EMPLOYMENT TRIBUNALS

Claimant: Ms G Shilton`

Respondent: Clydesdale Bank plc

HELD AT: Liverpool **ON:** 2, 3, 4, 5 & 6 June 2025

BEFORE: Employment Judge Johnson

REPRESENTATION:

Claimant: Mr J Wilson (claimant's brother in law)
Respondent: Mr Crammond (counsel)

JUDGMENT having been sent to the parties on 30 June 2025 and written reasons having been requested in accordance with Rule 60(4) of the Employment Tribunals Procedure Rules 2024, the following reasons are provided:

REASONS

Introduction

1. These proceedings arose from the claimant's employment with the respondent as payments manager from 20 February 2017 until her dismissal on 28 September 2021. The respondent dismissed the claimant for gross misconduct relating to allegations that while working remotely at her holiday home in Lanzarote during the Covid pandemic, she shared client data with a third party following a meeting held by Teams on 20 January 2021.

2. The claimant denied the allegations arguing that they were made by a colleague with whom she had a poor relationship, and the decision may also

have been motivated by her sickness absence and her team not generating enough income.

3. She believed she was unfairly dismissed and presented a claim form to the Tribunal on 23 January 2022 following a period of early conciliation. The respondent provided a response and grounds of resistance resisting the claim on 16 March 2022 and arguing that the claimant was fairly dismissed by reason of her conduct and that a fair and reasonable process took place.

4. There was considerable case management in these proceedings and the original final hearings had been postponed. However, on 23 February 2024, at a preliminary hearing case management, Judge Ainscough allowed the claimant permission to amend her claim to include a disability discrimination complaint relating to the condition of shingles/post herpetic neuralgia. This was subsequently withdrawn, and the complaint remains solely one of unfair dismissal. Judge Aspinall however, listed the case for this 5 day hearing and made detailed case management orders relating to disclosure and the preparation and exchange of witness evidence.

Issues

5. The issues which the Tribunal has been asked to consider were finalised page 39 of the bundle. The disability discrimination complaint was no longer required and was removed from those issues which I needed to consider. The remaining complaint was unfair dismissal arising from alleged misconduct.

6. Remedy was left until the conclusion of the liability part of the hearing with questions relating to ***Polkey*** being left until remedy because of issues relating to post dismissal sickness absence.

Evidence used

7. As the only complaint being considered was unfair dismissal and there was no dispute that the claimant had been dismissed by the respondent, the respondent had to demonstrate that the decision to dismiss was a fair one. Consequently, they gave evidence first, (subject to one claimant witness who had caring responsibilities and could only attend on Day 1).

8. The claimant called the following witnesses:

   a) The claimant (6th witness – Day 3)
   b) Elizabeth Wilson (1st witness – she had caring responsibilities)
   c) John Wilson (7th witness– Day 3)

9. The respondent called the following witnesses:

   a) Fiona Cameron (2nd witness - Day 1)
   b) Sharon Richards (3rd witness – Day 2)
   c) Fiona Montgomery (4th witness – Day 2)
   d) Martin McKenzie-Smith (5th witness – Day 2)

Note: Derek Treanor deceased, draft statement but unsigned and remained a privileged document and not used during the final hearing – limited evidential value.

10. Documents were in a bundle more than 400 pages including proceedings, orders, policies and procedures disciplinary process and other documents, plus a further document added at the beginning of the final hearing produced by the respondent and which I labelled as 'R1'. This document was Ms Cameron's example phone banking app display concerning the transfer of money to the claimant.

11. The claimant's witness statements were all relatively short in length and did not cover all of the issues in this case in detail. Some allowances were made for her as a person without a professional legal representative. This included the use of the background information provided within the claim form, but this too was relatively brief.

12. The claimant witnesses did on occasion during their evidence refer to documents which had not been provided as part of disclosure and no application was made at the beginning of the case to add any of these documents.

Findings of fact

13. The parties should note that the Tribunal's findings of fact do not seek to deal with every point where the parties disagree, simply what is relevant to the issues which the Tribunal is being asked to consider. If the discussion of an incident or point is not referred to within these findings, it does not mean that it has not been considered by the Tribunal, simply that it is not relevant to the issues and the findings that we are required to make.

14. In terms of the findings that we make, the Tribunal has reached its decision on what it considers to be on balance of probabilities the most likely way/reason in which an incident arose.

15. The respondent is a wholly owned by Virgin Money UK plc and a bank authorised and regulated by the FCA. The FCA employs Conduct Rules which apply to all staff involved with financial services. This includes Individual Conduct Rules. All staff were given training in these rules.

16. The respondent has a disciplinary policy which includes breaches of the FCA Individual Conduct Rules as illustrations of gross misconduct which could result in an employee being dismissed. This includes sharing confidential information with third parties.

17. The claimant was employed as a payment manager from 20 February 2017 until her dismissal on 28 September 2021, which was by reason of conduct. The allegations relating to the conduct arose from 20 January 2021 and because of the claimant's subsequent sickness absence, the progress of the disciplinary process was delayed until September 2021.

The allegation leading to the disciplinary investigation

18. On 20 January 2021, a Teams call took place with Miss Shilton, Mrs Cameron, and Angela Ellis at 9am. There was another team member who was absent on long term sick leave and not present. I accept that it was a routine call/meeting and one which would happen every or every other day. This meeting finished at around 9:45am. I accept that Mrs Cameron had a laptop and smart phone. She had no extension screen available, so used her laptop to access the MI Tool system and her smart phone to access Teams which was installed as an app on her phone. On balance, I accepted that none of the participants had their cameras switched on and there was nothing untoward about that.

19. When the call finished, Mrs Cameron was struggling to leave the call and despite pressing the button icon on her app to end the call, there was a delay before the call ended. I accept that at that moment, Miss Shilton had also remained on the call and for the period which I understood to be seconds and certainly not as much as a minute, Mrs Cameron could hear the claimant speaking before the call ended.

20. She described hearing Mrs Shilton's voice and another female voice speaking. She heard references to the companies that the Team had just discussed and became alarmed that client data was being shared with a third party without permission. A handwritten note was produced immediately after the call ended. Although I did not hear evidence which precisely confirmed when she became aware of the identity behind the voice she could hear, on balance having considered the available evidence, I accepted that Mrs Cameron thought the voice was familiar, distinctive from that of Miss Shilton and that at some stage during the day, concluded it was that of Elisabeth Wilson who was Mrs Shilton's sister. She was able to discern this voice because she had worked for Clydesdale at the same time as Mrs Wilson who occupied a role that was like that held by Sharon Richards. She had since moved to a competitor of Clydesdale.

21. I accept that Mrs Cameron remained anxious that day about what she had heard and tried several times to call Mrs Shilton but could not reach her until 1:20pm. She referred to the difficulties that she had logging off from Teams at the earlier meeting and in the note that she produced, Mrs Cameron told Miss Shilton that she could hear a voice in the background, that Mrs Shilton was discussing business that had arisen in the team meeting and that it made for uncomfortable listening. No reference was recorded as having been made either Mrs Cameron or Miss Shilton, but Mrs Shilton said *"oh, I called my other sister this morning".* When challenged about sharing information, Mrs Shilton denied that she would ever do such a thing. (p137).

22. A few hours later, at around 5pm, Mrs Cameron then called Sharon Richards who was their line manager and explained her concerns. She was told to write down and submit what had been overheard by her. This typed version of her original handwritten note, described the following conversation, (p136):

'…Other voice in the background said – "that Cornish bakery one, it looks like XXXX has spoken to them in 20XX, what as the name of the other one?"

'Gill voice "Homestyle".'

In her note of the call, Mrs Cameron confirmed that the call was then disconnected and that XXXX was a man's name that she could not discern and 20XX was a year which she could not hear in its entirety. She recorded that what she heard gave the impression that the unidentified person was checking their company database against the company names. She also recorded that during the Teams call, Miss Shilton had also asked Mrs Cameron to repeat the name of 'Fitz Alan Partners' and wondered whether this was the name she could not quite hear.

Mrs Cameron's note also recorded her impression of the call being that the other person was checking the company data base for the Cornish Bakery and would also do for Homestyle, (p136).

Mrs Cameron also provided a note of the later conversation with Miss Shilton at 1:20pm and emailed them to Mrs Richards the next morning at 11:34 on 21 January 2021, (pp135 and 137).

23. At this point, no reference was made within the typed documents to the other person being Liz Wilson or anyone else in what were broadly contemporaneous notes. However, I accept that by the time that the typed versions were typed up, Mrs Cameron believed that Liz Wilson was the other voice. Mrs Cameron confirmed having a telephone conversation with the other team member Angela Ellis during the evening of 21 January 2021. Ms Ellis, who is a friend of Mrs Wilson referred to her having difficulties with a flight, but in her interview with Ms Richards on 22 January 2022, she admitted to having the impression that Mrs Wilson was in Lanzarote at this time, (pp146-8).

24. Mrs Cameron gave credible and reliable evidence of those events where she was involved. I considered whether there was any bias or prejudice on her part, but if she did say which had been alleged, that she was jealous of Miss Shilton for working remotely from Lanzerote, it simply a figure of speech and represents what many people say when a colleague is on leave and going away and where they feel envious. Consequently, I concluded that there was insufficient evidence to demonstrate any malice on her part and that she sought to undermine Miss Shilton.

25. On 21 January 2021 there was a meeting by Teams with Miss Shilton at 4pm and conducted by Sharon Richards, (pp138-141). Miss Shilton was informed that it related to conduct and when asked, she confirmed that she was aware of the responsibilities when working from home to use an environment that is private and confidential when discussing bank business and that customer and colleague conversations should be kept private and confidential. Miss Shilton said that it was just her using the bungalow in Lanzarote and she confirmed that the Teams conversation took place at 9am as described above. She said that nobody was present in the room with her at the time and

confirmed her later conversation with Mrs Cameron at 1:20pm. She speculated that *"I was doing a list like I always do, and I probably said the names out loud. I was talking to my sister about my mum".* It was put to her by Mrs Richards that this was seconds after Ms Ellis had finished the call and that no phone had rang in the meantime. Miss Shilton said it was her sister Jackie (i.e. not Liz) and that she had been on hold during the Teams call. This questioning continued for a while with Miss Shilton repeating what she had said, and Mrs Richards reminded her of the Code of Conduct and the need for trust, before informing her that she would break for 15 to 20 minutes to consider her thoughts.

26. Mrs Richards called back at 16:45 and when Miss Shilton answered that Jackie had called her towards the end of the Teams call, she asked her that a copy of the phone history be provided for that time. Mrs Richards observed that there were two version of events to consider, and the records would help her consideration. In the meantime, she would reflect overnight. Miss Shilton confirmed that she would provide the records, (p141).

27. The next meeting took place on 22 January 2021 at 10.30 by Teams. Mrs Richards asked if Miss Shilton had anything further to share with her regarding the matter and she confirmed she had nothing to share. Moreover, she said that she would not providing the phone records as, *"I won't be sending my sister's personal data, don't think it's right."* Mrs Richards explained that it would help if it was provided and even when she suggested some sort of redaction to any disclosed document to limit the information to what was necessary, Miss Shilton stated *"it's my sister's personal details so I'm not sharing."* She confirmed that her sister called near the end of the Teams call on 20 January 2021 and that she was put on hold and did not speak or pause the meeting to tell her sister that she would be put on hold. When she said that as soon as the Teams called finished, she took her sister off hold, she was asked if she started talking business. Miss Shilton appeared to say that she is saying a list out loud at the same time and that she had a tendency to talk to herself. This did seem an odd thing to say and I concluded it was contradictory because what Miss Shilton appeared to be saying that she took a call from her sister Jackie as soon as the Teams meeting finished and while doing so, started talking to herself reading out business details.

28. She described being baffled by Mrs Cameron's assertion that she could hear two voices talking about the business information which had been the subject of the Teams call. Given the limited witness evidence provided by Miss Shilton in this case, there appeared to be a lack of credibility in the explanation being advanced. The meeting concluded with Miss Shilton confirming that her sister Liz works as a Regional Manager – Global Payments and that Jackie does not work in financial services. She refused again to disclose the phone history with the numbers redacted. Mrs Richards warned that there may be a misconduct and it may be appropriate to proceed to a disciplinary hearing, but she would first need to consider the case further, (pp142-5).

29. On 25 January 2021 a further meeting took place between Mrs Richards and Miss Shilton and once again she confirmed that she had nothing further to add to the investigation. She did, however, seek to argue that Mrs Cameron had workmen at her house while working from home and a colleague had a daughter nearby when a call was taking place. Mrs Richards noted that these concerns had not been raised when they had taken place, the implication being that they were simply being used to provide some equivalence to what Miss Shilton was being investigated for. Miss Shilton confirmed she would work in Lanzarote for a further week and then have two weeks leave before returning to the UK, (pp149-150).

30. A further call took place later that afternoon at 16:33pm and Mrs Richards repeated the allegation regarding the conversation with the third party discussing Clydesdale bank customer details. Mrs Richards repeated Miss Shilton's previous version of events which she confirmed was correct in reply. She continued to be resistant to disclosing the phone records. Miss Shilton denied that Liz Wilson was present and that they discussed Clydesdale customer data. Mrs Richards explained that this version appeared more plausible and that Miss Shilton's version of her sister being on hold, taking the call while talking to herself, did not make sense. She confirmed that the counter allegations regarding colleagues and people present during Teams meetings while working from home did not 'correlate' with the allegations against her. Consequently, Mrs Richards informed Miss Shilton that she had no option but to recommend this matter to a disciplinary hearing. Mrs Richards confirmed that Miss Shilton to take her leave and in the meantime the case would be referred to an independent manager, (pp151-3).

<u>The beginning of sickness absence and the appointment of a Disciplinary Manager</u>

31. On 28 January 2021, Miss Shilton submitted a fit note valid until 14 February 2021. The reason was herpes zoster, which was understood to be an attack of shingles, (p156). She remained of sick until her dismissal and continued to submit fit notes referring to shingles related illnesses for the remainder of her employment with the respondent.

32. In the meantime, Mr McKenzie-Smith as the HR manager being involved with the process, approached Fiona Montgomery to inform her that she might need to act as the disciplinary manager at a future disciplinary hearing. At that time, she was the Head of Contact Centres (she has since left Clydesdale's employment) and I accept that until the disciplinary hearing, she was unfamiliar with Miss Shilton.

<u>Long term sickness absence and the involvement of Occupational Health (OH)</u>

33. On 13 April 2021 the first OH report was produced from AXA Health, (pp167-9). Dr Mai Shubita the OHP examined Miss Shilton the day before and noted that she had been absent from work by reason of shingles since January 2021. I accept that Miss Shilton was aware of the OH referral and had not objected. In terms of her fitness to work, Dr Shubita concluded that based upon the evidence Miss Shilton had provided, *"…I believe a return to work is unlikely to be successful whilst she continues to be troubled by symptoms at*

the currently reported level." However, the opinion went on to say that *"…delaying the workplace investigation is likely to contribute to uncertainty about employment and therefore add to a potential mood disorder. In recognition of this, ACAS – recommends early and timely closure of workplace investigations…Therefore I consider that she is medically fit to participate in the investigation process."* Adjustments were suggested including the meeting taking place remotely and for breaks to be allowed as necessary.

34. Specific questions had been raised by Mr M-S in the referral and in relation to the question of how the disciplinary investigation might affect Miss Shilton's absence or health, Dr Shubita concluded that the while it could not be established with any certainty, *"the outstanding investigation is likely to be a contributory factor in the ongoing absence and a barrier to a return to work."* It was noted that shingles *"…can be a response to stressful circumstances and the fact that the rash developed shortly after she was notified of the investigation suggests that there is a link.* I considered that this OH report was illustrative of many circumstances where an employee becomes ill when an investigation takes place and continues to be ill, while the resolution of the process is the thing which would give clarity and certainty to the employee and thereby providing some relief to the ongoing symptoms. Nonetheless, the OH report confirmed that the disciplinary process can proceed with reasonable adjustments and Mr Mckenzie-Smith decided that the process could and should continue.

35. Consequently, Mrs Richards and Mr Mackenzie-Smith met with Miss Shilton at a wellbeing meeting on 21 April 2021, held by video. Miss Shilton explained that she continued to suffer from symptoms connected with shingles and that she was not worrying about the disciplinary investigation until she returned to work. When referred to the OH opinion and that it stated that she was fit to proceed with the investigation she said, *"I don't want to go through it at this point".* (pp172-3). Mr Mackenzie was happy to leave the next stage of the investigation until there was return to work and a future phased return to work was discussed as well as a new medication that might relieve the ongoing symptoms. Mr McKenzie-Smith was willing at this stage to allow Miss Shilton time for the new treatment to work and informed Mrs Montgomery that she should remain on standby as the disciplinary manager in the meantime.

36. On 27 July 2021 a second OH report was obtained following Miss Shilton's ongoing sickness absence and concerns from management that a return to work did not appear to be on the horizon. Miss Shilton was aware of the referral and attended the appointment with the OH Physician Rupert Lee. In terms of her mental health, she told Mr Lee that it was good and that she was happy that the disciplinary investigation would not resume until she returned from work, (187-9). He believed that although the shingles related rash had subsided, Miss Shilton was left with significant pain which affected her sleep. This was consistent with the diagnosis of Post Herpetic Neuralgia which her GP had begun to identify as the reason for her unfitness for work on the Med3 fit notes, provided since 1 June 2021, (p176).

37. He believed that although substantial in terms of its level of impairment on day-to-day activities, the ongoing condition could not be considered long term. However, Mr Lee concluded that Miss Shilton remained unfit for work and noted that the current fit note would not expire until; 29 July 2021. The minimum anticipated return to work date was given as 4 to 6 weeks *"…depending on her ongoing recovery from the Shingles."* No adjustments were identified other than that a phased return to work would eventually be appropriate.

38. In terms of specific questions raised by Mr Mckenzie-Smith, Mr Lee confirmed that Miss Shilton was *"…fit to attend procedural meetings in the workplace".* But he went on to say that, *"However…she tells me that she has been told that no such meeting will take place until she is back at work, which she appears content with".* In response to the question of adjustments *"…to progress attendance at meetings and a return?",* Mr Lee said as follows:

    "In relation to procedural meetings, should such a meeting need to take place while she has ongoing symptoms as described, it is likely to be beneficial for this to take place remotely and for regular breaks to be available to her during the meeting should she feel significant fatigue. Additionally, providing detailed information in advance regarding the meeting is likely to be helpful, as well as the option of having someone attending with her for support, should your policy in this area permit it."

    Accordingly, while Miss Shilton remained content that the disciplinary process would not resume until she returned to work, Mr Lee did confirm that the process could proceed with reasonable adjustments and providing a full explanation of what was happening next.

39. I did ask Mr McKenzie-Smith what his thoughts were about the decision to resume the disciplinary process while Miss Shilton remained absent from work. He discussed his concerns with Mrs Montgomery explaining that he was concerned about the disciplinary process being delayed indefinitely and she agreed that it would be appropriate to do so. On 30 July 2021, a fit note was received confirming a further month's absence from work and following the provision of the second OH report on 22 July 2021, a return to work in the near future remained uncertain, (p191).

40. On 18 August 2021 a letter was sent by Mrs Montgomery to Miss Shilton inviting her to a disciplinary meeting. The letter confirmed that the second OH opinion said she was fit to attend the disciplinary hearing and a meeting was proposed on 26 August 2021 by Teams. Full details of those attending were given and the purpose of the hearing was described as being *"…to determine whether disciplinary action should be taken against you in accordance with the Bank's disciplinary Procedure."* A copy of that procedure was p[provided with the letter, (pp193-5).

41. A summary was provided of the background regarding Mrs Richards' investigation into the alleged concerns raised and a copy of her investigation report was also included. The letter warned that the allegations could result in findings of gross misconduct which could result in disciplinary sanctions

including summary dismissal. Miss Shilton was advised that she had a right to be accompanied by a trade union representative or a work colleague.

42. On 19 August 2021, Miss Shilton objected to the hearing taking place. She expressed surprise as to what she believed was the short notice for the hearing, that he had previously told her that this would not resume until she returned to work and that she had raised a question regarding her fitness with Mr Lee (26 July 2021). She disputed that she was fit to attend a procedural meeting and seeking a n amendment to the second OH report, (p200).

43. Recognising that Miss Shilton was challenging the OH report, Mrs Montgomery wrote to her on 26 August 2021 and rearranged the proposed disciplinary hearing date to 2 September 2021 on the rationale that *"Should the opinion of AXA not change, I believe it is appropriate to rearrange the meeting",* (pp196-8). The letter effectively repeated the detailed contents provided in the original invitation letter.

44. Following receipt of the new invitation to the disciplinary hearing, she emailed Mr McKenzie-Smith and HR on 23 August 2021. In the second email, she said that until her GP says she is fit and well to attend a disciplinary hearing, she would not do so. Mr McKenzie-Smith on 31 August 2021 said he would see whether Mr Lee could speak with her and attempted to reassure her that the disciplinary hearing planned for 2/9/21 would *"…be at a pace suitable to your health with breaks being taken at any time required."* (p204). This was consistent with the advice given by Mr Lee at that stage.

45. Unfortunately, Miss Shilton emailed Mr McKenzie-Smith on 31 August 2021 to say Mr Lee informed Miss Shilton (presumably via AXA's administration), that he was too busy to see her and confirmed that she would not attending disciplinary hearing relisted for 2 September 2021, (p212).

The disciplinary hearing

46. The 2 September 2021 disciplinary hearing took place in Miss Shilton's absence and accordingly, it was adjourned until 28 September 2021, which would be after most recent fit note expires, (21 September 2021) and with the hope that Miss Shilton could then agree to participate, (p212). A further fit note was issued on 21 September 2021 confirming that Miss Shilton remained unfit until 10 October 2021, (p215). On 23 September 2021 Miss Shilton notified Clydesdale that he would not attend the disciplinary hearing until she returned to work, (p217). No letter was provided by Miss Shilton from her GP confirming that she was unfit to attend disciplinary meetings in the absence of a discussion taking place between her and Mr Lee and she confirmed in her evidence that she did not ask one to be produced.

47. The hearing reconvened on 28 September 2021 following an exchange of emails between Miss Shilton and Mr McKenzie-Smith where she relied upon her fit notes concerning her fitness to attend and that she would not attend until she fit and returned to work and she relied upon his earlier reassurance concerning this at the welfare meeting on 21 April 2021, (p233). Once again, Mr McKenzie-Smith referred to the adjustments that would be offered.

48. When I asked Mr McKenzie-Smith about the change of position from promising that the disciplinary would not resume until there was a return to work to proceeding to a disciplinary hearing while Miss Shilton was off sick, he explained he did make the initial promise but as the situation progressed he became aware of the prolonged absence and that a degree of anxiety would remain as long as the process remained outstanding. He concluded by saying that things changed. However, this initial reassurance was treated as a firm promise by Miss Shilton and something she would fall back upon as attempts were made to progress the case. As Mr Mckenzie-Smith explained in his evidence, by July 2021, more than 6 months had elapsed since the initial incident and there was a need to progress the case. The first OH report supported this, and it was not overruled by the second OH report.

49. On 1 October 2021 disciplinary hearing outcome letter was sent to Miss Shilton. It was Ms Montgomery's letter and drafted by her, although she had consulted with HR in relation to procedural matters. She began by expressing her sorrow at Miss Shilton not feeling able to attend, that she was aware that AXA's second OH report had not been changed and reminding her that adjustments would have been made had she done so, (pp220-2).

50. She began by confirming that Miss Shilton was summarily dismissed by reason of her gross misconduct and that her last day of service would be 28 September 2021. It is understood that she was unaware of this decision until she received the letter which could have been no earlier than 1 October 2021. Reference was made to the Code of Conduct and that *"the investigation concluded you had shared confidential information with a competitor via your sister. As the only person to have heard the comments made, I re-interviewed Fiona Cameron and found her to be a credible witness in this case."* She confirmed that she was satisfied that Mrs Cameron did not have any negative feelings towards Miss Shilton and that she simply fulfilled her duty to report Miss Shilton discussing details with a third party whom she identified as Mrs Wilson, (her sister).

51. Mrs Montgomery acknowledged that during the investigation Miss Shilton had asserted that she was alone during the Teams meeting on 20/1/21and that her other sister Jackie called her mobile during the call. However, her unwillingness to provide any proof of the inbound call persuaded Mrs Montgomery that this call did not happen at the time alleged. In the absence of any further evidence, she concluded there was a breach of policy and that the bond of trust between employer and employee had been broken. A right of appeal was notified and that the Bank had a duty to notify the FCA. I accept that this notification was not something that Mrs Montgomery would do as disciplinary manager.

<u>The appeal</u>

52. On 7 October 2021, Mrs Montgomery gave notice of her appeal in an email sent to Mr Mckenzie-Smith, Ms Richards and Ms Montgomery. Seven grounds were identified over two pages, challenging the length of the process, the failure to suspend, failure to follow ACAS guidance, that other members of

staff (Ms Cmeron) had workmen in their houses while working from home, inconsistency of treatment, the illegality of providing call details relating to her sister because of her lack of consent, (pp235-7). Of note Miss Shilton said that, *"At no time have I ever knowingly or with any malicious intent broken the banks code of conduct or knowingly or deliberately shared any confidential information accessible to me from my employer."* I did find this elaborate and somewhat guarded sentence slightly puzzling and was not persuaded by Mrs Shilton's argument that it simply reflected her style of writing. This was not supported by her general correspondence within the papers before me. Effectively I concluded it was not a simple denial of the conduct which led to the dismissal, but a qualified statement suggesting that if there was a breach, it was not done intentionally by Miss Shilton.

53. At this point, Mrs Montgomery and Mr McKenzie-Jones ceased to play an active role in the disciplinary process. However, the appointed appeals manager Derek Treanor (Chief Credit Officer – Group Risk), wrote to Miss Shilton inviting her to an appeal hearing on 1 November 2021. She was advised that it would take place remotely and contact details were provided. He confirmed that his role as Appeal Manager was to review the outcome of the original disciplinary meeting to determine: if the original outcome was reasonable; if a different sanction should be in place; or if no sanction should be in place. She was invited to submit any documents that she wished to rely upon by 28 October 2021, (pp247-8). She was asked to confirm attendance or if she could not attend explain why and that she had the right to be accompanied.

54. The appeal hearing took place on 1 November 2021 and in attendance were Miss Shilton, Mr Treanor and the HR notetaker Rosie Hay, (pp254-6). Miss Shilton was clearly recorded as being able to participate in her appeal and make her points to Mr Treanor. It was confirmed that her sister still refused for the phone records of the call on 20 January 2021 to be disclosed. The hearing was then adjourned so that Mr Treanor could review the appeal and deliver his decision later.

55. He heard from Mrs Richards at a further meeting on 3 November 2021 to discuss the disciplinary investigation who confirmed her belief in what Mrs Cameron had told her on 20 January 2021 and that she had worked with Mrs Wilson and whom she believed to be *"…quite a manipulative character".* (p257). He then spoke with Mrs Montgomery on 4 November 2021 and who said that Miss Shilton not accepting the second OH report, not providing evidence of her challenge despite being allowed time to do so and failing share the phone records were relevant to her character and that in terms of the allegations, she felt she did not act with integrity or due diligence and did not pay regard to the interests of customers meaning that dismissal was the only option.

56. Finally, he spoke with Mr McKenzie on 18 November 2021 and discussed the question of delay and the decision not to suspend. He explained that suspension was considered but decided not appropriate because any relevant information would have already been provided by Miss Shilton had she done so. moreover, she was absent on sick leave and there was an element of

trusting an unwell employee not to access their system, which would usually be revoked once sickness became long term. He was also concerned that suspension might not be considered a neutral act and might appear that the situation was being pre-judged.

57. On 23 November 2021 the appeal hearing reconvened, and Mr Treanor explained that he had reviewed the case and nothing new had been provided in terms of evidence. He noted that the phone records had not been provided. he was comfortable with the process and the dismissal was confirmed, (pp266-7). Mrs Shilton expressed her disappointment and confirmed that she would take the respondent to the 'ET', (understood to mean the Employment Tribunal). The decision was confirmed in a letter which was sent to Miss Shilton on 30 November 2021. Each of the points raised was addressed in detail and explained. He confirmed that suspension was deemed not appropriate, that delay took place because of her sickness absence until OH confirmed the hearing could proceed, that it was reasonable to proceed given the earlier adjournments and adjustments offered, that it was reasonable to conclude the conduct had taken place, that she had wilfully shared information and that this situation was not the same as working from home when tradesmen or children are present.

<u>The £150 payment from Cameron to Shilton</u>

58. On 13 October 2021, Miss Shilton informed Mr McKenzie-Smith that she had received £150.00 transferred from Mrs Cameron's bank account and raised the question: *"Is this guilt money?"* (p244). Mrs Richards replied in his absence (he was away on leave) on 14 October 2021and explained that the money had been sent inadvertently by Mrs Cameron when she transferred her mobile banking app from Clydesdale Bank to the replacement Virgin Money App. She explained that the monies had been sent in error as due to work collections, colleague accounts were saved on her app and realising her error, Mrs Cameron immediately contacted Santander (the recipient account) seeking its recovery. The bank suggested that it would be easier for Miss Shilton to simply repay Mrs Cameron directly.

59. Miss Shilton replied on 19 October 2021 and said she did not accept the *'excuse'* and asked further questions. Having heard the evidence of Mrs Cameron and the other witnesses regarding this, I was satisfied that Mrs Cameron had made a simple though unfortunate error and there was no malice or guilt associated with this action which was purely an accidental event. For the avoidance of doubt, I understood that the £150 has since been repaid to Mrs Cameron, (p242).

<u>Other evidence</u>

60. Mrs Elisabeth Wilson is a sister of Miss Shilton and did not play a role in the disciplinary process and did not provide any evidence to the investigation. Her statement was brief and while using a verbose denial that at no time on the morning of the 20 January 2021 was she invited or encouraged by Miss Shilton to participate covertly either remotely or in person in a Clydesdale Bank Teams video call that Miss Shilton was participating in, she did not deny

she was present when the call took place or immediately afterwards at 9.45am or that she was residing in a nearby bungalow in Lanzarote some 500 metres away. It was not until she was cross examined regarding her witness statement that she finally admitted that she was residing in Lanzarote around the time of the 20 January 2021. She described a routine which involved her visiting her sister at her bungalow at 8:00 AM each morning for breakfast, leaving at 9:00 AM to begin her own remote working and returning at 6:00 PM for dinner and to spend the evening with her. It was surprising that this information was not included in the witness statement that she provided. In any event none of this information was available to the respondent's managers during the disciplinary investigation even though Miss Shilton could have quite easily provided it as part of her rebuttal of the allegations. As such I concluded that this evidence had little credibility given the way in which it was presented to the tribunal.

61. Mr. Wilson the claimant's brother in law and her representative in this case also provided a witness statement which appeared to deal with matters which were not made available to the dismissing officer at the time of disciplinary hearing in September 2021. It dealt with the question of the quality of Wi-Fi installed at Miss Shilton's bungalow in Lanzarote and the environmental challenges encountered on that island due to weather conditions such as dust storms from the coast of Africa. Essentially, he was seeking to argue that any reliance placed upon recognition of voices during Teams calls should be treated with skepticism given that people would often sound very different to their actual voice when being met face to face. Again, this was evidence which was not available to the respondent during the disciplinary process. Moreover, was not persuasive in terms of what it was seeking to achieve. Ultimately this case involved a call to Mrs Cameron who was able to identify two different voices including the claimant Miss Shilton and it is extremely doubtful that her voice would change from one person to another in order that the impression will be given that she was having a conversation with someone else rather than talking to herself. I therefore concluded that this evidence was not relevant, nor of any assistance to my deliberations required when considering the issues of conduct and the decision of the dismissing manager as part of a disciplinary process.

Law

62. Under section 98(1) of the Employment Rights Act 1996, it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position he held. A reason relating to conduct is a potentially fair reason falling within section 98(2).

63. The reason for the dismissal is the set of facts or the beliefs held by the employee which caused the employer to dismiss the employee. In determining the reason for the dismissal, the Tribunal may only take account of those facts or beliefs that were known to the employer at the time of the dismissal.

64. Under section 98(4) of the Employment Rights Act 1996, where the employer has shown the reason for the dismissal and that it is a potentially fair reason, the determination of the question whether the dismissal was fair or unfair 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 must be determined in accordance with equity and substantial merits of the case.

65. When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in British Home Stores v Burchell 1980 ICR 303, the Tribunal must consider a threefold test:

    a. The employer must show that he believed the employee was guilty of misconduct;
    b. The Tribunal must be satisfied that he had in his mind reasonable grounds upon which to sustain that belief; and
    c. The Tribunal must be satisfied that at the stage at which the employer formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

66. The requirement for procedural fairness is an integral part of the fairness test under section 98(4) of the Employment Rights Act 1996. When determining the question of reasonableness, the Tribunal will have regard to the ACAS Code of Practice of 2015 on Disciplinary and Grievance Procedures. That Code sets out the basic requirements of fairness that will be applicable in most cases; it is intended to provide the standard of reasonable behaviour in most cases. Under section 207 of the Trade Union & Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal any Code of Practice issued by ACAS shall be admissible in evidence and any provision of the Code which appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

67. In Polkey v Dayton Services Ltd [1988] ICR 142 *('Polkey')*, it was stated that if an employer could reasonably have concluded that a proper procedure would be "utterly useless" or "futile", he might be acting reasonably in ignoring it.

68. In Sainsburys Supermarkets v Hitt [2003] IRLR 23 the Court of Appeal ruled that the relevant question is whether the investigation fell within the range of reasonable responses that a reasonable employer might have adopted. The Tribunal must not substitute its own decision as to the reasonableness of the action taken by the employer. The Tribunal's function is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted.

69. In respect of certain claims, such as unfair dismissal and breach of contract, Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 provides that where an employer or employee has unreasonably failed to comply with the Code of Practice, it may, if it considers it just and equitable in

all the circumstances to do so, increase or reduce compensation awards by up to 25% (this does not apply to any Basic Award for Unfair Dismissal).

70. The ***Polkey*** principle established by the House of Lords is that if a dismissal is found unfair by reason of procedural defects, then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact. This matter was to be considered only if the claimant was found to be unfairly dismissed. Following a discussion with representatives, I agreed that because Polkey would also involve consideration of post dismissal health issues which may have given rise to a long term sickness absence 'capability' dismissal, this issue should be dealt within the remedy part of the hearing, rather than in relation to the question of liability.

71. Section 122(2) of the Employment Rights Act 1996 provides that where the Tribunal finds that any conduct of a Claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, the Tribunal must reduce that amount accordingly.

72. Section 123(6) of the Employment Rights Act 1996 provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable.

73. The Tribunal must award compensation that is just and equitable. Even if the loss arising from the dismissal is substantial, the Tribunal can still award no compensation if it would be unjust or in equitable for the employee to receive it.

Discussion

74. The claimant was an employee with the respondent at all material times to which this case relates and until she dismissed summarily on 28 September 2021. She had been employed by the respondent since 20 February 2017 and thereby had more than 2 years continuous employment which meant that she was not disqualified by having insufficient service contrary to section 108 ERA.

75. She presented her claim on 23 January 2022 following a period of early conciliation from 3 December to 4 January 2022. Accordingly, the claim was in time.

76. The claimant was described as dismissed by the respondent following the decision of the dismissing manager Fiona Montgomery at a resumed hearing on 28 September 2021 (following an adjournment on 2 September 2021). However, the claimant did not attend this hearing and it appears that she was not informed of the dismissal decision until she received Mrs Montgomery's letter dated 1 October 2021. This means that even if the claimant was able to read the letter the same day, she did not know she was dismissed until 1 October 2021 at the earliest and this is the effective date of termination.

However, at this stage of my deliberation it was not significant because the claim had been presented in time by applying the earlier September date.

77. The respondent has asserted that the reason for the claimant's dismissal was one of conduct, which is a potentially fair reason in accordance with section 98(2)(b) ERA.

78. Mrs Montgomery believed the employee was guilty of misconduct and attributed it primarily to Mrs Cameron giving credible evidence about what she had heard and doing so in a way which clearly demonstrated that there was no negative or personal feelings towards her which might motivate her to behave in bad faith. The concern that was raised against Miss Shilton was considered consistent with her duty under the Company Policy. Mrs Montgomery noted that despite Miss Shilton asserting that her sister Jackie had called shortly before the Teams call ended on 20 January 2021, the failure to provide any evidence in support of that allegation despite having been asked to do so, left her preferring Mrs Cameron's evidence.

79. Because the allegations were accepted, Mrs Montgomery concluded that without any additional evidence being provided to rebut what was alleged, there was a breach of policy and the bond of trust between employer and employee. She explained in the dismissal letter that this amounted to misconduct because contrary to the Individual Conduct Rules, Miss Shilton had not acted with integrity (Rule 1), did not act with due skill, care and diligence (Rule 2) and she failed to pay due regard to the interests of customers (Rule 4). This also was sufficiently serious for an FCA referral to be made against her.

80. In considering the dismissal letter and Mrs Montgomery's subsequent comments made to the appeal hearing manager and in her witness evidence, I was satisfied that she had in her mind reasonable grounds upon which to sustain that belief. Based upon the evidence before her, she had credible allegations from Mrs Cameron who had no animus against Miss Shilton. Miss Shilton had been given ample opportunity to provide documentary evidence to support her rebuttal to these allegations which on the face of it did not appear to make sense. After all, she confirmed during several interviews with Mrs Richards that she placed her sister Jackie on hold without any word to her during a Teams meeting and then immediately began a call with her as soon as the meeting ended while talking to herself repeating client details at the same time. Even though Jackie was an unauthorised third party, Miss Shilton had been encouraged by Mrs Richards on several occasions to provide the necessary phone data in whatever form would be acceptable to Jackie and Miss Shilton but quite irrationally, this was refused. No statement was provided by Jackie explaining any difficulties and no evidence was provided to demonstrate Liz Wilson could not have been present at the time.

81. Despite arguments being made during the hearing that Mrs Richards did have a personal animus towards Miss Shilton, I concluded that this was far from the truth. Mrs Richards gave credible and reliable evidence which was supported by documents that the investigation was something she took no pleasure in and she was willing to adjourn meetings on several occasions over a number

of days to give Miss Shilton an opportunity to provide evidence to support her dispute of he allegations made. There was no evidence that she presented an investigation to Mrs Montgomery which was biased or unfair. It was reasonable for Mrs Montgomery to place reliance upon the evidence before her and Miss Shilton every opportunity to put forward her case.

82. For these reasons, it was quite reasonable for Mrs Montgomery to conclude that Miss Shilton was responsible for misconduct as described within the dismissal letter. Moreover, she had carried out as much investigation into the matter as was reasonable in the circumstances, even allowing additional time following the 2 September 2021, for Miss Shilton to provide any further evidence as necessary.

83. I have also considered the question of procedural fairness, which while alluded to in the internal appeal by Miss Shilton, did not form part of her grounds of complaint in her claim form nor was much evidence given within her witness statement.

84. I have considered the ACAS Code Practice, which was referred to by Mr Wilson during the hearing and included within the hearing bundle. In broad terms, I would say that the respondent adopted a fair process with the issues raised by Mrs Cameron to Mrs Richards being the subject of a meeting the day following the incident and with a number of meetings taking place on 21, 22 and 25 January 2021 where the allegations were discussed, and Miss Shilton was afforded every opportunity to put forward her case. She also spoke with Mrs Cameron and encouraged Miss Shilton to provide the necessary evidence to support her argument that her sister Jackie had called her during the Teams call. It was a reasonable request to make and the refusal by Miss Shilton was unreasonable and demonstrated a failure to cooperate with the disciplinary process.

85. Mrs Roberts informed Miss Shilton at the second meeting on 25 January 2021 that the case would proceed to a disciplinary hearing and that it related to the maters under investigation which could amount to misconduct. Mrs Montgomery was appointed to hear the disciplinary hearing separately and was not involved with the matter under investigation.

86. Mr McKenzie-Smith patiently managed the process, and any delays were caused by Miss Shilton's ongoing health issues and her employer's decision to give her time to return to work.

87. Suspension on full pay was a sanction available to the respondent, but the ACAS Code of Practice provides in paragraph 8 that when it comes to suspension with pay, if considered necessary, it should be as brief as possible, kept under review and the employee should be made clear that it should not be treated as disciplinary action. The implication is that suspension is measure which should only be imposed when necessary and for the shortest possible time as is reasonable, (p298). In this case, it might have been appropriate to impose a suspension given the nature of case under investigation and the use of client data. However, during the appeal and during this hearing, Mr McKenzie-Smith gave credible and reliable evidence

that it was not considered relevant and might be seen as prejudging the case. While suspension can be a neutral act and many employers would suspend in a case like this, a decision not to suspend was not a question of unreasonable behaviour on the part of management and given Miss Shilton's ongoing sickness absence, an issue which had little impact on the conduct of this disciplinary process.

88. Once the investigation process had concluded, a period of time elapsed before the disciplinary hearing could take place. Mrs Montgomery was appointed an early stage and clearly was ready to proceed as soon as Miss Shilton was well enough to attend.

89. Miss Shilton placed great reliance upon the welfare meeting in April 2021 when Mr McKenzie-Smith promised that the disciplinary process would not continue until she returned to work. It was reasonable that if a sickness absence progressed and the ACAS Code of Practice acknowledges that a hearing proceeding in an employee's absence where they are *'persistently unable to attend a disciplinary meeting without good cause'. (Paragraph 25).*

90. In this case, two OH reports were obtained by the respondent, and which confirmed that Miss Shilton could participate in formal meetings with adjustments being made. While she challenged the second report, she did not provide any evidence of being refused a follow up with OH Physician Mr Lee in late August 2021 nor did she obtain a letter from her GP giving an opinion that the meeting could not go ahead. She had submitted fit notes continuously, but these were considered in the OH reports and which confirmed she was not fit for work but could undertake formal meetings.

91. Moreover, there was medical evidence in the first OH report that delay in the process would not help Miss Shilton's condition improve and the simple fact was that by late July 2021, more than 6 months had elapsed since the incident on 20 January 2021 and a point was being reached where any further delay could become unreasonable.

92. Nonetheless, several attempts were made to arrange a disciplinary hearing in August 2021 before a date on 2 September 2021. Sensibly, Mr McKenzie-Smith while acknowledging Miss Shilton's protests regarding the second OH report, continued to book meetings and to offer adjustments so she could attend and participate. It was reasonable to proceed to the third attempt at a disciplinary hearing on 2 September 2021, although Mrs Montgomery was generous in adjourning it and allowing Miss Shilton's current fit note to expire in late September 2021 before the meeting resumed. By this point, it had become reasonable to proceed and in accordance with paragraph 25 of the ACAS Code, Mrs Montgomery made a decision based upon the evidence available.

93. During this period, Miss Shilton was notified of these meetings, given sufficient information concerning the allegations, details of the meeting arrangements and time and the right to be accompanied.

94. I was satisfied that Mrs Montgomery had authority to hear the disciplinary hearing and was experienced of dealing with such matters. She was able on 28 September 2021 to decide on appropriate action and notify Miss Shilton of her decision in a detailed letter dated 1 October 2021.

95. Miss Shilton was afforded the right of appeal and while unfortunately Mr Traynor has sadly since passed away, there was sufficient information and evidence available to persuade me that this process was conducted diligently and fairly. This was a case where the employer behaved entirely appropriately and fairly and in accordance with the ACAS Code as well as its own internal procedures. While I understand that Miss Shilton was suffering a great deal from her ongoing shingles related issues, she unfortunately became fixated upon the initial promise made that the disciplinary would not proceed until she returned to work. Several months were allowed to elapse before a hearing took place and only then with the support of OH and with several rearrangements of the proposed hearing date.

96. Finally, having considered the conduct identified by Mrs Montgomery in her dismissal letter, the breaches of the Individual Conduct Rules and the overall breach of trust, dismissal was within the range of reasonable responses available to her as a Disciplinary Manager. It was informative, that when interviewed by Mr Traynor as part of his consideration of the appeal, she clearly referred to the failure to provide records of the telephone conversation as being key to her decision concerning Miss Shilton's behaviour as well as her dispute of the second OH report without providing any evidence to support this contention. Overall, there were clearly concerns about the nature of the confidentiality breach and the reluctance to support the arguments that she had put disputing the allegation. Consideration was given to a lower sanction but the nature of the breach meant her findings were of gross misconduct justifying dismissal. This was a decision within the range of reasonable responses.

Conclusion

97. Accordingly, for these reasons, I must conclude that the claimant was fairly dismissed by the respondent by reason of conduct.

98. Overall, I was satisfied that the respondent's witness evidence was detailed, credible and reliable.

99. However, I was concerned by the failure of the claimant's witnesses to produce detailed statements which addressed the issues which were to be considered by me in relation to the unfair dismissal case. Judge Ainscough in paragraph 33 of her Note of Preliminary Hearing had given clear instructions to the parties of the way in which a witness statement should be approached and the content that should be included within it.

100. While I acknowledge that the claimant was represented by her brother-in-law who is not legally qualified, I do find that they had sufficient notice to understand what was required by way of disclosure and the provision of witness evidence. On several occasions during their evidence, the witnesses

made reference to documents which were not included in the hearing bundle, were not subject to late applications for inclusion at the beginning of the hearing and where an explanation was given that *'I thought I could provide it during the hearing.'*

101. A similar explanation was given concerning the brevity of the witness statements without appreciating that they were undermining their case by failing to provide basic grounds in support of their case. In particular, it was surprising that Mrs Wilson made no mention of being in Lanzarote when the Teams meeting took place on 20 January 2021 and this quite basic fact was only given when Mr Crammond cross examined her.

102. This was not acceptable and was not in the spirit of the overriding objective as it did not involve cooperation with the respondent and it did not assist the Tribunal.

103. Finally, I would like to thank Mr Crammond. W hile operating in accordance with his duty to those instructing him (i.e. the respondent), he did adopt a very sensible and proportionate approach to cross examination and thus enabled me to hear all of the evidence that I needed to hear in order that I could fairly reach my decision in this case within the time available. This level of cooperation was in the interests of justice and entirely in keeping with the duty of representatives to help the Tribunal in furthering the overriding objective under Rule 3.

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Employment Judge Johnson

Date 24 July 2025

JUDGMENT SENT TO THE PARTIES ON

Date: 28 August 2025

FOR THE TRIBUNAL OFFICE

Notes

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