EMPLOYMENT TRIBUNALS

Claimant: Miss Claire Doherty

Respondent: University Hospitals of Leicester NHS Trust

FINAL HEARING

Heard at: Leicester **On:** 6 to 8 March 2017

Before: Employment Judge Camp (sitting alone)

Appearances
For the claimant: in person, assisted by Mrs Esta Molloy (lay representative)
For the respondent: Mr Richard Powell, counsel

RESERVED JUDGMENT

The claimant was not unfairly dismissed and her claim fails.

REASONS

1. The claimant, Miss Claire Doherty, was employed as an auxiliary nurse by the respondent NHS Trust from 26 February 1990 until her dismissal with effect on 15 June 2016. She was dismissed following alleged misconduct on 11 September 2015 relating to counterfeit £20 notes. After a period of early conciliation, she presented her claim form on 5 July 2016. Her only complaint before the tribunal is of unfair dismissal – so-called 'ordinary' unfair dismissal under sections 94, 98 and 111 of the Employment Rights Act 1996 ("ERA"). Despite what is suggested in her claim form, she does not have a public interest disclosure claim.

2. At the time of dismissal, the claimant was on a final written warning for using bad language towards a fellow member of staff on 28 October 2014. A 24-month final written warning was imposed on 12 February 2015. It is common ground that: after that final written warning was imposed, the claimant was told by a manager that if she appealed, the penalty could be increased; she did not appeal; what she was told was incorrect; the claimant asserted, when she challenging the decision to dismiss her, that that incorrect information had put her off appealing the warning.

3. The claimant was dismissed following allegations (to quote from the letter of dismissal):

   (1) That you attempted to pass a counterfeit £20 note in the WRVS coffee shop (Balmoral) at Leicester Royal Infirmary on Friday 11th September 2015.

   (2) That you concealed two counterfeit £20 notes in the ladies' toilet in the Balmoral Building, Leicester Royal Infirmary, on 11th September 2015 with the intention of retrieving them later.

   (3) That you passed three counterfeit £20 notes at the WRVS and one £20 note in the WH Smith at Leicester Royal Infirmary in the week commencing 7th September 2015.

4. There was little dispute that the claimant was guilty of (1) and (2). The claimant did indeed attempt to buy something using a counterfeit £20 note. She denied (and denies) knowing it was counterfeit; and ultimately the respondent was not satisfied that she did know it was counterfeit at the time she presented it. Similarly, the claimant did indeed conceal two counterfeit £20 notes in the ladies lavatory in the Balmoral Building at the Leicester Royal Infirmary on 11 September 2015, intending to retrieve them later. The claimant's explanations for doing this and what the respondent decided about it will be considered later in these Reasons. In relation to allegations (1) and (2), the dispute was about whether what the claimant did was or was not morally blameworthy.

5. In relation to allegation (3), it was and is common ground that counterfeit notes were indeed passed during the week commencing 7 September 2015 in various places in the Leicester Royal Infirmary. The claimant's case was essentially that she didn't know whether the were passed by her. The panel who decided the original disciplinary hearing following which she was dismissed found allegation (3) to be proven. That part of their decision – and only that part of their decision – was over-turned on appeal.

6. On 11 September 2015, the gist of what happened was that the claimant went to buy some food and drink at the WRVS shop, possibly whilst on her coffee break, and tried to pay for them using a note that turned out to be counterfeit. The note was retained by staff at the shop. The precise order of events is in dispute, but at some stage: she telephoned her partner, who had given her the note and some others; she hid two further notes that he had given her under a sanitary disposal bin in the ladies toilets; she went to the canteen; she went back to the ward; she was met on the ward by security, and subsequently by the police; she attempted to retrieve the two £20 notes she had hidden. Ultimately, she was arrested by the police and taken to the police station. She was charged by the police and prosecuted, but the CPS discontinued the prosecution against her.

7. The claimant went on annual leave on 12 September 2015. There was a meeting to discuss the incident on 22 September 2015. Following the meeting, it was decided that a formal investigation should be undertaken. The appointed investigating officer was Jane Spiers, Matron of the wards on which the claimant worked. She produced a report having interviewed a number of witnesses, including the claimant herself. Her conclusion was, in summary,

that there was a case to answer for potential gross misconduct. The decision was taken that the matter should go forward to a disciplinary hearing.

8. Prior to the disciplinary hearing (which ultimately took place, after a number of postponements at the claimant's request, on 24 March 2016), the claimant was provided with all of the documentation being relied on by management. She was told what the allegations against her were, and she was warned that dismissal was a potential outcome.

9. The panel that dealt with the disciplinary hearing was chaired by Mrs Georgina Kenney, Head of Nursing, and comprised her, Vicky Cartwright (a Matron), and Claire Blakemore from HR. After a long hearing and a period of deliberations, the claimant was informed on the day that she was being dismissed. The decision was confirmed in a letter of 4 April 2016, which also mentioned she had a right of appeal. She exercised that right by a letter of 11 April 2016.

10. The grounds of appeal focused on the fact that the final written warning of 2015 had been taken into account and on the fact that she had (as mentioned above) been misinformed about what might happen if she appealed against that final written warning. The final written warning of 2015 was determinative in relation to the disciplinary process of 2016 in that: the respondent's conclusion was that the claimant was not guilty of gross misconduct but of lesser misconduct; the reason dismissal was deemed appropriate was because she was already on the final written warning. The claimant's main argument – and it remained her main argument before me at this Final Hearing – was that she should not have been given a final written warning in 2015 and that if she hadn't been given a final written warning in 2015 she would not have been dismissed in 2016.

11. After the claimant appealed, the respondent undertook a review of the decision to impose the final written warning. The review was conducted by someone in HR. The conclusion of that review was to the effect that a final written warning was rightly imposed.

12. There was a hearing of the claimant's appeal against dismissal on 6 and 13 June 2016. The respondent wrote to the claimant setting out its summary of what had happened at the appeal hearing and the reasons for its decision to reject her appeal against dismissal on 13 June 2016.

13. By way of further background, I refer to the "*Chronology of Principal Events*" and the "*Cast List*". Although both documents were prepared by the respondent, there is (or should be) nothing particularly controversial in either of them.

14. There are two main issues I have had to decide.

    - What was the principal reason for dismissal and was it a reason relating to the claimant's conduct?
    - Was the dismissal fair or unfair in all the circumstances, in accordance with equity and the substantial merits of the case, pursuant to section 98(4) of the Employment Rights Act 1996 ("ERA")?

Deciding those two main issues has involved me looking at the following subsidiary issues:

14.1 did the respondent genuinely believe the claimant guilty of the misconduct alleged?

14.2 did the respondent have reasonable grounds on which to sustain that belief?

14.3 had the respondent carried out as much investigation into the matter as was reasonable in the circumstances at the final stage at which it formed that belief?

14.4 did the respondent, in deciding that dismissal was the appropriate sanction and in relation to all other matters, including the procedure followed, act as a reasonable employer might have done, i.e. within the so-called 'band of reasonable responses'?

15. The relevant law appears substantially in the issues as set out above. My starting point has been the wording of ERA section 98 itself. I have also had in mind the well-known 'Burchell test', originally expounded in British Home Stores Limited v Burchell [1978] IRLR 379. I note that the burden of proving 'general reasonableness' under ERA section 98(4) is not on the employer as it was when Burchell was decided; the burden of proving a potentially fair reason under subsection (1) is [on the employer], but the burden is neutral under subsection (4).

16. In relation to ERA section 98(4), I have considered the whole of the well-known passage from the judgment of the EAT in Iceland Frozen Foods v Jones [1982] IRLR 439 at paragraph 24, which includes a reference to the "*band of reasonable responses*" test. That test, which I shall also call the "*band of reasonableness*" test, applies in all circumstances, to both procedural and substantive questions: see Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588.

17. Hand in hand with the fact that the band of reasonableness test applies is the fact that I may not substitute my view of what should have been done for that of the reasonable employer. I have to guard myself against slipping "*into the substitution mindset*" (London Ambulance Service NHS Trust v Small [2009] IRLR 563 at paragraph 43) and remind myself that only if the respondent acted as no reasonable employer could have done is the dismissal unfair. Nevertheless (see Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677): the 'band of reasonable responses' test is not infinitely wide; it is important not to overlook ERA section 98(4)(b); Parliament did not intend a tribunal's consideration simply to be a matter of procedural box-ticking.

18. Although this is not a 'gross misconduct' case as such, I have taken into account the law applicable to such cases, helpfully summarised by the EAT in Arriva Trains v Conant [2011] UKEAT 0043_11_2212 (22 December 2011), in paragraphs 23 to 32 of their Judgment, paragraphs that should be deemed to be incorporated into these Reasons.

19. In relation to the issue of fairness under ERA section 98(4), I have also taken

into account the ACAS Code of Practice on Disciplinary and Grievance procedures. I note that compliance or non-compliance with the Code is not determinative of that issue.

20. My decision in summary is that the principal reason for dismissal was a reason relating to the claimant's conduct and that the dismissal was fair in all the circumstances in accordance with ERA section 98(4).

21. In reaching that decision, I have considered all of the points raised by the claimant and on her behalf during the course of these proceedings, including points she made in relation to her appeal against the decision to dismiss her. I do not, however, address every single one of those points in these Reasons, but only the main ones she relied on, particularly those points that were mentioned in closing submissions on her behalf and/or her other points that seem to me to have the most potential merit.

22. During the course of the hearing, in accordance with the overriding objective, I raised a number of additional points relating to the issue of fairness under ERA section 98(4) that it seemed to me could be taken on the claimant's behalf. I shall also address those points below.

23. The first issue in the case is: what was the principal reason for dismissal and was it a reason relating to the claimant's conduct? In accordance with the Burchell test, that issue boils down to: did the decision-makers dismiss the claimant / uphold the decision to dismiss because they genuinely believed she was guilty of misconduct?

24. I have no hesitation in concluding that Mrs Kenney and Miss Fawcus decided that dismissal of the claimant was appropriate for this reason. At no stage during these proceedings has it been suggested that they had any other motive; and it was not put to them when they gave their oral evidence that they did.

25. I wondered aloud during closing submissions whether it was being suggested on the claimant's behalf that part of the reason for dismissal was or might be something to do with a warning the claimant was given for capability in 2015. The reason I raised that as an issue was that the warning for capability was mentioned in the claimant's evidence and it was not clear to me why it was. Suffice it to say that even if – as I think was not the case – the claimant was arguing that the decision was unfair because of something to do with the capability process, I am entirely satisfied that the capability process had nothing to do with it; it was not a source of any unfairness connected with dismissal. In any event, the argument that it did have something to do with it would not be open to the claimant because it was not put to any of the respondent's witnesses.

26. I shall now consider particular arguments potentially supporting a conclusion that the claimant was unfairly dismissed pursuant to ERA section 98(4). My overall decision is that all of the limbs of the Burchell test are satisfied: that the respondent had reasonable grounds to sustain its belief in the claimant's guilt of the alleged misconduct; that the respondent had carried out as much

investigation into the matter as was reasonable in the circumstances at the final stage at which it formed that belief; and that the respondent, in deciding that dismissal was the appropriate sanction in relation to all other matters, including procedure followed, acted as a reasonable employer might have done, i.e. within the band of reasonable responses. I have also 'taken a step back from' the case and asked myself whether, looking at all the circumstances, including what happened in relation to the appeal, dismissal was fair or unfair, and concluded that it was fair.

27. As already mentioned, the claimant's main argument both in relation to her internal appeal against dismissal and as part of these proceedings is to the effect that she shouldn't have been given a final written warning – that she was denied the opportunity to mount a successful appeal against its imposition and that she would not have been dismissed had it not been imposed.

28. The respondent accepts: that the claimant was misinformed about the appeal process; that if the final written warning had not been taken into account and if the disciplinary panel had been considering just the claimant's conduct relating to counterfeit bank notes in September 2015, she would not have been dismissed. I accept an additional part of the claimant's argument, namely that misadvising her about the potential consequences of appealing was a serious and substantial matter, and that the claimant would have been unfairly dismissed had the respondent's attitude in 2016 been that the 2015 final written warning was set in stone and that the validity and merits of that warning ought not to be thought about or looked into at all.

29. It does, however, need to be borne in mind that I am examining the 2015 final written warning only in connection with the fairness of dismissal in 2016. The issue is not: was it fair and reasonable to give the claimant a final written warning in 2015? Instead, it could be summarized as: did the respondent act within the band of reasonable responses in 2016 in the way it handled and dealt with the final written warning, and, in particular, the fact that the claimant had been misadvised in 2015 in relation to appealing that final written warning?

30. This is not a case where there was bad faith and/or an improper motive in relation to the imposition of the final written warning, nor one where it was manifestly inappropriate to give a final written warning at the disciplinary hearing in 2015. The claimant accepted that she had told another member of staff to "*piss off*" and twice to "*fuck off*" whilst working on the ward. (The fact that this partly happened in the kitchen on the ward rather than on the ward 'proper' did not, for me, have the same significance the claimant appears to think it had). As respondent's counsel highlighted during cross-examination of the claimant and in closing submissions, whatever the provocation, the use of such language was in and of itself potentially gross misconduct for which she could have been dismissed. To the extent the claimant is arguing it was manifestly inappropriate to impose a final written warning on her for it, that argument is without merit. In relation to this, it is perhaps noteworthy that the claimant realistically accepts that imposing a first written warning on her for this conduct would have been a reasonable thing for the respondent to have done.

31. If it is being argued on the claimant's behalf that it was manifestly inappropriate for the final written warning to have remained on her record for 24 months instead of a shorter period, I don't accept this either. For at least 15 years or so, the respondent's disciplinary policy and procedure has been the product of JNC negotiations and it has contained a provision about final written warnings stating that they always last for 24 months – not more and not less. In the circumstances, although I am more accustomed to final written warnings lasting 12 months, a 24 month final written warning was plainly within the band of reasonable responses.

32. As part of the disciplinary process in 2016 there were a number of different things the respondent could have 'done' in relation to what could be called the "final written warning issue".

33. At one extreme, the respondent could have decided to ignore altogether the fact that the claimant had a 'live' final written warning. To my mind, that would have been as unreasonable as ignoring the final written warning issue altogether. Between those two extremes there is a lot of ground and it was the ground the respondent occupied.

34. The suggestion made in closing submissions on the claimant's behalf as to what the respondent should have done was that (if the respondent was not prepared to ignore the final written warning altogether) it should have: stopped / suspended the disciplinary process; conducted a completely separate process in which it considered, belatedly, an appeal against the imposition of the final written warning. I disagree that the respondent had to go quite that far in the particular circumstances of this case.

35. It seems to me that in dealing with this situation a reasonable employer would seek to put the claimant in substantively the same position she would have been in had she appealed against the final written warning. Doing this does not, though, necessarily entail going through a freestanding final written warning appeal process in 2016.

36. A reasonable thing the respondent could have done would have been to assume that the claimant's appeal against the imposition of a final written warning went about as well for her as it could, reasonably realistically, have done. I don't think the claimant was ever going to do better, had she appealed against the final written warning, than having it down-graded to a first written warning.

37. A second way in which the respondent could reasonably have tackled the final written warning issue would have been for the respondent, as part of the disciplinary process, to have considered the merits of an appeal against the final written warning and made for itself the decision as to whether the final written warning was appropriate sanction, or whether it ought to have been down-graded to a first written warning.

38. Effectively, what the respondent did in this case was a bit of both of these things. In 2016, both the original disciplinary panel and the panel dealing with the appeal thought about what their decision would have been had the claimant been given a first written warning instead of a final written warning. They both decided that they would still have dismissed her. Doing so would not have breached the respondent's disciplinary policy and procedure. Paragraph 16.6.1 of the procedure that applied in March 2016 states that: "*Dismissal may be appropriate where: A lesser warning* [i.e. something less than a final written warning] *is still valid and the misconduct is sufficiently serious to warrant immediate recourse to this level (i.e. "Summary Dismissal" where the dismissal is immediate and neither is notice paid, nor payment in lieu of notice)*".

39. I shall discuss the seriousness of the claimant's conduct later for these Reasons. For present purposes, I simply note that that I agree with the respondent's analysis that this was very serious misconduct that could legitimately have been treated as gross misconduct in its own right. I also agree that what this part of the disciplinary procedure has in mind is misconduct which is at the upper end of the range, in terms of seriousness, of misconduct that falls short of being gross misconduct.

40. One suggestion made on the claimant's behalf is that if a first written warning and not a final written warning had been imposed in 2015: it would, in accordance with the disciplinary procedure, have been a 12 month warning; by the time of the claimant's disciplinary hearing in March 2016, the warning would have lapsed. I disagree with that interpretation of the disciplinary procedure.

41. The disciplinary procedure is not drafted as clearly as it ought to be (albeit I appreciate how difficult it is in practice to get changes made to JNC-negotiated policy). Be that as it may, what the written policy and procedure that applied in February 2015 said about first written warnings is that: "*Provided there have been no further instance of misconduct or unsatisfactory performance, a First Written Warning with expire after a period of twelve calendar months from the date of the disciplinary hearing when it was given.*" I was initially attracted by the argument that the policy / procedure is ambiguous – and that if it's ambiguous and could be interpreted in two different ways, it should be interpreted in the way most favourable to the employee, given that it is the employer's procedure. My ultimate conclusion, though, is that the procedure should be interpreted as meaning that: a warning does not lapse in 12 months if a further incident leading to disciplinary action happens within that 12 month period; and/or the critical date that one is looking at in accordance with paragraph 16.6.1 when one is thinking about what disciplinary sanction to impose for misconduct and whether a previous warning is 'live' is the date of the misconduct.

42. The practical effect of this conclusion is that even if the claimant had been issued with a 12-month first written warning in 2015, it would still have been live and relevant in relation to the disciplinary process in 2016, because that process concerned conduct that had taken place in September 2015.

43. The two main reasons I have reached this conclusion are:

43.1 first, this interpretation of the policy / procedure gives proper effect to the words "*provided there have been no further incidents of misconduct or unsatisfactory performance*";

43.2 secondly, if what mattered wasn't whether the warning was live when the further incident of misconduct took place but, instead, whether it was live when the disciplinary hearing into that incident of misconduct took place, this would introduce a strange element of luck into the disciplinary process. That process might be delayed through no fault of the respondent in one case, leading to the employee escaping dismissal; whereas, in another, identical, case, for no particular reason, the disciplinary process might happen very quickly, meaning that employee was, through bad luck, dismissed. Also, there should not be an incentive to employees to string the disciplinary process out. Also, employees who conceal their misconduct should not be in a better position than those who do not.

44. I am satisfied on the basis of Miss Sawcus's evidence that there was a reasonably thorough examination of the merits of the final written warning in 2016 and that what the respondent did was at least as good as the process that would have been undertaken in 2015 had the claimant at that stage appealed against the imposition of the final written warning.

44.1 Had there been an appeal in 2015, the claimant would have had an opportunity to put forward arguments orally and in writing as to why it was unfair to impose a final written warning on her to a panel of senior managers within the respondent. The claimant had just such an opportunity in 2016.

44.2 In 2015, the individuals on that panel would have been of greater seniority to those that dealt with the original decision to impose a final written warning. The panel who dealt with her appeal against dismissal in 2016, and who in doing so considered the final written warning, was made up of individuals of the appropriate level of seniority.

44.3 In 2016, the claimant in one sense obtained a benefit that she would not have obtained in an appeal in 2015, namely that the final written warning was considered at two hearings in 2016, not just the single appeal hearing that there would have been in 2015.

44.4 At an appeal hearing in 2015, the panel considering the appeal would have looked at whether imposing a final written warning was consistent with what sanctions had been imposed on other employees in comparable situations and the claimant would have been able to raise arguments about that. Again, this was exactly what happened in 2016.

44.5 Had there been an appeal in 2015, the appeal panel would have considered and analysed the evidence that was before the panel that imposed the final written warning. This is the one area in relation to which what happened in 2016 wasn't quite what would have happened in an appeal in 2015. However, I agree with counsel's submission that the

claimant was not significantly prejudiced by this omission in 2016. This is because what the panel did look at in 2016 was the claimant's evidence and what it didn't look at was statements from various witnesses relied on by the respondent. Further, there was nothing preventing the claimant, had she wanted to do so in relation to the appeal against dismissal, from putting before the panel any evidence relating to the final written warning that she wanted to. Had she felt there were particular items of evidence that it was particularly important for the panel to look at when thinking about the merits of the final written warning, she presumably would have asked the panel to look at them.

45. I think what the respondent ought best to have done in 2016, once the final written warning issue was raised, was not (as the claimant has suggested) to stop the disciplinary process altogether and hold a separate process, but was to have consciously gone through a similar process that would have been gone through at an appeal against a final written warning in a separate part of the disciplinary and appeal hearings from the part that was concerned with the claimant's misconduct in September 2015. However, I certainly don't take the view that there was only one right way for the respondent to deal with the unusual situation it found itself in. Looking at the whole of the disciplinary process, including the appeal, I am satisfied that the way in which the respondent dealt with the final written warning issue was within the band of reasonable responses, and was not a source of unfairness in accordance with ERA section 98(4).

46. In summary and conclusion on this point:

46.1 the respondent reasonably considered itself to be in the position envisaged in the first bullet point under paragraph 16.6.1 of the respondent's disciplinary policy and procedure, namely one where "*a previously issued final written warning is still current and further disciplinary action is warranted*";

46.2 alternatively, even if the respondent ought, when going through the disciplinary process in 2016, to have assumed that the claimant would have appealed against the imposition of a final written warning in 2015 and also assumed that the appeal would have resulted in final written warning being downgraded to a first written warning, the respondent would still have been in the position envisaged in the second bullet point under paragraph 16.6.1 namely, "*a lesser warning is still valid and the misconduct is sufficiently serious to warrant immediate recourse to this level*", i.e. to dismissal.

47. I turn to a number of procedural and evidential points that have been made by or on behalf of the claimant.

48. The claimant complains that the respondent has refused to disclose a recording that was made of the disciplinary hearing on 24 March 2016. The hearing was recorded using someone's computer and was being recorded onto a USB memory stick. The respondent's case is that at the conclusion of the hearing, the USB stick was physically passed over the table to the claimant and the

respondent never saw it again. The claimant's case is not entirely clear to me. What is clear to me is that at the end of that hearing, the claimant was in a state of high emotion – unsurprisingly so, given she had just been told she was dismissed. I think the most likely explanation for the apparent disappearance of the USB stick is that although it was passed over the table to her, and although she may well have unconsciously put in a pocket or in a handbag or something like that, because of what had just happened, she did not pay attention to what she was doing and subsequently mislaid it; and/or she left it on the table and it was overlooked and subsequently mislaid by the respondent. Either way, that recording was not available to be disclosed to her.

49. In any event, it isn't clear to me why the non-provision of the USB stick might render the claimant's dismissal unfair. This is not a case where there seems to be any material dispute about what was said during the course of the disciplinary hearing.

50. There is a complaint about to the respondent's failure to call any witnesses at the disciplinary hearing. In my view, this failure doesn't make the dismissal unfair either. The claimant knew that she could, if she wanted to, call as many witnesses as she wanted to and she also knew that management might not call as witnesses all the people from whom it had obtained statements – it had not done so at the disciplinary hearing following which the final written warning was imposed. Anyway, there wasn't actually very much relevant factual dispute about what had happened. The most damming evidence against the claimant probably came from the claimant herself.

51. Similarly, there is, to my mind, nothing to the claimant's complaint that management failed in particular to call Marina Proud as a witness. Marina Proud was someone who gave evidence against the claimant as to what she had done and said on the day of the incident in question at the WRVS shop where she tendered a counterfeit note. The undisputed evidence of the respondent's witnesses was that management had intended to call Marina Proud to give evidence at the disciplinary hearing, but she failed to turn up because, apparently, she forgot about it. Given that Marina Proud was a witness against the claimant, her failure to attend the hearing could only have been to the claimant's benefit.

52. The same goes for other witnesses too. If management doesn't call live witnesses, the only person giving oral evidence about what happened is the employee who is accused of misconduct. By not calling witnesses, management runs the risk that it will fail to prove the employee's guilt. So long as the employee is given a reasonable opportunity to call whatever witnesses he or she wants to, and is similarly given an opportunity to comment on the witness statements relied on by management, that is to my mind a fair procedure. It accords with the ACAS Code. In any event, my assessment on the facts of this case is that it was within the band of reasonable responses for the respondent to adopt such a procedure.

53. I also note that the claimant did not ask for a postponement of the hearing when Marine Proud did not turn up.

54. The claimant relies on the fact that the CPS dropped the charges against her. In my view that is irrelevant. The CPS and the respondent were dealing with two completely separate things; the criminal courts work to a completely different burden and standard of proof. In any event, the respondent as employer is entitled to decide for itself whether the alleged misconduct is proven. Further, there are sorts of reasons why the CPS might have decided to drop charges against the claimant that have little or nothing to do with guilt or innocence of the alleged misconduct which led to her dismissal.

55. The claimant complains that the respondent failed to disclose to her relevant documents that might have assisted her case. In my view, if and insofar as the respondent failed to provide her with documents that were potentially relevant to her case (and I am not satisfied it did fail to do this), none of the documents the claimant is referring to that actually existed at the relevant time would have provided her with significant assistance in relation to the disciplinary and appeal process. To put things another way: the respondent's approach to disclosure of documents to the claimant throughout the disciplinary and appeal process was within the band of reasonable responses.

56. There are a couple of procedural issues not raised by the claimant herself that were discussed during the course of the final Hearing.

57. The first of these is that Georgina Kenney's role in the process was not limited simply to chairing the disciplinary hearing. She also considered the investigation report that had been prepared by Jane Spiers and took a decision that it was appropriate for the matter to proceed to a disciplinary hearing. Upon reflection, I have decided that this doesn't make the dismissal process unfair. Respondent's counsel submitted that Mrs Kenney's role in deciding the matter should proceed to a disciplinary hearing was analogous to that of an appellant judge giving permission to appeal. I broadly accept that submission. Indeed, Mrs Kenney's role was probably even more limited than that of a judge giving permission to appeal, in that she wasn't deciding that the disciplinary case against the claimant met any particular merits threshold beyond there being some substance to it. In light of Mrs Spiers's report it is anyway inconceivable that anyone in Mrs Kenney's position making a decision about this would have decided the matter any differently from the way in which Mrs Kenney did. I also note that the Mrs Kenney was not the sole decision-maker; she was chair of a panel of three.

58. The final procedural point which troubled me – again not a point raised by or on behalf of the claimant – relates to the formulation of charges that were levied against her and what she was ultimately found guilty of. As explained above, one of the charges was: "*That you concealed two counterfeit £20 notes in the ladies toilet … with the intention of retrieving them later.*" This allegation was found to be proven, unsurprisingly so given that the claimant admitted that she had hidden the money, was seen attempting to go back into the toilets later, and admitted that she had gone back to the toilets later with a view to retrieving the money. What troubled me was the question: what, in the respondent's decision-makers' minds, was the significance of her hiding the money and then seeking to retrieve it later? This was concerning because if the claimant had a

good and innocent explanation for her conduct then she wouldn't be guilty of anything constituting serious misconduct; and that if she didn't, how or why was this classified as something less than gross misconduct?

59. I asked Mrs Kenney about this. She told me that she and the panel she was chairing decided the claimant's intention was to retrieve the money and spend it, in circumstances where she knew it might well be counterfeit. Miss Fawcus's evidence was along similar lines. Although the appeal panel chaired by Miss Fawcus was not conducting a full re-hearing (they were, reasonably in my view, doing something of a hybrid between a re-hearing and a simple review of the decision to dismiss), she told me that they had been presented with, and took into account, evidence that the claimant, despite knowing that it was potentially counterfeit, had wanted to retrieve the money with a view to spending it. The written charges levied against the claimant did not include retrieving the money or wanting to retrieve the money with an intention of spending it regardless of whether or not it was counterfeit.

60. My eventual decision on this point is that my concerns stem from being unduly critical of and over-analysing the respondent's decision-making process. For the respondent to have deemed something that could have been gross misconduct something less than gross misconduct can't possibly be a source of unfairness. Further, it was, I think, implicit in the charge that was levied against the claimant of hiding counterfeit notes with the intention of retrieving them that the claimant was being accused of – potentially dishonestly – concealing counterfeit notes, meaning to spend them later. Why else, one might ask, would she have hidden them rather than destroyed them? The claimant was asked throughout the process what her intentions were. She had evidently understood what she was being accused of and at no stage during the process, (nor, indeed, during the tribunal proceedings) did she herself complain about this aspect in the respondent's decision-making. Again, the respondent acted fairly and within the band of reasonable responses.

61. Based on the evidence of Mrs Kenney and Miss Fawcus, which was substantially unchallenged in this respect and which there is no good reason not to accept, the thing that made the claimant's alleged misconduct particularly serious to the respondent was her hiding the two counterfeit notes and then seeking to collect them from their hiding place later, having not disclosed their existence to anyone.

62. During the course of the disciplinary appeal process, the claimant gave a number of different and contradictory versions of events when attempting to explain what she had done. She gave a further, different, version of events in her evidence to me. What I have to look at, of course, is what evidence was before the decision-makers at the time. The evidence that was before the decision-makers at the time included a handwritten statement the claimant produced within a few weeks of 11 September 2015. In that statement, she suggested that: she hid the notes immediately after a telephone conversation with her partner in which she had told him that something was wrong with a £20 note she had just attempted to present at the WRVS Shop; he advised her not to spend the notes, but to get them checked at the bank or just to get rid of

them and "*that when she hid them she had all intentions of going back for it* [the notes] *once I knew the £20 might have been ok or was resolved*". She then, according to this version of events, went back to the ward, where she encountered security. It was not until some time later that she told the police she had hidden the notes. She didn't tell them about the notes until she had tried, unsuccessfully, to retrieve them. In another version of events she gave, she told the respondent she hadn't told anyone about the £40 left in the lavatory until she was at the police station. She also told the respondent at various times that she was intending to spend the counterfeit notes.

63. Although the claimant sought to explain her behaviour by saying she had simply panicked, there was ample evidence to support the respondent's conclusions that she had hidden the two notes so as to conceal them from the respondent and the relevant authorities because, in light of her conversation with her partner, she believed they were, or were likely to be, counterfeit; and that she intended to retrieve them when the coast was clear and spend them, despite knowing or suspecting that they were counterfeit. That is a very serious matter. It is something the respondent could reasonably have deemed gross misconduct in its own right. It is dishonest and potentially criminal behaviour and objectively judged would be a breach of the trust and confidence term; that is, it would be conduct without reasonable and proper cause calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. It was certainly well within the band of reasonable responses for the respondent's decision-makers to consider that conduct, committed at a time when the claimant was on a final written warning, sufficiently serious to merit dismissal.

64. This was, then, a fair dismissal in accordance with ERA section 98(4). Because of this, it is not necessary for me to deal with the remedy issues that it was agreed at the start of this hearing would be dealt with alongside liability. For the sake of completeness, though: if I had decided the claimant was unfairly dismissed for any reason, I would probably be reducing her compensation both the basic and compensatory awards by 100 per cent, or something close to a 100 per cent, for contribution and fault pursuant to ERA sections 122(2) and 123(6).

65. In summary: the reason for dismissal was a reason relating to Miss Doherty's conduct; the dismissal was fair pursuant to ERA section 98(4).

Employment Judge Camp
16 May 2017

SENT TO THE PARTIES ON
17 May 2017
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FOR THE TRIBUNAL OFFICE