# EMPLOYMENT TRIBUNALS

**Claimant:** **Mrs Carol Oram**

**Respondent:** **Gloucestershire Care Services NHS Trust**

**Heard at:** **Bristol City Hall** **On: 8th and 9th November 2017**

**Before:** **Employment Judge Walters**

**Representation**
**Claimant:** **Mr McPhail, Counsel**
**Respondent:** **Ms Garner, Counsel**

# RESERVED JUDGMENT

1. The Claimant's claim that she was unfairly dismissed is upheld.

2. The Claimant was wrongfully dismissed.

# REASONS

## Introduction

1. This claim was heard at Bristol on 8 and 9 November 2017. The Tribunal reserved its judgment and reasons having concluded the hearing late on the afternoon of the second day of the hearing.

2. The claimant had commenced proceedings in the Bristol Employment Tribunal on 16 June 2017, alleging that she had been unfairly dismissed and wrongfully dismissed by the respondent.

3. In considering the outcome of this case I had regard to the ET1, the ET3 grounds of response, the bundle of documents prepared by the parties,[1] the evidence provided by the witnesses and the submissions of the parties.

[1] Page numbers of the bundle when referred to in the Reasons are in bold type.

4. The respondent called three witnesses: Miss Sian Thomas, Miss Susan Field and Miss Kate Norton. The claimant gave evidence in support of her claims. During the hearing I heard an application by the claimant to admit the evidence of Elizabeth Brumwell. The circumstances of the application were that Ms Brumwell was the claimant's Unite union representative and she had provided a two paragraph witness statement which was unsigned and undated. The claimant was asked to indicate the reason for the non attendance of Ms Brumwell and I was informed that she was on annual leave. Counsel for the claimant could not assist as to where she was taking that annual leave or as to the duration of it and I was not provided with any meaningful explanation of what her annual leave consisted of. It was apparent that Ms Brumwell had informed the claimant or her representatives approximately a week to ten days previously that she was on annual leave.

5. The respondent took no objection to the admission of the evidence but it became apparent that the legal representatives had not seen the one page witness statement which the claimant was seeking to introduce into evidence. The respondent was in possession of a longer witness statement from Ms Brumwell which was equally unsigned and undated. I decided that it would be inappropriate to admit a witness statement on which there was no signature or date as I could not be satisfied that what was being put before me was indeed the evidence of Ms Brumwell. Accordingly, I exercised my discretion not to admit that evidence into the hearing and I disregarded its contents.

6. At the conclusion of the evidence the respondent's counsel made submissions both in writing and orally and counsel for the claimant made submissions orally. I need not set them out here as it will become apparent how the parties put their respective cases in due course. I should add that at the outset of the hearing I had indicated that it was my view that it would be unlikely that I would be able to deal with the question of remedy (if necessary) during the course of the current hearing due to time constraints. Accordingly, with the consent of the parties it was decided that I would focus only on the question of 'liability' and that if there was a need for a remedy hearing then that would be addressed subsequently. However, notwithstanding the fact that both questions of contributory conduct and Polkey reductions are essentially matters for remedy and compensation, it was decided that the parties should make representations in respect of both matters at this juncture and that a determination would be made in respect of the issues to assist a proper and expeditious conclusion of these proceedings. Accordingly, evidence was heard which would permit conclusions being reached in respect of both contributory conduct and Polkey deductions and submissions were made by both counsel to me in respect thereof.

## The Issues

7. At the outset of the hearing I was presented with an agreed written list of issues by the parties. The issues as identified by the parties were as follows:

*"Unfair dismissal*

*(1) It is agreed that the claimant was dismissed on 17 February 2017. It is further agreed that the alleged fair reason for dismissal was alleged gross misconduct. In determining whether the respondent's decision to dismiss fell within the meaning of a fair dismissal under Section 98(4) of the Employment Rights Act 1996.*

*(a) In terms of the decision to treat the misconduct as proven:*

*(i) Did the respondent have a genuine belief in the alleged misconduct?*

*(ii) If so, did the respondent have reasonable grounds for that belief?*

*(iii) If so, had it carried out as much investigation as was reasonable in the circumstances in coming to that belief?*

*(b) Was the decision to dismiss within the reasonable band of responses for an employer in all the circumstances of the case?*

*(c) Was the dismissal otherwise fair in all of the circumstances of the case.*

*Contributory Conduct and Polkey*

*(2) If it is found that the dismissal was unfair, did the claimant, to any extent, cause or contribute to the dismissal through her conduct? If so, should the Tribunal make reductions to the basic and compensatory award for contributory conduct and if so what reduction would be just and equitable?*

*(3) If it is found that dismissal was procedurally unfair should the Tribunal make any reduction to the compensatory award on Polkey grounds to reflect the likelihood that the claimant would be dismissed in any event?*

*Mitigation*

*(4) If the claimant was unfairly dismissed has the claimant failed to mitigate her loss and if so, what reduction to the compensatory award should be made?*

*Breach of Contract*

*It is agreed that the claimant had a contractual notice period of three months.*

*It is further agreed that under the respondent's disciplinary policy fraud or dishonesty is a potential ground of gross misconduct.*

*(5) Did the claimant carry out any acts which the respondent was entitled to treat as gross misconduct which amounted to repudiatory breach of contract?*

*(6) Did the respondent breach the claimant's contract of employment by summarily dismissing the claimant?*

(7) *If so, what losses did the claimant suffer as a result of the said breach?"*

8. Finally, the respondent during the course of the first day of the proceedings, at the request of the Tribunal, provided a written exposition of its case in relation to the wrongful dismissal which is Document R2 and which reads as follows:

> *"In relation to the claim of wrongful dismissal the respondent relies upon allegations 2 and allegation 4 as set out in a letter of dismissal of 21 February 2017 as being acts of dishonesty which amounted to fundamental breaches of contract and the fact that these acts were dishonest and/or that the claimant was acting dishonestly supported by the determination that was made in relation to allegation 3*".

**Legal Principles**

Unfair Dismissal

9. The Tribunal applied sections 94 and 98 of the Employment Rights Act 1996.

10. I shall set out section 98 here:

"*Section 98 general:*

*(1) In determining for the purpose of this part whether 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;*

*(b) that it is either a reason falling within subsection 2 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

*(2) A reason falls within this subsection if it:*

*(a) relates to the capability or qualifications of the employee for performing work of a kind which she was employed by the employer to do;*

*(b) relates to the conduct of the employee;*

*(c) Is that the employee was redundant.*

*(3) Is that the employee could not continue to work in the position which he held without contravention (either on his part or that of his employer) of a duty or restriction imposed by or under an enactment.*

*(4) 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;*

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

11. In applying that legislation I have had regard to the guidance set out in **British Home Stores v Burchell [1978] IRLR 379** as follows:

(1) It is for the respondent to prove the fact of its belief in the misconduct.

(2) At the time of dismissal did the respondent have in its mind reasonable grounds on which to sustain that belief?

(3) Had the respondent carried out as much investigation into the matter as was reasonable in all the circumstances of the case?

12. I then asked myself the question as posed in **Iceland Frozen Foods v Jones 1983 ICR 17:** did the employer act reasonably or unreasonably in treating the matter as sufficient reason for dismissing the employee? I have to determine whether or not dismissal was within a band of reasonable responses to the conduct.

**Basic Award**

13. I do not at this stage need to consider section 122(2) ERA 1996. I will hear submissions from the parties on whether the reduction of compensation under Section 122 should be in any different proportion to the deduction under Section 123(6) ERA 1996.

**Contributory Conduct**

14. Section 123(6) of the Employment Rights Act 1996 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".

15. In considering this aspect of the claim the claimant conceded that she was 25% to blame for her dismissal and the respondent asserted a 100% contribution.

16. In determining whether to make a reduction for contributory conduct I had in mind the guidance set out in **Nelson v BBC (NO. 2) [1980] ICR 110** I then considered the extent of such contribution.

**Polkey deduction**

17. The Tribunal is under a duty to consider making a deduction in relation to compensation if it is just and equitable to do so. I refer to the guidance set out in **Gover and ors v Protperycare Limited 2006 ICR 1073** and **Software 2000 Limited v Andrews 2007 ICR 825.** Furthermore, I should not shy away from making a deduction because a degree of speculation is required. However, there must be some material basis for making a deduction and in rare cases no deduction can be made because it is simply impossible for the Tribunal to make even a speculative decision see **Swanton New Golf Club Limited v Gallagher EATS 0033/13.**

**Wrongful Dismissal**

18. At common law, an employer is entitled to terminate a contract in accordance with the terms of that contract. In instances where the employee is in breach of contract ordinarily the employer can only terminate the contract upon giving the appropriate length of contractual notice to the employee. In this case the parties are agreed that the appropriate period of notice would have been three months.

19. An exception to the requirement to give contractual notice occurs where the employee has committed an act of misconduct which is so serious that the employer is justified in terminating the contract summarily. The behaviour of the individual employee has to be such that it goes to the very root of the contract of employment and amounts to a fundamental breach of that contract of employment so serious that summary dismissal is justified.

20. The dismissal being admitted it is open to the employer to demonstrate on the balance of probabilities that it was entitled to dismiss the claimant summarily as oppose to giving her the contractual notice. In doing so the employer is entitled to have regard not only to the reasons which existed at the time that it terminated the contract but also such further reasons as have been established on further investigation or by further evidence. It is a matter of fact for the Tribunal, therefore, to determine whether the evidence which the employer adduces is sufficient to justify a summary termination of the contract of employment.

21. I have set out initially the findings of fact which are relevant to the unfair dismissal claim. I then consider the conclusions in respect of unfair dismissal. I then move on to the wrongful dismissal findings of fact and conclusions.

**Factual findings on the unfair dismissal claim**

22. I have only made findings of fact in respect of such matters as provide context and which are relevant to the issues as identified above.

23. In about January 2013 the claimant, who at the time of dismissal was employed by the respondent as the Named Nurse for Safeguarding Children was informed that she was at risk of being made redundant. She sought to obtain alternative employment with South Warwickshire NHS Foundation Trust (hereinafter referred to as "South Warwickshire") but was unsuccessful in doing so.

24. In March 2013, however, as a result of discussions with South Warwickshire she was offered a consultancy agreement to provide services for South Warwickshire which she agreed to.

25. On 22 April 2013 the claimant sought permission to work a different work pattern for the respondent and she discussed the matter with her then line manager Liz Fenton. The claimant wished to work a condensed working week i.e. a nine day fortnight. The application form at **(97)** cited a reason for so doing as to, "*balance my work and personal life*".

26. On 3 May 2013 the claimant was written to by her then line manager setting out the terms of the flexible working arrangement that had been agreed.

27. On or about 30 August 2013 I accept the evidence of the claimant that she was informed of the dates which she would need to work for South Warwickshire for the following six months. The procedure for taking annual leave required her to seek permission from her line manager who at that time should have recorded the request and the permission in a written document. The respondent's witnesses confirmed that they were not able to determine whether or not a request for annual leave had in fact been made and, in those circumstances, the respondent was not able to advance a case that no request for annual leave had been made or that no agreement to that annual leave had occurred. I have not seen the claimant's original annual leave sheet it has not been located. There is a typed document at (**94)**, which purports to demonstrate the annual leave of the claimant. The provenance of the document is not entirely clear. It does not confirm that a request for leave was made for 5 December. However, the evidence from the respondent in connection with the request for 5 December leave is that the annual leave entry for 5 December 2013 in the claimant's outlook calendar was in fact made on 30 August 2013 which corroborated the claimant's evidence to a degree. Although there was a modification of the original entry on Monday 9 December at 0959 no one could determine what the extent and reason for that modification was and I have heard no evidence about it.

28. In relation to the entry for Friday 6 December 2013 on the claimant's outlook calendar it is agreed that the original entry was created on 7 May 2013 and the modified time stamp on the entry was for the same date at 1625 which is consistent with the claimant's working pattern having altered

as a result of the agreement with her line manager. In effect, the claimant was never expected to be in work on the 6th December 2013.

29. On 14 November 2013 the claimant suffered an accident at work. She injured her foot and was absent from work for the period 14 November 2013 to 23 December 2013 save for the morning of 9 December 2013 when she attempted to return to work.

30. On 2 December 2013 the claimant attended at her GP and after examination she obtained a sickness certificate for a period of one week to 9 December **(124)**.

31. However, the claimant had been in correspondence with her line manager keeping her informed of the progress of her injury and its recovery in the aftermath of that accident and one can see that during her period of sick leave from at least 20 November 2013 she was undertaking some limited duties for the respondent whilst on sick leave see **(118, 119, 120** and **123)**. In the email dated 2 December 2013 the claimant updated her line manager who by this time was Liz Jarvis that she had been signed off work for the week and she enquired whether she needed to ring every morning or whether she would be able to catch up with her at the end of the week and she hoped that she would be well enough to return to work the following week. There was no further communication with the line manager that week.

32. The respondent accepted that at the end of what would have been her working day for the respondent on Wednesday 4 December 2013 the claimant travelled to Barnsley in order to carry out work on behalf of South Warwickshire on the Thursday 5 and Friday 6 December 2013. There is no dispute about the fact that the claimant did undertake restorative supervision work for South Warwickshire in Barnsley on those dates.

33. On 9 December 2013 the claimant attempted to return to work but was unable to continue due to pain from her foot. At **(126)** there is an email from the claimant to Liz Jarvis indicating that she had now been signed off work for another two weeks but that she would return earlier if matters had improved sufficiently. There was no discussion of her absence on the 9 December 2013.

34. In fact, there is no documentary record of the claimant informing her line manager or the respondent that she had in fact been absent on annual leave/non-working day or that she had been working for South Warwickshire on the 5 and 6 December 2013 either. The claimant does not contend that she mentioned working for South Warwickshire at that time but it was her case that she had pointed out her annual leave/non-working day to her line manager.

35. On 24 December 2013 the claimant returned to work and had a somewhat difficult meeting with her line manager Liz Jarvis. The form purporting to record the content of that meeting is at **(131)**. The dates of absence of the claimant were mis-recorded as being from 14 November 2013 to 23 November 2013 when it clearly should have been from 14 November to 23

December 2013 but be that as it may there is an entry alongside a heading of "*number of occasions absent in the last twelve months which states 10 (counting this as one absence*)." The form does not make any reference to the fact that the claimant had attended work at Cirencester hospital or that she had attended on the morning of 9 December 2013 or that she had taken a period of annual leave on 5 December 2013 nor does it refer to a non-working day on 6 December 2013 and the whole of the period therefore was assumed to be in respect of sickness and not for any other reason. The claimant apparently received sick pay for the whole of the period. The form was signed by both the claimant and her line manager on the day of the meeting, the 24 December 2013.

36. The supervision record of the meeting on 24 December 2013 is similarly silent as to any discussion about the claimant taking annual leave on 5 December 2013 and indeed there is reference to the claimant wanting to book a week's annual leave during February half term 16 February 2014 meaning that she would have exhausted her full year's entitlement at that stage. If that was correct it would have been on the basis of no annual leave having been taken on 5 December 2013 **(132-133)**.

37. The claimant underwent a sickness review meeting on the 14th January 2014 and a letter confirming the discussions was sent to her on the 17th January 2014. The letter sets out the period of sickness absence which the claimant had undergone and confirms the content of the meeting of 24 December 2013. **(138-139)** The claimant at that time did not query the accuracy of the supervision record or the outcome letter of 17 January 2014.

38. In December 2015 a counter fraud investigation occurred as a result of information received by the respondent which suggested that the claimant had been working for another organisation whilst off sick from work. I have an extract from the counter fraud report in the bundle. **(149-154)** The investigation considered whether or not in fact the claimant had been undertaking paid work for South Warwickshire at a time when the claimant was on sick leave.

39. The investigation revealed there were four occasions when the claimant had travelled to Barnsley on a day on which she was expected to work for the respondent. However, those enquiries also revealed that the claimant would have travelled to work after the work that she was expected to do for the respondent. The investigation determined that with the exception of one period her work was carried out either on a day when she was not expected to work for the respondent because of the agreement to work a nine day fortnight or because she had booked annual leave. I should add that habitually the claimant did in fact do her work for South Warwickshire when she was either on annual leave or on one of the non-rostered work days. This is, therefore, not a case in which it was alleged there was sustained dishonesty extending over a period of time.

40. The fraud allegation against the claimant referred to the period 4 – 6 December 2013 only. The counter fraud investigation revealed (and it is not disputed) that

a. the claimant travelled from her home to Barnsley on 4 December 2013, that she in fact worked on 5 December and 6 December 2013.
b. she had submitted the fit to work certificates on 2 December and 10 December 2013 and
c. she had received payments during those periods on the basis that she was not fit to work.

41. The investigation also revealed that during the consultation with the doctor on 2 December 2013 the claimant did not mention the prospect of working for South Warwickshire later that week. There was also no record of any self assessment return being submitted to HMRC by the claimant and the conclusions of the counter fraud Investigation team was that the claimant received payments between 4 and 24 December from the respondent amounting to £2,121.12 in respect of sick pay and that there was a prima facia case that she had acted dishonestly and may have committed an offence of fraud by false representation contrary to section 2 of the Fraud Act 2006 although it was considered to be disproportionate and not in the public interest to pursue criminal proceedings due to the limited number of days over which the offences were committed. The counter fraud investigation recommended that the respondent seek to recover the full period of sick pay from 4 – 24 December 2013 presumably on the basis that the claimant had been fit for work over that whole period because she had worked for South Warwickshire on two days. The logic of the above conclusion escapes me but what is clear is that the counter fraud investigation investigators believed that the claimant had been dishonest in relation to the period of 4 – 6 December 2013.

42. As a consequence of the counter fraud report the respondent instituted a disciplinary investigation and Sian Thomas was appointed as the Investigator.

43. A disciplinary investigation meeting occurred with the claimant on 9 November 2016 **(164–173)**. The allegations which were being investigated were set out in a letter to the claimant of 26 October 2016 as follows:

> "***Allegation 1*** *Between 4 and 24 December 2013 you misrepresented the extent to which your foot injury rendered you incapable of undertaking your employment with Gloucestershire Care Services NHS Trust. You received sick pay during this period from Gloucestershire Care Services NHS Trust to which you were therefore not entitled.*
>
> ***Allegation 2*** *On 4, 5 and 6 December 2013 you undertook paid work with South Warwickshire NHS Foundation Trust whilst receiving sick pay from Gloucestershire Care Services NHS Trust.*
>
> ***Allegation 3*** *You failed to declare your earnings from your work with South Warwickshire NHS Foundation Trust from 2 October 2013 – 19 December 2014 to Her Majesty's Revenue and Customs for the purpose of appropriate taxation.*

> ***Allegation 4*** *You failed to obtain permission from Gloucestershire Care Services NHS Trust to undertake additional work as required under the Trust's additional employment policy"*.

44. At the investigation meeting on 9 November 2016 the claimant was asked for her explanations in relation to the four allegations. In relation to Allegation 1 the claimant explained that she had undertaken some work for the respondent whilst she was on sick leave. She explained the course of her injury and recovery.

45. In relation to Allegation 2 the claimant indicated that she planned to be back at work on Monday 9 December 2013 so she had considered the 4 December 2013 to have been her last sick leave day with the respondent and that the 5 December 2013 had been booked as an annual leave day and 6 December 2013 was a non working day in line with the nine day fortnight working arrangement. She indicated that there were missing documents from her personnel file including 1-2-1s and her contract of employment. She stated that she had agreed verbally the South Warwickshire arrangements at a 1-2-1 session with her line manager who was Ms Fenton at the time.

46. The claimant added that she had travelled on 4 December after her working day would have ended. She was not asked about whether she had informed her line manager of the annual leave period when she met with her on 24 December 2013. She acknowledged that she should have telephoned on Wednesday 4 December 2013 to clarify that she was no longer intending to take sick leave and that she intended to return to work on 9 December 2013. She had not intended to defraud the respondent. She had made the decision to travel on 4 December 2013 because she felt able to undertake the supervision work on 5 and 6 December 2013.

47. In relation to Allegation 3 the claimant indicated that she had created an account on the HMRC Gateway through which she believed she had submitted forms but then indicated that she had forgotten about the submission and she had not heard anything from HMRC and had not therefore paid tax. She offered to supply the Gateway reference number but this was not pursued by the respondent. She indicated she was attempting to rectify the matter and was waiting to hear from HMRC. She had acted in April 2016 as a consequence of her interview with Counter Fraud.

48. In response to Allegation 4 the claimant indicated that she had a verbal agreement with Ms Fenton and that was sufficient. She indicated she was not aware of the terms of the additional employment policy at that time. No further questions appear to have been put to her at that time.

49. Ms. Thomas then had the telephone conversation with the former line manager, Elizabeth Fenton on 18 November 2016. Ms. Thomas obtained written 'evidence' from Ms Fenton which consisted of a note of a telephone conversation between her and the investigating officer. It purported to be signed although I note in the form I have in the bundle there is no wet signature and her name had been simply typed into the transcript.

However, assuming that this is an accurate record of the conversation, Ms Fenton stated:

> *"CO's contract was for full-time hours and the funding transferred from the PCT I recall was for four days. I recall a conversation she (CO) had with me regarding some work she had been approached to support related to restorative supervision. I can recall a discussion about the restorative supervision for public health services. The model was very effective but costly to establish and maintain and so we had a conversation about up skilling in-house staff to maintain this programme following the initial investment. The person running the programme in South Warwickshire was known to Carol as she used to work for the PCT*.
>
> *We discussed how CO engaging with this programme this could support GCS and potentially generating income for the Organisation to cover the shortfall in the funded post.* ***I do not recall further conversations*** *in an agreement to commence this work, nor that I set up an agreement with South Warwickshire or recharge mechanism which I would have done if a firm agreement was in place….* ***I do not have access to records to confirm specific dates*** *but given the actions been taken to manage her attendance* ***I do not believe I would have given Carol permission*** *to undertake additional work especially not on her day off. The very early conversations that have been had on this topic related her to doing this work as part of her role within GCS*". [2]

50. I note that Ms. Thomas asked Ms. Fenton to recall events (without access to the documentation) which had occurred some three and a half years prior to the date upon which the statement was initially taken and subsequently confirmed. It is perhaps not surprising that Ms Fenton in such circumstances would have difficulty in recalling precise details of conversations.

51. Ms. Thomas also secured a limited number of further documents which are included in the bundle and she prepared the disciplinary investigation report **(181-192)**. The report concluded that there was prima facie evidence in respect of the four allegations.

52. In relation to Allegation 1 Ms. Thomas concluded that the claimant had misrepresented the extent of her injury. In respect of Allegation 2 Ms. Thomas concluded that the claimant was paid sick pay whilst undertaking work for South Warwickshire. I interject here that there is no doubt, of course, that the claimant did receive sick pay for the 5th and 6th of December 2013 but the reason why it occurred would have been of fundamental importance to a reasonable employer.

53. In relation to Allegation 3 the simple finding which was not disputed was that the claimant had not paid tax for the work that she had undertaken for South Warwickshire.

[2] My highlighting of significant parts

54. In relation to Allegation 4 the conclusion was that there had been a failure to comply with the additional employment policy. Ms. Thomas recorded the contention that there was a verbal agreement with Liz Fenton but that there was no direct evidence that the claimant's managers were aware that the claimant was doing such work and accordingly it was reported that she did not follow the requirements of the policy and had undertaken that work without any permission from the respondent.

55. On 10 January 2017 the claimant was invited to a disciplinary hearing in respect of the four matters **(193-194)**. The claimant prepared a response document (**201-204)**. The claimant accepted:

"*in retrospect that I should have contacted my manager to inform her of this change, the length of my sick leave I had received no communication following on from my email 2nd December... asking if I needed to call in everyday, as per the policy. I believe that I would have intended to speak with my manager at my return to work interview on Monday 9th December to discuss this but,as detailed, below this did not happen and the response I received ..... was dismissive*."

56. She also pointed out that the respondent obtained a benefit from the fact that she was working for South Warwickshire in that she was able to disseminate knowledge and information to others.

57. The disciplinary hearing took place on the 17th February 2017. It was conducted by Ms. Susan Field. No witnesses other than the investigating officer and the claimant gave evidence. I do not know why Ms. Fenton and Ms. Jarvis were not called as witnesses at the disciplinary hearing. Their evidence was very much in dispute and central to the case against the claimant. Both women had left the organisation by that stage but both had made witness statements. The dismissing officer, therefore, had before her the written evidence of the two vital witnesses both of whom had some difficulty in recalling matters some three and a half years previously and who appeared to have been asked to recall evidence without access to any relevant documentation. In fact, Ms. Jarvis had simply not been asked about the specific details of the meetings with the claimant between December 2013-January 2014 at all. In opposition to that evidence Ms. Field had the oral evidence of the claimant whose evidence was tested.

58. During the disciplinary hearing Ms. Field heard evidence as to whether the respondent was aware of whether the claimant was working for South Warwickshire. The claimant stated that she had informed her line manager Liz Fenton that she was going to undertake limited consultancy work for South Warwickshire and that she did not make any secret of the fact that she was engaged to work via a consultancy agreement with South Warwickshire. The hearing was informed that a number of people attended various events at which the claimant was giving feedback on her experience of restorative supervision. Ms. Brumwell, the claimant's representative, confirmed the position at the hearing. **(217)** The hearing was not adjourned for further enquiries to be made of either Ms. Fenton or Ms. Jarvis and the claimant was not asked to identify the names of people who knew she was working for South Warwickshire and no further questions were put to Ms. Brumwell on that matter.

59. The outcome of the disciplinary hearing was given verbally **(220)**. The letter confirming dismissal was sent on the 21st February 2017 **(222-225)** The claimant was dismissed in respect of allegations 2 and 3. Allegation 4 was deemed "serious misconduct"[3]. The letter of dismissal does not specify the individual outcomes but gives an overall outcome of dismissal. Allegation 1 was not upheld.

60. During the cross examination Ms Field confirmed that the dismissal was in fact in relation to Allegations 2 and 3 alone. It is noted that in relation to Allegation 4 there was a distinction drawn by Ms. Field between that conduct and the conduct alleged in allegations 2 and 3. It is referred to in the letter of dismissal as "serious misconduct." Under the terms of the respondent's disciplinary procedure "serious misconduct" is defined as conduct which may in fact lead to dismissal. However, if the employee has committed serious misconduct as opposed to gross misconduct, then any dismissal for that would have been on notice **(80-81)**.

61. The claimant appealed the decision by letter of 22 February 2017 setting out grounds of appeal which she indicated may not be exhaustive. **(226)** The appeal was heard by the Chief Executive Officer, Ms. Norton on 24 March 2017. The Appeal Officer considered that she had no ability to hear further evidence and that she was carrying out a review in accordance with the express wording of the respondent's appeal procedure and, therefore, did not conduct any further investigations as to the contentions made by the claimant during either the disciplinary hearing or at the appeal although she did authorise further enquiries and caused further work to be undertaken in relation to the claimant's payslips.

**Conclusions on unfair dismissal**

62. I apply the legal principles to the facts as found. The parties are not in dispute as to the reason for the dismissal. The potentially fair reason was 'conduct'. Therefore, there is no meaningful issue that the respondent genuinely believed the claimant had committed the misconduct alleged against her.

63. Of course, the conduct which was found to have caused the claimant's dismissal was contained in Allegations 2 and 3. I reject any contention that Allegation 4 was a cause of the dismissal for the reason I have already given in these reasons.

64. Accepting, as I do, that the respondent had a genuine belief that the claimant had committed the alleged misconduct the next matter I need to resolve is whether the respondent formed its belief on reasonable grounds. I accept the submission of counsel for the claimant which was not disputed by counsel for the respondent that if the respondent had not formed its belief reasonably in respect of both allegations 2 or 3 then the dismissal is unfair because the respondent's case was that the two matters were looked at together and not individually.

[3] The respondent's policy does not permit summary dismissal for conduct which is classed as "serious misconduct."

65. As to Allegation 2 it was apparent to the respondent that in fact the claimant was travelling out of working hours on the 4th December 2013 and that the 6th December 2013 was a non-working day. It is true that she received sick pay for those dates. However, no reasonable employer could have concluded that either the 4th or the 6th December 2013 payments were the result of dishonesty on the part of the claimant. The 4th was a sick day and the 6th a non-rostered day. Furthermore, in relation to the 5th December 2013 the respondent did not make any finding about whether the claimant had booked annual leave and, therefore, the respondent could not reasonably conclude that there was no belief on the claimant's part that the 5th December 2013 was an annual leave day.

66. The allegation which the claimant was supposed to answer was that she had undertaken paid work with South Warwickshire whilst receiving sick pay from the respondent. To that limited extent the allegation is correct: she did receive sick pay on the 5th December 2013 and 6th December 2013. However, it was apparent from Ms. Field in her witness statement at paragraphs 19 to 23 that it was not the fact that she had worked for South Warwickshire which was the issue but more that she had not informed her line manager that she had taken annual leave and a non-rostered day thereby receiving sick pay to which she was not entitled. As was made clear by Ms. Field this allegation centred on whether on her return to work the claimant deliberately withheld the fact that she had been on annual leave on the 5th December 2013 rather than sick leave. The key issue for the me was whether the respondent had reasonable grounds for believing that the claimant had acted dishonestly i.e. whether she in fact had deliberately failed to notify the respondent of the annual leave/non-rostered days.

67. The claimant's account to the disciplinary hearing was that she probably did notify Ms. Jarvis that the 5th December 2013 was annual leave and the 6th was non-rostered. If she did flag that then of course there would have been no dishonesty. The respondent did not call Ms. Jarvis to give evidence at the disciplinary hearing nor make any further enquiries of her. Ms. Jarvis had never been asked to specifically comment on the contention made by the claimant and the respondent failed to enquire of the other attendees at the meeting of the 14th January 2014 what they could recollect. These would have been simple and, in my judgment, reasonable enquiries for an employer accusing an employee of dishonesty to have undertaken.

68. In effect what the respondent relied upon was the paper work in order to draw inferences from it. However, the paper work in relation to the 24th December 2013 meeting was clearly not a comprehensive record of all that was said at the meeting: it was not meant to be.

69. I have reached the conclusion, therefore, that a reasonable employer alleging potentially career ending dishonesty would have surely taken the simple steps of contacting Ms. Jarvis for her account and of asking all of the attendees at the meeting of the 14th January 2014 for their recollections of the meeting. Indeed, a reasonable employer might also have taken steps to secure the attendance of Ms. Jarvis at the disciplinary hearing as her evidence was potentially crucial. Simply to rely upon the paper work alone

was in my judgement a course no reasonable employer would have undertaken.

70. I now turn to Allegation 3 which concerns the non-payment of income tax. The claimant accepted she had not paid income tax. Ms. Field indicated that she had concluded that the respondent had dishonestly failed to do so. It was not suggested by the respondent that if the non-payment had been due to mistake then there would have been an adverse finding amounting to gross misconduct. The evidence before the disciplinary hearing was that the claimant had made attempts to make payment of tax by registering with the HMRC Gateway. The respondent had not disputed the existence of that attempt because it did not call for sight of the Gateway reference email. I asked Ms. Field in terms why then in those circumstances she had reached the conclusion that the claimant had dishonestly failed to declare her income. Her thought process was that the fact of non-payment and that she had not made significant progress in making payment entitled her to conclude dishonesty.

71. Of course, I remind myself again that it is not for me to substitute my own views of the actions of the employer. However, it cannot be ignored that the employee in this case was a senior nurse with very many years service. She had not previously acted dishonestly. In my judgement a reasonable employer would look for cogent evidence of dishonesty before making a career ending finding adverse to the employee. The respondent clearly rejected the claimant's explanation of mistake without any real explanation as to why it did so. A reasonable employer would have carried out a rigorous investigation of the circumstances surrounding her non payment. Simply relying upon her knowledge that she should pay tax because the South Warwickshire forms said so, and that she didn't pay at the correct time and that she hadn't paid by the date of the disciplinary hearing was in my judgment a conclusion that no reasonable employer could have reached.

72. I have already indicated that in my judgment the evidence against the claimant in respect of Allegation 4 was not one of the reasons for her dismissal. I find, however, that the approach of the respondent to Allegation 4 also fell short of what one would expect of a reasonable employer. As the respondent was dubious about the claimant's evidence then a reasonable employer would have checked it. This is a step which the respondent should have taken and it did not do so. The respondent chose not to believe the claimant when there was a clear opportunity to have investigated the matter further. For example, Ms Brumwell's evidence in the disciplinary hearing that she was aware that the claimant was undertaking additional work was simply not followed up. The respondent decided not to believe the claimant when there were clear avenues open to it to explore the possibility that she may have been telling the truth.

73. I therefore conclude in light of all of the above that the respondent failed to carry out as much investigation as was reasonable. Furthermore, it did not have reasonable grounds for forming its belief in the claimant's guilt in respect of both allegations for which it dismissed.

74. If I am wrong about those matters then notwithstanding the submissions of the claimant's counsel that dismissal was not within a band of reasonable responses to the conduct as found I reject that submission. If in fact the respondent reasonably concluded after carrying out as much investigation as was reasonable that the claimant had been dishonest in the way alleged, then in those circumstances I take the view that any reasonable employer would have dismissed in those circumstances and that dismissal would have been well within the band of reasonableness. It is not sufficient to say that simply because someone has many years service and had not previously or subsequently committed acts of dishonesty that the proven dishonesty could not have been visited with dismissal. The allegations were extremely serious: so serious in fact in the context of a nurse that they could lead to the loss of registration and in those circumstances I would have found that dismissal was within a band of reasonable responses.

**Contributory conduct**

75. I now look at the question of contributory fault. I note that the claimant concedes that she contributed to her dismissal in any event to the extent of 25% on the basis of her failure to adhere to the additional employment policy and, in addition, to the failure to pay her tax but there is no concession in relation to dishonesty.

76. The respondent submits that even on the limited basis that the findings should be 75% even in relation to the failure to comply with the additional employment policy. The respondent asserts, however, that the claimant is guilty of the misconduct alleged against her and that she should have her compensation reduced by 100%

77. As will become apparent I have rejected findings of dishonesty made against the claimant and I uphold her wrongful dismissal claim. In order for a deduction to be made for contributory conduct I would have to be satisfied that the alleged conduct occurred. I am not satisfied that there was any contributory conduct other than as conceded by the claimant. I accept that the claimant was not aware of the formal requirements of the additional employment policy but in fact she should have been aware and taken steps to comply with it. I also accept that her failure to pay tax was caused by lack of diligence rather than dishonesty. I prefer the submission of the claimant's counsel and in my judgment any deduction for contributory fault should be 25% as conceded by him.

**Polkey deductions**

78. As to a potential deduction under the Polkey principle in my judgement the failings of the respondent are such that they failed to conduct a reasonable investigation and they did not have reasonable grounds for concluding that the claimant was guilty of Allegations 2 and 3. Further enquiries should have ensued in relation to Allegation 2. In my judgement those enquiries would have delayed the disciplinary hearing by a period of two weeks and, therefore, any deduction should not apply to that period.

79. I am, of course, conscious of the duty to consider making a percentage deduction by considering the material and evidence before me so as to

determine what might have happened had the enquiries with third parties been made by the respondent. In other words, I am asked to speculate as to what might have been said by Ms. Jarvis or the other attendees at the meeting on the 14th January 2014.

80. In my judgment this is one of those rare cases where it is simply not feasible to construct what the position would have been had those witnesses been spoken to. They may have agreed with the claimant, they may have said they couldn't remember, they may have disagreed with the claimant or there may have been a combination of the above. And depending on what may have been the outcome I would then have to construct what the respondent would have made of whatever it had discovered. It would have been a relatively straightforward task had the respondent put before me the evidence which the witnesses would have provided as part of its defence to the wrongful dismissal claim but they did not do so and, therefore, I am no more enlightened by the evidence I have read and heard. I consider it impossible to make any meaningful conclusion on what might have been the position. I therefore do not consider it appropriate to make any deduction on the basis that there was a chance of dismissal in any event.

**Findings of fact and conclusions on the wrongful dismissal claim**

81. I refer to the findings of fact already made above. I need not repeat them here. The respondent asserts that the dismissal occurred in respect of Allegations 2 and 4 and that Allegation 3 was simply background dishonesty. Notwithstanding the evidence of the respondent's witness Ms. Field that dismissal did not occur because of Allegation 4 as it was a matter of "serious misconduct" only, thereby not entitling the respondent to dismiss summarily the respondent has maintained at the hearing before me that Allegation 4 was a repudiatory breach justifying a summary dismissal. Has the respondent demonstrated that in fact it was entitled to dismiss the claimant summarily in respect of Allegation 4?

82. There is no doubt that the claimant did not comply with the additional employment policy but in order to determine whether or not that was a fundamental breach of the contract of employment going to the root of the contract such that the employer was entitled to summarily dismiss I have to look at the context of that failure. The question arises whether the claimant was aware of the breach of that policy.

83. I am satisfied the claimant had previously discussed her work with South Warwickshire with her former line manager Liz Fenton. I reach that conclusion having heard the claimant give evidence. I have not heard from Liz Fenton but I have been provided with the written statement which she provided to the disciplinary investigation at **(177-178)**. In those circumstances, I prefer the evidence of the claimant that she had informed Liz Fenton that she was going to undertake limited consultancy work for South Warwickshire and I find that the claimant did not make any secret of the fact that she was engaged via a consultancy agreement with South Warwickshire. I have heard evidence that a number of people attended various events at which the claimant was giving feedback on her experience of restorative supervision none of these individuals were asked by the

respondent to indicate the state of their knowledge of the claimant's involvement with South Warwickshire and in the absence of any evidence to gainsay what is being contended for by the claimant I prefer her evidence in that regard.

84. I accept the evidence of the claimant that the claimant's colleagues were aware of her having worked elsewhere and not simply that she was sharing information which she had gleaned doing her employment with the respondent and in that regard I note the evidence, however, limited from Ms Brumwell at the disciplinary hearing which was not subject of any further investigation by the respondent.

85. The claimant's evidence is that she was unaware of the necessity to complete forms in order to obtain permission. If the claimant as she contends was open and transparent about the fact that she was working for South Warwickshire and her behaviour was not covert then notwithstanding there was a breach of the policy in terms of filling in the relevant forms in writing I could not find that the conduct amounted to a breach of contract so serious that summary dismissal was justified.

86. There is undoubtedly an overlap between the evidence of the claimant and Ms Fenton's written account and, of course, had the full account of the matter been put to Liz Fenton there is a possibility that she may have recollected the events but one will never know. If the position is that the claimant had obtained a verbal agreement or thought she had then there would be no repudiatory breach of contract.

87. I find on the balance of probabilities that the claimant told Liz Fenton of her plans. She was not prevented from carrying out her duties for South Warwickshire. I accept that the claimant believed she had permission to work for South Warwickshire and I do not accept that the breach of the policy would justify a summary dismissal. It is of some relevance that even the respondent when it fully considered the matter initially did not believe so. There has been no further information to change that position.

88. In relation to Allegation 2 if the respondent is right that the claimant was dishonest then I would have no hesitation in finding that she had breached the contract entitling the respondent to dismiss summarily.

89. The first matter which I have to address is whether the claimant believed that she had annual leave booked for 5 December 2013. The second matter is whether she is correct that the 6 December was a rostered day off. The third matter is whether on 4 December 2013 she should have notified the employer that 5 December 2013 was still a day of annual leave and did she subsequently fail to rectify the matter when she returned to work.

90. In relation to the first issue whether the claimant believed she had annual leave booked I am satisfied that she believed that she had annual leave booked. None of the respondent's witnesses who gave evidence were able to gainsay that contention. I find that the claimant booked her dates for working for South Warwickshire six months in advance from August 2013. Her outlook calendar was populated in August 2013. The evidence in relation to the amendments on 9 December 2013 does not assist. I do not

accept that the document at **(103)** is confirmation that the annual leave for that date was accepted as it is unclear what date it refers to but one thing is abundantly clear is that the claimant had habitually been using her annual leave to work for South Warwickshire as the Counter Fraud report confirms and she had no reason not to do so in relation to the 5 December 2013. I find therefore that the 5th December 2013 was annual leave and there is no reason why the respondent should have been unaware of that fact.

91. I am also quite satisfied that the claimant travelled to work for South Warwickshire on 4 December after the time at which she would otherwise have been working for the respondent. The respondent's document **(94)** is not evidence which I can safely rely upon as prominence is unclear and no explanation has been provided as to its creation or its provenance.

92. In relation to 6 December 2013 I am satisfied that that date had been booked as a non-rostered day from as long ago as May 2013. Therefore, in respect of both 5 and 6 December 2013 they were not days on which the claimant was expected to work for the respondent.

93. I now have to ask myself whether having provided the sick note for the 2 – 9 December the claimant deliberately hid from her employers the fact that she was going to work for South Warwickshire. She herself recognises that she should have called in to say that her sick leave was ending on 4 December as she was entitled to do but I cannot reach a conclusion that by failing to mention her intention to work for South Warwickshire on 5 and 6 December that she was acting dishonestly. It is equally open to a Tribunal to reach the conclusion that she in fact had decided that she was well enough to undertake work and that therefore her sickness was ending as of 4 December 2013.

94. I then have to look at the events in respect of the return to work and her failure to notify of the fact that she had been working for South Warwickshire on 5 and 6 December. Firstly, the respondent contends that it is inconceivable that the line manager would have recorded the dates of 5 December 2013 and 6 December 2013 as sickness if the claimant had told her that it was in fact a period of annual leave/non-rostered day that she had undertaken.

95. The respondent's difficulty is, however, that the respondent has for reasons unknown to me not called Ms. Jarvis. Nor did they call her to give evidence at the disciplinary hearing. There is, however, a document in the bundle which is a witness statement from Ms. Jarvis in connection with the counter fraud investigation which had taken place in 2016. She provided a statement dated 22 May 2016 at **(158)**. Her statement is also based on her recollection: she had no access to documentation as by the time she gave that statement she was no longer employed by the respondent. She described how she had become concerned about the levels of sickness absence of the claimant prior to her assuming responsibility for her management and she initiated the sickness absence policy and indeed provided her with a first formal written warning in relation to her sickness record, none of that is contentious. She stated:

> *"I remember that Carol was very good at keeping in touch with me while she was off, often phoning me after a doctors appointment to update me about her progress. It was quite often the case that due to work commitments I was unable to take her calls and in those instances she would leave a message with my personal assistant or send me an email… She was fully aware of the process I was following regarding her absence. At no point during this period of absence was I aware that Carol was undertaking paid employment with a secondary employer. This is totally unacceptable behaviour and if she had informed me of this I would have advised her accordingly and followed a disciplinary process in line with Trust policy"*.

96. Ms. Jarvis does not give any evidence on this central issue. It is not contended by the claimant that she informed Liz Jarvis that she was undertaking paid employment with a secondary employer. It is not suggested by the claimant that she informed Liz Jarvis that she had in fact been working for South Warwickshire on 5 and 6 December 2013. Whilst I do not accept that the claimant informed Liz Jarvis that she was working on 5 December 2013 and 6 December 2013 I do accept her evidence that there was a period of annual leave on 5 December and also a rostered day off on 6 December 2013 and that Liz Jarvis was aware of these matters. I consider that the claimant would have made such information known because it was in the claimant's own best interests to have done so in order to limit her sickness absence. The evidence of the claimant to me was that she would have told Mrs Jarvis that the dates of sickness were incorrect because she was looking to reduce her periods of sickness as she was conscious of being subject to supervisory management in respect of it.

97. I do not accept therefore that the claimant was dishonest in not mentioning the work for South Warwickshire to Liz Jarvis. It was work she was under the impression she was entitled to do at a time when she was not on the sick and which was as far as she was concerned time for which she was not due to work. The respondent having been made aware of the annual leave and non-rostered day paid those days as sick pay. That error does not fall at the door of the claimant. I am not satisfied that she acted dishonestly and there was no repudiatory breach of contract.

98. I turn now to consider Allegation 3. The respondent does not contend it was a repudiatory breach in itself. The claimant's account on this matter has remained entirely the same throughout. She in fact made enquiries with HMRC and took some steps to pay the tax that was due. She had not ever had to do account for income in that way and she believed that she had submitted a correct form. She thereafter forgot about it and there is no direct evidence to contradict her.

99. The respondent itself made a finding of dishonesty in relation to the non payment of tax. That is a very serious finding and requires cogent evidence to support it. The mere fact of non payment is not evidence to support a finding of dishonesty. A failure to pay tax could as equally be because of incompetence or because of mistake or because of forgetfulness. In order to establish a dishonest failure, in other words an evasion of tax liability, one

requires there to be something more than a simple failure to pay. It for the respondent to adduce evidence to demonstrate that the failure to pay was a calculated failure on the part of the claimant. Delay of itself may allow the respondent to infer dishonesty but I am not minded to accept that submission in this case. I accept the evidence of the claimant that this was the first occasion when she had to pay tax other than for PAYE. She certainly took a step to progress that at the appropriate time which in itself is not consistent with someone who is attempting to hide their income. Whilst she may have been dilatory and neglectful, I do not find that she was dishonest.

100. Furthermore, I note that in the evidence of Miss Norton she indicated that this particular allegation was not in fact a disciplinary offence at all and it could be said that in light of that evidence the respondent can hardly now contend that the failure to pay tax was a breach of a term of the contract of employment.

101. I therefore find that the claimant was wrongfully dismissed from her employment.

102. The parties need to provide dates for a one day remedy hearing not to take place until after 31st January 2018. If necessary the parties should apply for further case management directions.

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Employment Judge Walters

_____

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.....8 December 2017.....

..... .....
FOR THE TRIBUNAL OFFICE