breakdown of trust and confidence in the circumstances I have already outlined above. There was in my assessment only a fairly remote possibility that a full, fair and proper investigation and a full hearing, could (i) have cleared up all the underlying issues on pay and the timesheet calculations in a manner that was acceptable to the Claimant , such that the parties might have come to a mutual agreement on the way in which the Claimant's pay was calculated and whether she was in owed anything as a result, such that the main sources of the breakdown were removed; I say this based on the number of times the Respondent endeavoured to investigate and respond to the Claimant's complaints when they were raised and offer conclusions, which were not

accepted by the Claimant; and further and in any event (ii) reach a position whereby the Claimant understood that her tone and attitude towards Mr Amador needed to change and Mr Amador was prepared to give things one more go.

94. Given my finding that there was only a fairly remote possibility that dismissal would not have ensued after a fair procedure, in my judgment, by analogy with the time the Respondent took to conduct the grievance (two weeks), the appeal on that (just over a month, although the Claimant was on leave for 2 weeks; but there was no face to face interview) and the appeal against dismissal (3 weeks), a full, fair and thorough and proper investigation and dismissal process would have taken around 4 weeks to have been concluded. However, I do not believe it would be just and equitable to restrict any compensatory loss to just that period of time. As I have said there was in my assessment a fairly remote chance that at the end of such a process, which would have involved full and frank discussions between all parties, dismissal would not have occurred. On that basis, applying *Polkey* I find that any award of compensation should be made for (i) a period 4 weeks - during which the fair process would have been followed; and thereafter (ii) there should be an 80% reduction to reflect the slight chance that dismissal might not have resulted. On that basis, I make a 20 per cent award for the period following on from the 4-week period, on that ground that I believe there is only at best a one in five chance that a fair procedure would have made any difference to the outcome.

95. Moving on to consider the second aspect of the reduction in compensation challenge raised by Ms Nicholls, namely contributory fault. The Claimant had in my judgment genuinely held reservations about the way her pay was calculated. It was reasonable for her and she was entitled in my judgment to raise her concerns and to express her reservations. It was found by Ms Preece following the Claimant's grievance that Mr Amador had not communicated how he was making adjustments manually to reflect time in the clinic that he considered not to be working time; she said that these changes should have been communicated. The Contract of Employment made it clear that variations to it should be made in writing and that the changes should not take place until after such information was communicated. Raising these issues did not amount in my assessment, to unreasonable or blameworthy conduct by the Claimant. However, however frustrated the Claimant may have felt, it was not reasonable in my assessment for her to adopt the increasingly aggressive and provocative language and attitude that she did towards Mr Amador in regard to these matters, in particular calling him dishonest and threatening not to return to work until the issue was resolved. I believe that Mr Amador genuinely did his best to explain the issues to the Claimant and come to a resolution. The manner and tone which the Claimant adopted was not simply unhelpful, it was in my assessment unreasonably aggressive and disrespectful towards her line manager. Clearly, in my judgment, that conduct operated on Mr Amador's mind.

96. I therefore find that the Claimant's conduct was blameworthy in this regard and that she contributed to her dismissal by the manner, tone and attitude she adopted towards Mr Amador. To that extent, I find that the Claimant was 50 per cent to blame for her dismissal. However, standing back and looking at the matter as a whole in order to avoid any double counting and so as to ensure that

the final result is overall just and equitable, I do not believe that it would be fair and equitable to make any further reduction to the compensatory award beyond the *Polkey* reductions I have already indicated.

97. Therefore, looked at overall, in my judgment it is just and equitable that any compensatory award is limited to 100 per cent for 4 weeks and thereafter should be reduced by 80%.

98. Although I have made some criticism of the Claimant's attitude, I do not believe that it would be just and equitable to reduce the amount of her basic award to any extent.

99. Remedy calculations. Neither party addressed me at the hearing on the specific financial details of the actual awards that might be made to the Claimant. That will need to be resolved at a further hearing on remedy if the parties cannot agree a figure. If the parties cannot agree a figure, **the Claiman**t should apply for a 3hour remedy hearing before me, so that this - together with any other of the outstanding financial matters - can be dealt with. If there is to be a remedy hearing, the Claimant should, 28 day before such a further hearing, send a detailed schedule of loss to the Respondent, copied to the Tribunal, setting out what she says is entitled to by way of basic and compensatory award; the Respondent should send a counter-schedule, copied to the Tribunal, not later than 14 days before such a hearing.

Holiday pay

100. From the evidence, I find that the new method of calculating holiday pay was intended to start from 1 January 2022. The letter at [105] is dated 10 April 2022 and states "*We will move to calculate all colleagues' holiday entitlement in hours, rather than days, to reflect their current working pattern. Your annual holiday entitlement will be calculated by multiplying the number of actual hours of work you perform each week by 5.6. This is inclusive of your entitlement to the 8 normal bank holidays in England. As you know, the Company does not operate a standard five-day working week. This method of calculating holiday reflects the flexible working patterns of our colleagues.*" The letter also stated that the one-day holiday for a birthday would be retained. "*The plan is to move to this new system with effect from 1 April 2022 and we will write to you again to confirm once it is in place. The above calculation of your leave will be applied from the start of this holiday year – 1 January 2022*". Clause 31 of the Claimant's Contract of Employment is headed "Variation". It stated that "The employer reserves the right to make reasonable changes to any of your terms and conditions of employment. Changes to your terms and conditions of employment will be notified to you in writing *before the date upon which they come into force*." I do not believe this clause therefore allows for the backdating of changes. It seems to me that at best, the Respondent was entitled to change the way in which the Claimant's holiday pay was calculated for the remainder of the holiday year going forward from 10 April 2022.

101. There also seems to have some uncertainty on Mr Amador's part as to when the Respondent's holiday year ran from, but again the Contract of Employment and this letter make clear that that it runs from 1 January.

102. The new method adopted by the Respondent for calculating holiday pay – moving to calculate holiday entitlement in hours, rather than days, to reflect their current working patterns seems to me to be a fair and appropriate system, and one which follows UK government recommendations. The Respondent says that the calculation was based on 5.6 weeks holiday and was based on a calculation of 0.0177 for each hour worked. This method appears to reflect the overall 5.6 weeks holiday entitlement fully and fairly.

103. This was also confirmed by Ms Preece in her outcome of grievance letter,[264] "*In relation to the sixth point of grievance, lack of clarity and visibility on holiday accrual you explained that you didn't believe that Francis was calculating your holiday entitlement correctly. Having reviewed the evidence, including confirming the details of the calculation and carrying it out using guidance on holiday accrual published on the Gov.uk website I can confirm that the figures you have been provided with are correct. Based on working an average 35 hours per week over 4 days, your annual holiday entitlement (including Bank Holidays) is 196.05 hours. Consequently, this point of grievance is not upheld.* "

104. Calculations. Neither party addressed me on the specific details of the holiday pay claim in terms of amounts that were said to be owed or the basis on which they were now said to be owed. I am not able to make any findings as to whether and if so, what, sums are owed. The above findings may help the parties in terms of the parameters to be applied. If the Claimant still believes that the Respondent owes money in respect of her holiday pay, she should within 21 days of this Judgment being received, send a detailed schedule of loss to the Respondent setting out what she says is still outstanding; the Respondent should then send a counter-schedule. If the parties cannot then agree a figure, the Claimant should apply for a 3-hour remedy hearing before me, so that this, together with any other of the outstanding financial matters, can be dealt with.

Wages claim

105. This complaint appears to arise from the logging in and logging out time recording system and the way in which that time was used to calculate start and end times for the purposes of calculating pay. The Respondent used a time recording system called IWS. Neither party addressed me on the specific details of the wages claim in terms of amounts said to be owed or the basis on which they were said to be owed. So far as relevant, I repeat paragraph 100 above in terms of the introduction by the Respondent of the new method of recording time keeping.

106. It was not until 19 April 2023 [wrongly dated 2019 [268, 271-2]] following on from the Claimant's grievance outcome, that Mr Amador sent out a note to all staff clarifying the clocking in and clocking out arrangements. This explained that the system automatically rounded time up or down to the nearest 5 minutes

based on a 2 ½ minute split. Mr Amador also accepted in his evidence that he manually adjusted time recordings depending on the rostered time a member of staff was due to start. Mr Amador said he observed staff would clock in at reception, then go and get changed and would often make themselves a coffee before actually starting work. He said he did not expect staff to start earlier than they needed to and did not see why he should pay for this time. He said there was some flexibility as often staff would not actually see a client in the first or last hour. The Claimant says that the system was unreliable, needed to be switched on at the reception desk and often didn't work, so there was a manual signing in book as well [159-160]. All of these matters listed above, it seemed to me lacked transparency and would have created uncertainties for staff about how their wages were being calculated. It is for an employer, in my judgment, to make sure that wages and the way they are calculated is clear and transparent to its staff.

107. The Claimant gave an example of the timesheet for 27 June to Sunday 3 July [488]. She says on Wednesday 29, she is shown as clocking out at 19.29 but was only paid until 19.15. However, on that same time sheet, the actual start time is shown as 10.03 and the pay start is shown as 09.45. Another example is contained in the time sheet at [512] 20-26 February 2023. This shows that the Claimant was rostered to start at 9.45 and finish at 19.15 for 3 days and from 09.45 to 17.15 on the Sunday. On Tuesday 21 February, the actual start is recorded as 09.57 and the end time as 19.24. The "pay starts" column recorded a start time of 09.55 and the "pay end" column recorded a time of 19.15. Giving a total time of 09.26. On the Wednesday 22 February, the start time is recorded as 09.49 and the end time as 19.09. The "pay starts" is recorded as 09.50 and the "pay end" column recorded a time of 19.10. Even if the Claimant got in early and clocked in early, the earliest "pay start" time would be 09.45, when the rostered time started [see e.g. [505] 21November -27 November 2022, and [510] 6 -12 February 2023]. However, a 9.51 start would result in a 9.50 pay start time [510]. Depending on the minutes, time could be rounded up or down to the nearest 5 minutes. As far as end times are concerned, there are instances where an end time after the rostered end time, is accounted for in the "pay end" column – see for example [494, 500].

108. From my observations, it appears that there was a degree of what might be called "swings and roundabouts" in the IWS system in terms of the automatic rounding up or down. From an examination of the time sheets, it appears that until around the end of August 2022, the actual start and end times did not impact on the "pay start" and "pay end" columns – these pretty consistently (although there is the odd exception – [494]) reflected whatever actual times were recorded and show the pay start and end times reflecting the rostered time. From around the middle/end of August 2022, there does appear to be much more movement in the pay start and end times. This seems to coincide with when the Claimant at started to notice "discrepancies" in her pay.

109. Mr Amador started to investigate after the Claimant complained about how her wages were calculated, to check the records and reconcile the information. In the process of doing this, he says the issues with the Claimant's start times came to light. It seemed to me that the timekeeping issues were a natural consequence that arose from the Claimant raising questions about how her

wages were calculated. I did not accept the Claimant's criticisms of Mr Amador's actions in this context.

110. Mr Amador made several attempts after the Claimant complained about how her wages were calculated, to check the records and reconcile the information. There were also numerous attempts by Mr Amador in person and HR, both from Head Office and externally, to investigate the Claimant's concerns about her hours and wages. When discrepancies were located, reimbursement was actioned. For example, the 9 hours that the Claimant said were missing for May 2023 were reimbursed in her June pay slip [388-532]. The Respondent explained that 9 hours were not also missing for June, because the Claimant's work pattern by then was 5:3, and so she was not due an extra day by the time of her dismissal. The Claimant was also credited with backpay of 2.66 hours after Mr Amador had conducted a further review of her start and finish times [529].

111. Calculations. Neither party addressed me on the specific details of this claim in terms of amounts that were said to be owed or the basis on which they were now said to be owed. I am not able to make any findings as to whether and if so, what, sums are owed. The above comments may help the parties in terms of the parameters to be applied. If the Claimant still believes that the Respondent owes money in respect of her wages, she should, within 21 days of this Judgment being delivered, send a detailed schedule of loss to the Respondent setting out what she says is still outstanding on a month-by-month basis; the Respondent should then send a counter-schedule. If the parties cannot then agree a figure, the Claimant should apply for a 3-hour remedy hearing before me, so that this, together with any other of the outstanding financial matters, can be dealt with.

G Phillips
25 June 2024

Sent to the parties on: 26th
June 2024

For the Tribunal Office:

g P Wing