EMPLOYMENT TRIBUNALS

Claimant: **Ms S Webb**

Respondent: **Doncaster & Bassetlaw Hospitals NHS Foundation Trust**

Heard at: **Sheffield** **On: 2 and 5 February 2018**

Before: **Employment Judge Brain**

Representation

Claimant: Mr S Conway, Solicitor
Respondent: Mr N Caiden of Counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:-

1. The claimant was unfairly dismissed by the respondent.
2. Subject to the issue of re-employment, it is just and equitable to reduce the amount of the basic award payable to the claimant by 75% by reason of the claimant's conduct.
3. Subject to the issue of re-employment, there shall be no compensatory award, it not being just and equitable in the circumstances for the claimant to receive a compensatory award from the respondent as the procedural failure upon which basis the Tribunal finds the dismissal to have been unfair would, if perfected, have made no difference to the outcome.

REASONS

1. Following the conclusion of each party's case and the receipt of helpful submissions from both representatives the Tribunal reserved judgment.
2. The claimant presented her claim on 21 June 2017. On page 7 of the claim form she indicated that she was bringing claims of unfair dismissal and wrongful dismissal. The agreed list of issues presented to the Tribunal on the morning of 2 February 2018 said that the sole claim before the Tribunal was one of unfair

dismissal only. Accordingly, the Tribunal makes no determination as to whether the claimant was wrongfully dismissed.

3. The claimant worked for the respondent from 21 July 2003 until 21 February 2017. Upon the latter date her contract of employment was summarily terminated by the respondent.

4. The claimant initially worked for the respondent as a call handler for the out of hours clinic and as a receptionist/clerk in the fracture clinic. From 8 September 2014 she began working as a band 2 receptionist/clerk in the accident and emergency department. At paragraph 4 of her witness statement she describes her main responsibilities as being, *"to meet and greet patients and relatives, answer the telephone, book appointments, deal with X ray forms, escort relatives to the patients and to print and fold all the letters sent to GPs surgeries."* At paragraph 5 she says that, *"when working as a clerk, my main duties were to book patients in after taking the paperwork off the paramedics, request notes from general records, answer telephone queries, print off test results and documents as required by the doctors and nurses, deal with violent or aggressive patients and relatives, open the post and to distribute it where necessary, deal with distressed relatives if a patient had died and to book visits to the mortuary."*

5. The claimant's description of her job appears to be uncontroversial (upon the basis that there was no challenge to her description of it during her cross-examination). She fairly accepted in evidence given under cross-examination that she worked largely unsupervised and that it was important for the respondent to have trust in her that she would follow instructions and *"do the right thing"* (as it was put by Mr Caiden). She also acknowledged the importance of trust and honesty given her access to confidential information as part of her role.

6. When undertaking reception duties she would be the first point of contact for members of the public who walk into the emergency department of the hospital. She said in evidence that in her receptionist role she would have visibility as far as the public were concerned and would also be seen by ambulance staff.

7. The Tribunal heard evidence from the following witnesses called by the respondent:-

   7.1. Kelly Kendal. She is currently employed by the respondent as the acute services co-ordinator. Her role includes the line management of 30 accident and emergency reception staff and secretarial/administration staff. She was the claimant's line manager at the material time.

   7.2. Julie Thornton. She works for the respondent as the deputy general manager in the emergency care group.

   7.3. Lesley Hammond. She is employed by the respondent as the general manager of the emergency care group. She chaired the disciplinary hearing.

   7.4. Anthony Jones. He is employed by the respondent as deputy director of people and organisational development. Mr Jones chaired the hearing of the claimant's appeal against the decision to dismiss her.

8. The Tribunal also heard evidence from the claimant. She also presented an unsigned and undated witness statement from Wendy Welch. Ms Welch

worked as a receptionist/clerk in the accident and emergency department between 15 March 2010 and 17 May 2016.

9. On 25 April 2016 the claimant was issued with a new contract of employment (pages 115A to C of the bundle). This document confirms that her continuity of employment commenced on 21 July 2003. It recorded that her normal of hours of work were 29 hours per week. Her attention was also drawn to the respondent's disciplinary and grievance procedures. The contract said that copies of those documents were to be found upon each ward and department. The copies were also said to be attached to the contract. The claimant accepted that those documents were also available upon the respondent's intranet.

10. The disciplinary procedure is in the bundle at pages 34 to 78. The Tribunal's attention was drawn to the following passages:-

10.1. Paragraph 1.1. provided that the disciplinary procedure *"is intended to enable disciplinary matters to be dealt with quickly, fairly, consistently and reasonably, having regard to the equity and substantial merits of each case".*

10.2. Paragraph 1.7 provides that, *"the level at which the procedure is invoked will be determined by the seriousness of the allegation/misconduct and/or where appropriate the existence of a previous warning which has not expired."* Gross misconduct is defined as *"a breach of discipline which is so wilful; pre-meditated; serious or irresponsible, that it strikes at the root of the employment contract. It is misconduct which effectively destroys the trust and confidence which the Trust must have in an employee. This includes criminal offences outside employment where the offence is one that makes the individual unsuitable for the type of work or unacceptable to other employees.*

10.3. Paragraph 1.4 provides that, *"apart from proven cases of gross misconduct, which generally warrant dismissal, no employee will be dismissed for a first offence without having first been warned and without having been given the opportunity to attain the required standards."*

10.4. At paragraphs 5.4 and 5.5 are delineated the roles of an investigating officer and responsible manager. The latter is the manager who has responsibility to appoint an investigatory officer, review the investigatory information and decide whether the issue in question should be heard in a formal disciplinary hearing and who may make decisions around the level of disciplinary action to be taken following a disciplinary hearing. The former is appointed by the responsible manager to investigate the matter in question. The investigating officer will attend any resultant disciplinary hearing and present the supporting facts and material but can neither adjudicate at the disciplinary hearing nor be in any way involved in or connected with the allegation in question.

11. Section 9 of the policy sets out the formal stages of the disciplinary procedure. The operation of the procedure will include one or more of the four stages set out in section 9 (copied at page 43 of the bundle). Stage 1 is appropriate in those cases for which the issue of a recorded oral warning is decided upon. Stage 2 is the stage for which the issue of a first written warning will be appropriate. Stage 3 is that for which the issue of a final written warning will be

appropriate and stage 4 is dismissal. The procedure then goes on to deal with the procedure around the issue of warnings in section 11 (copied at pages 44 and 46). The letter of warning must include, amongst other things, what is expected of the employee in future, the type of warning issued and the time limit given for improvement or review. The procedure goes on to say that the warning will clearly state the period during which it will remain extant and/or be upon the employee's personal file and give notice that any subsequent misconduct of the same or of a similar nature will result in further, more severe, disciplinary action.

12. The right of appeal is contained in section 14 (copied at page 47). Appeals should normally take place, it is said, within five weeks of receipt of the appeal by the respondent although there may be circumstances when it is required for this period to be extended.

13. Appendix 2 of the procedure provides rules relating to employment with the respondent. Amongst other things:-

    13.1. The respondent has a policy of no smoking on its sites. Employees were told by virtue of the provisions at appendix 2 that smoking in all areas of the respondent's premises is strictly forbidden.

    13.2. All charges and cautions brought against an employee for any criminal or civil offence, whether connected with employment or not, must be reported immediately to the employee's head of department.

    13.3. The unauthorised use of the respondent's computer systems extends to accessing internet sites which are not work related. Such access is strictly forbidden.

14. Also within the Tribunal's bundle of papers were copies of the respondent's 'smoke free policy' and 'use of the internet and email policy'. These were within the bundle commencing at pages 79 and 92 respectively.

15. The smoke free policy has as its purpose the maintenance of a smoke free hospital environment extending to designating all buildings as smoke free. The policy applies to the respondent's staff. Breaks for smoking are not permitted. The policy provides that electronic cigarettes *"are unregulated nicotine products for which there is insufficient evidence of safety and pose a fire hazard. In view of this, use of e-cigarettes is not permitted anywhere on Trust premises."*

16. The use of the internet and email policy provides that a failure to comply with it may result in disciplinary action being taken and that misuse of the computer systems may be considered gross misconduct. A number of examples of gross misconduct in connection with computer use are given. These include accessing, downloading and/or distributing pornographic, racial, sexual, derogatory or offensive material, deliberately or negligently downloading malware which expose and undermine the respondent's IT security measures, breaches of the Computer Misuse Act 1990 or the Data Protection Act 1998 and administering, supporting or moderating a third party internet site such as discussion groups, fan sites or websites for a business.

17. Against this background, the Tribunal now turns to the events which ultimately led to the claimant's dismissal. Miss Kendall says at paragraph 5 of her witness statement that, *"On or about early June 2016 several issues were brought to my attention concerning Mrs Webb from different sources who had witnessed them.*

This included reports that she had been seen accessing the internet during work times on two occasions by a senior sister; that she had logged off from the computer system before the end of her shift meaning that patients who arrived could not be booked in by a member of the nursing staff leading to a delay in patient care, complaints about her poor attitude from nursing and ambulance staff; and that she had been seen by a manager charging and smoking her e-cigarette in the reception area and also keeping food and drink on her desk. These events had occurred that day or during the nightshift the day before."

18. Miss Kendall goes on to say at paragraph 6 of her witness statement that, *"I was aware that Melanie Lavers, business support manager, had previously spoken to Mrs Webb informally in December 2015 about the fact that she was using the internet whilst she was working and she had been informed that this was against Trust policy. A copy of the file note is at page 114 of the bundle. As this issue had arisen again I arranged to speak to Mrs Webb on 2 June 2016 about this and the other issues that had been reported to me."* The file note at page 114 is unsigned by Melanie Lavers and the claimant. The claimant had no specific recollection of the note when taken to it on cross-examination. However, she did not deny that she had been spoken to about the issue of internet use in December 2015.

19. Miss Kendall spoke to the claimant on 2 June 2016 (page 116). Miss Kendall's file note records the claimant admitting to the five issues raised (which are summarised in paragraphs 5 and 6 of Miss Kendall's witness statement). Miss Kendall observed in the note that the claimant *"did not take the complaints very well."* Arrangements were made to continue the discussion the next day. Miss Kendall fairly accepted, in evidence under cross-examination that the claimant accepted the issues raised and was honest with her.

20. The file note also goes on to record a conversation that took place over the telephone at 8.30am on 3 June 2016. It had been arranged on 2 June 2016 that Miss Kendall would see the claimant at 1pm on 3 June 2016 when the claimant reported for work. Miss Kendall said that in the telephone discussion at around 8.30am on 2 June (prior to the scheduled meeting) the claimant said that she wanted legal representation and "*was very aggressive on the phone".* Miss Kendall said that she would speak to the claimant later in the day as planned.

21. There appears to be no note of the subsequent meeting of 3 June 2016 which took place upon the claimant's arrival at work. Although the claimant takes issue with Miss Kendall's description of her (the claimant) being aggressive towards her in the course of a telephone conversation that morning, no issue seems to be taken by the claimant with Miss Kendall's evidence that the meeting did in fact take place as scheduled. The claimant was unaccompanied. Miss Kendall says that she told the claimant at the meeting that there was a smoking ban on the hospital site which included e-cigarettes. Miss Kendall said that she would *"arrange a communications course in respect to her attitude issues."* She also said that she explained to the Claimant *"that as she had previously been spoken to about accessing the internet I would need to speak to human resources about the concerns and how to proceed."*

22. On 9 June 2016 Miss Kendall spoke to Jo Dixon, HR business partner. This is documented at pages 128 and 129. The case summary in the box at page 128 refers to Miss Kendall raising the issues of internet use, the smoking of e-

cigarettes and the claimant's attitude. The note also says that Miss Kendall had obtained a print out from the respondent's IT department about the claimant's internet usage.

23. The print out obtained by Miss Kendall is copied in the bundle at pages 117 to 125. This covers the period between 1 and 6 June 2016 inclusive. Miss Kendall fairly accepted that there was no evidence in the print out that the claimant had used the internet for personal matters on or after 2 June 2016. There was one entry on 6 June 2016 at 14:41 ('hello.staticstuff.net') which was questionable. It was suggested to Miss Kendall by Mr Conway that this was a pop up and not activated by the claimant.

24. On 29 June 2016 Miss Kendall wrote to the claimant (page 138) inviting her to attend an investigatory meeting to be held on 12 July 2016. The claimant was told that, *"The purpose of this meeting is to discuss your response to the allegation that you have been using the internet inappropriately, smoking and charging an e-cigarette on the back desk. During this meeting you will be given a full opportunity to respond to these concerns."* The claimant was told that she had the right to be accompanied by a trade union representative or a work colleague.

25. Mr Conway suggested to Miss Kendall that there had been an unreasonable delay in dealing with matters. Miss Kendall sought to excuse the delay upon the basis of a need to liaise with HR. The Tribunal accepts that as an explanation but it only gets Miss Kendall so far given that the discussion between her and Jo Dixon took place on 9 June 2016. That leaves an unexplained delay of almost three weeks before Miss Kendall contacted the claimant by letter on 29 June 2016.

26. The notes of the meeting with the claimant of 12 July 2016 are at pages 140 and 141. Miss Kendall was accompanied by Miss Kerstie Hodgkinson of HR.

27. The claimant accepted that she had been on the internet *"for personal use on two occasions recently."* Miss Kendall reminded the claimant that there had been regular team meetings at which *"we regularly talk about appropriate internet usage."* The claimant accepted this to be the case and was then asked by Miss Kendall why she continued to use the internet for personnel matters. The claimant said, *"Due to it being quiet and it was only a few occasions and everyone else does it."*

28. With reference to the e-cigarette allegation, the claimant volunteered that she had charged her e-cigarette on her desk via the USB port on her computer. We can see at page 141 that she gave a brief description as to the steps to be taken when charging an e-cigarette. The claimant accepted that this was inappropriate. She also said that she had smoked the e-cigarette *"on occasions at the back of the reception area, under the stairs. This is out of sight of anyone."* Miss Kendall reminded the claimant of the respondent's policies regarding smoking on site. The claimant said that she *"thought e-cigarettes were different."*

29. The meeting then concluded with Miss Hodgkinson giving an explanation to the claimant as to how the matter would then progress and that the respondent would be in touch with her *"as to how we were going to proceed as soon as possible."* Miss Kendall says (at paragraph 13 of her witness statement) that

the claimant was asked to provide a "*written statement detailing her response to what we had said which she said she would do."*

30. There is nothing in the note at pages 140 and 141 that shows that the claimant was asked for a statement. When giving evidence under cross-examination the claimant said that she was told that she should make a statement but only when she was provided with a copy of the minutes. However, she not was sent the minutes until 9 February 2017 ahead of the disciplinary hearing that took place on 21 February 2017.

31. On 15 July 2016 Miss Kendall emailed Mrs Hammond (page 143). Miss Kendall said, *"The investigatory meeting went with Sue Webb and HR Kerstie Hodgkinson. Sue acknowledged all the issues raised and confirmed they would not happen again with e-cigarette and internet use. After the meeting, Kerstie and myself had a discussion and would like your input on how you would like to proceed? We can continue and make this official with accompanying statements regarding the allegations or to act as a 'warning meeting' regarding hospital policy and procedures?"*

32. Mrs Hammond replied on 19 July 2016 (page 144) to say, "*I think it needs to be formal because both incident she knows is not allowed especially the e-cigarette in hospital … or am I being harsh?"* Ms Hodgkinson replied on 26 July 2016 (also at page 144) and said, "*Having spoken to Kelly it is very apparent that there are issues with all staff in that department and the culture of doing things they shouldn't be, so I think it would be beneficial for Kelly to work with Joanne Dixon, HRPP to look at ways to re-educate the team. However in regards to Sue Webb I am happy to move this forward so myself and Kelly will start to draft a management report for you to consider. I am aware that Kelly isn't currently in the office, so could I ask you Kelly to contact me on your return and we can arrange a date to get together."*

33. On 10 August 2016 Ms Hodgkinson asked Miss Kendall to prepare a draft management report to submit to Mrs Hammond. The delay in actioning this was attributable to Ms Hodgkinson's annual leave. The Tribunal refers to page 146. Pages 154 to 161 are emails between 10 August and 13 September 2016 around efforts made by those concerned to meet in order to progress matters. It is not fruitful to descend into the detail of this correspondence. Suffice it to say that annual leave and staffing issues were the reasons for the lack of progress.

34. On 13 September 2016 Miss Kendall sent a draft management report to Ms Hodgkinson (pages 161 to 163). A further draft was sent to Ms Hodgkinson on 23 September 2016 (page 172). Miss Kendall said that she was awaiting a statement from the claimant who had been on sick *"for a few weeks".* The claimant was in fact absent from work by reason of ill health between 7 and 21 September 2016.

35. On 23 September 2016 Kelly Kendall emailed the claimant to ask for her statement (page 177). We can see from the email exchanges between Kerstie Hodgkinson and Kelly Kendall at pages 178 to 181 that the management report had not been finalised at this stage.

36. At paragraph 19 of her witness statement Miss Kendal says that, *"On 3 October 2016 Mrs Webb asked if I could arrange a meeting with Julie Thornton, deputy general manager. I asked her if everything was alright and she simply stated*

that she wanted to speak to Julie. I arranged this meeting for her." Miss Kendall then goes on to say at paragraph 20 of her witness statement that, *"On 6 October 2016 I was informed by Mrs Webb that she had to go to a court hearing on 10 October 2016 in relation to an allegation of benefit fraud. She confirmed that she had already spoken to Julie Thornton, deputy general manager about this."* Miss Kendall goes on to say that, *"Ms Webb did not contact me to confirm what had happened in court but when I saw her on 11 October at the end of her shift I asked her what the outcome had been and she confirmed that she had been convicted but had accepted a community order. I confirmed this discussion to Julie Thornton (page 183). Julie Thornton then escalated the issues to Lesley Hammond and human resources."*

37. In evidence under cross-examination, Miss Kendall accepted that she had not adjusted the claimant's substantive role following receipt of this information and, further, the claimant had continued to work in that role and in fact had undertaken a significant amount of overtime. Miss Kendall said that it was not her decision as to whether to remove the claimant from her role or suspend her pending enquiries.

38. For her part, Miss Thornton says (at paragraph 2 of her witness statement) that the claimant informed her on 3 October 2016 that *"she had been summoned to attend court in relation to a benefit fraud charge. She stated several times that the court had told her that she did not need to tell her employer about the court appearance but that she wanted to be honest about the issue. I thanked her for this. She explained that she had been paying back the money and had been surprised to receive a courts summons. She told me the court hearing was early the following week and I asked her to update me after this to confirm the outcome. I noted the date down as Tuesday 11 October 2016 but I believe I may have made an error as it was actually on 10 October 2016. I felt it was important for me to know the outcome of this hearing as an act of theft or fraud is an act of potential gross misconduct under the Trust's Disciplinary Rules (page 53)."* Here, Miss Thornton is referring to the relevant passage from the disciplinary procedure to which the Tribunal referred above.

39. Miss Thornton goes on to say at paragraph 3 of her witness statement that*, "I was not contacted by Mrs Webb to confirm the outcome of the hearing the following week as I had asked her to do. I spoke to Kelly Kendall on 13 October 2016 and she confirmed that Mrs Webb had stated to her that the hearing was on Monday 10 October. Kelly also explained that Mrs Webb had been found guilty of benefit fraud and was to do 150 hours of community service, having accepted this instead of 32 days imprisonment or tagging. This denoted to me that this was quite a serious offence. I made a note of my conversation with Mrs Webb and Kelly Kendall (pages 183 to 184)."* Julie Thornton then emailed the claimant asking her to make contact to discuss the outcome of the court hearing.

40. Miss Thornton confirmed in evidence under cross-examination that for her part she had no concern about the claimant continuing in her role pending the outcome of disciplinary proceedings.

41. Miss Thornton spoke to Diane Culkin, human resources manager. She (Ms Culkin) advised that the claimant be asked to produce a copy of the court summons and a record of the court's decision.

42. A decision was then taken to combine the respondent's enquiries about the internet and e-cigarette issues on the one hand and the benefit fraud issue on the other. The Tribunal refers to the emails at pages 202 to 207.

43. On 19 October 2016 Miss Thornton spoke to the claimant. She emailed Kerstie Hodgkinson, Lesley Hammond and Joanne Dixon the same day with a summary of the conversation (page 224). Miss Thornton ascertained that the claimant was made aware of the need to pay back the benefits in January 2016 but *"at this point she was unaware she had to go to court."* The claimant told Miss Thornton that she had received a letter on Saturday 1 October 2016 saying she had to attend court on Monday 10 October and had informed Julie Thornton of that fact on Monday 3 October. She informed Miss Kendall about the court appearance on 6 October 2016. Miss Thornton said that Doncaster Council (the prosecuting authority) had told her that she did not need to tell her employers about the benefits that she was paying back. She also informed Miss Thornton that she "*doesn't have any documentation in relation to her court appearance other than the outcome sheet which specifies she has been given 150 hours community service – the rest of the documentation is with the duty solicitor – I have asked her if it is possible to retrieve this – SW doesn't think it will be".* Miss Thornton asked the claimant to try to obtain the documentation.

44. At a meeting with Miss Thornton the following day Miss Thornton's evidence is that the claimant intimated that she may go off on sick leave. The claimant said in evidence before the Tribunal that around this time, *"I was really in a state. I was mortified."* The claimant said that she feared for her job at this stage. Her evidence to the Tribunal was that a colleague who had been convicted of drinking and driving escaped dismissal. Miss Thornton accepted in evidence that the claimant had raised this example with her during the course of their discussions. However, the claimant could not or would not divulge the identity of the individual in question.

45. We can see from Julie Thornton's email of 20 October 2016 sent following her meeting with the Claimant that day and addressed to Ms Culkin, Ms Hodgkinson and Ms Dixon (at pages 220 and 221) that the claimant had expressed concern about what Miss Thornton described as *"the outstanding HR matter."* This was a reference to the internet and e-cigarette issues. Diane Culkin replied that, *"this process* [the investigation into the internet usage and e-cigarette issues] *has been temporarily put on hold until a decision has been made on whether information needs to be included related to the most recent issues."*

46. On 21 October 2016 Miss Thornton emailed Diane Culkin to say that the claimant had contacted Doncaster Council and her solicitor *"so hopefully the documents will be with us shortly."*

47. By 7 November 2016 the information had not been received. Miss Thornton therefore sent a chasing email that day (page 238). The claimant said that she would bring the information in on 11 November 2016 but did not do so. A further chasing email was therefore sent on 21 November 2016 (page 237). The claimant was on sick leave on 21 and 22 November 2016. The claimant had not produced the documents by 23 November 2016 as requested by Miss Thornton. The respondent was therefore considering investigating a possible conduct issue against the claimant for failure to obey a reasonable

management instruction. This did not come to pass however as the claimant handed the documents to Kelly Kendall upon her return to work on 28 November 2016.

48. In the meantime, Diane Culkin had discovered on 24 November 2016 that the claimant had pleaded guilty to benefit fraud of approximately £10,000.00 and was sentenced to a community punishment order of 150 hours of unpaid work plus a £60 victim surcharge and costs (pages 259 and 259A).

49. On 28 December 2016 the claimant was invited to an investigatory meeting to be held on 3 January 2017 (pages 279 and 280). The purpose of the meeting was said to be, *"to discuss the offence of fraudulent claim of housing benefit and council tax as per Doncaster Magistrates Court attendance 10 October 2016. Previous correspondence dated 10 June 2016 from the Department for Work and Pensions highlighted the recommendation to prosecute. However, you did not notify your employer until 3 October prior to your court attendance date for 10 October 2016."* The claimant was informed of her right to be represented. In the event, the meeting was postponed to 9 January 2017 (pages 283 and 284).

50. The notes of the meeting are at pages 292 and 293. The meeting was chaired by Miss Thornton. Ms Hodgkinson was also present. The claimant was unrepresented. The notes record that the claimant, *"Explained that when she started claiming benefits this was all above board and the entitlement was accurately calculated. However, when SW obtained another job she failed to declare these changes until she subsequently moved house and then it was stopped. Two years on SW was contacted and interviewed by the council to which the outcome of this was that they were going to consider whether this would need to be progressed. At this point SW started paying the overpayments back."* Miss Thornton asked why the respondent had not been notified sooner. The claimant said that she had spoken to Karen Oates (at Doncaster Council) who said the matter was just being investigated and that the claimant should *"hold fire"* pending the outcome of that investigation. The claimant said that she notified the respondent as soon as she received the summons.

51. Mrs Hammond received the completed management report on 25 January 2017 from Miss Thornton. The relevant email is at page 316 and the report itself is at pages 347 to 404. Mrs Hammond decided that there was a case for the claimant to answer at a disciplinary hearing. Accordingly she wrote to the claimant on 7 February 2017 (pages 345 to 346) inviting her to a disciplinary hearing on 21 February 2017.

52. The claimant was informed that Mrs Hammond would chair the meeting and that she would be accompanied by Joanne Dixon. Miss Kendall would present the respondent's case supported by Miss Hodgkinson. Five allegations were to be addressed. These were:-

1. Inappropriate internet usage which is in breach of the "use of the internet and email policy.".

2. Charging and using an e-cigarette on site and within a working area which is in breach of the "smoke free policy."

3. A failure to declare the matter of council tax and housing benefit fraudulent claims following her interview under caution and letter advising a recommendation to prosecute.

4. That the claimant was convicted of benefit fraud on 10 October 2016.

5. The failure to formally notify Julie Thornton of the court hearing as requested.

53. The claimant was told that these were serious matters which could result in her dismissal. The management statement of case was sent to her. She was told that she had the right to introduce statements and call witnesses and also to be accompanied by a colleague or a trade union official.

54. The management report commencing at page 347 was said to have been prepared by Miss Kendall and Ms Hodgkinson. There was an earlier version of the same report within the bundle commencing at page 296 bearing the name of the same authors. Three allegations were included in the earlier version. The fourth and fifth allegations set out above at paragraph 52 and referred to in the final version at pages 348 and 349 were plainly added later.

55. Another version bearing the name of Miss Kendal, Miss Thornton and Ms Hodgkinson is in the bundle commencing at page 319. At paragraph 21 of her witness statement Miss Kendall says that Miss Thornton continued to take the lead upon the issue relating to the criminal charges, hence Miss Thornton meeting with the claimant on 9 January 2017. Miss Thornton, at paragraph 10 of her witness statement, says that it was agreed that it was appropriate for Miss Kendall to take the investigation forward and complete the investigation report. She goes on to say at paragraph 12 that, *"There was some debate around this time whether I or Kelly Kendall should hold the investigatory meeting."* (This was the investigatory meeting into the criminal case which Miss Thornton dealt with by meeting with the claimant at the investigatory meeting of 9 January 2017). Miss Thornton then says that she worked with Ms Hodgkinson on finalising the management report in respect of the allegations concerning the conviction. Miss Thornton says that it was agreed that Miss Kendall would present the management case in respect of all of the allegations.

56. It was put to Mrs Hammond that she had in fact added to the three charges that we see in the first version of the report commencing at page 296 and had expanded that to the five charges eventually raised against the claimant. Mrs Hammond fairly accepted that she had done so. She said there was nothing wrong in her so doing in her capacity as the commissioning manager.

57. The management report sent to the claimant commencing at page 347 contains seven appendices. Where comment is required the Tribunal summarises as follows:-

Appendix 1 was a print out of activity upon the claimant's computer. The way in which the respondent presented this document to the Tribunal makes it quite difficult to follow. A landscape version of the same print out is in the bundle at page 509 (being the report prepared for the purposes of the subsequent appeal hearing). This was a little easier to follow. It is a different print out to that which Miss Kendall had before her when conducting the investigation into the matter the previous June. There are a number of entries showing that the claimant had gone on to an Amazon website on a number of occasions on 2, 3, 5 and 6 June 2016. There was nothing to show that she had done so on or after 7 June 2016.

Appendix 2 is the file note of 2 December 2015 referred to above.

Appendix 3 is Miss Kendall's file note of 2 June 2016 again referred to above.

Appendix 5 is the note of the meeting of 12 July 2016 referred to above.

Appendix 6 is a list of the claimant's sickness record. She was absent on 16 and 17 June, 7 to 21 September inclusive and 19 to 26 November 2016 inclusive.

Appendix 7 consists of documentation around the criminal case.

There was a letter from the claimant's solicitors dated 17 October 2016 addressed to the claimant referring to her appearance in Doncaster Magistrate's Court on 10 October 2016. The solicitor's letter recorded that the claimant had not notified Doncaster Council of a change in her financial circumstance when she knew that she was obliged to self-notify. The letter confirmed the sentence passed upon the claimant that she should do 150 hours of unpaid work pursuant to a 12 month community order, should pay £85 costs, a victim surcharge of £60 payable at the rate of £5 per week. The claimant was advised against appealing upon the basis that the Crown Court may in fact increase the sentence.

Also in Appendix 7 was a letter from Karen Oates dated 10 June 2016 notifying the claimant of a recommendation that the claimant should be prosecuted and that if the prosecution division took the view that prosecution should follow, a summons would be served upon the claimant in due course.

The summons (at page 400) was sent to the claimant by first class post on 22 September 2016 requisitioning her appearance in court on 10 October 2016 to answer charges that: between 1 February 2010 and 31 March 2013 she dishonestly failed to promptly notify Doncaster Council of a change of circumstances which she knew would affect her entitlement to council tax benefit; and that she had dishonestly failed to promptly notify Doncaster Council of a change of circumstance which she knew would affect her entitlement to housing benefit. Both charges were brought under the Social Security Administration Act 1992.

Also included in Appendix 7 was a copy of the community order and a timeline of events prepared by the respondent.

58. A further incident took place on 2 February 2017. At paragraph 23 of her witness statement Miss Kendall said that on that day she was speaking to a doctor in the emergency department. The claimant approached. Miss Kendall says that, *"Mrs Webb kept trying to interrupt us while we were speaking and when I asked her to wait she stormed off only to come back again and interrupt us again asking 'when is it going to be'".* Miss Kendall informed the claimant that her behaviour was unprofessional. She prepared the note that we see at page 406. The note records the claimant admitting that she should not have spoken to Miss Kendall as she had done and that she apologised to her. About this, the claimant says in paragraph 50 of her witness statement that she did interrupt Miss Kendall's meeting. The claimant says, *"I was under a lot of stress at the time and I did apologise."*

59. On 9 February 2017 Miss Kendal wrote to the claimant to say that the 2 February 2017 incident was to be discussed as part of the disciplinary hearing. It was not part of the respondent's case that this was pursued as a stand alone allegation. Also enclosed with that letter were the notes of the investigatory meetings held on 12 July 2016 and 9 January 2017.

Mrs Hammond accepted that this was the first occasion upon which the claimant had sight of either set of notes.

60. The disciplinary hearing went ahead on 21 February 2017. The notes of this are at pages 411 to 416A.

61. The claimant was represented by her trade union representative David Ferris. Mrs Hammond was in attendance as the chair of the panel assisted by Joanne Dixon. Kelly Kendall presented the management's statement of case supported by Kerstie Hodgkinson.

62. The notes record that Mr Ferris said that the incident of 2 February 2017 had been added after the management bundle had been sent out. The note then says that, *"it was agreed that this matter be considered today rather than separately."* It was suggested by Mr Caiden on behalf of the respondent that Mr Ferris was happy to do this because he knew that it was a relatively minor matter and in addition no investigation into it was necessary. The claimant replied that Mr Ferris *"thought it would be a file note".*

63. Mr Ferris accepted on behalf of the claimant that she had been *"vaporising not smoking"* during work time in her work area and admitted to charging up the electronic cigarette at work. The claimant fairly accepted in cross examination that no case was run by or on her behalf during the disciplinary proceedings to the effect that there was a distinction to be drawn between smoking tobacco on the one hand vaporising when using an electronic cigarette on the other.

64. There was no challenge to the respondent's evidence about internet use. However, it was submitted on the claimant's behalf that others used the internet during working time and also used electronic cigarettes. Mr Ferris said that there had been no repeat of the claimant's behaviour after the meeting of 12 July 2016. The claimant did not identify anybody else who she alleged had behaved as had she. The claimant accepted, under questioning from Mrs Hammond at the disciplinary hearing, that she should not have used the computer for personal use after having been spoken to about it on 2 December 2015 when she was seen shopping for handbags on Amazon. Mrs Hammond said that if others are breaking that policy then the claimant should inform her manager to allow that to be dealt with.

65. The meeting then turned back to the issue of using electronic cigarettes in the workplace. We can see at page 415 that the claimant's trade union representative said that she did not think it had been appropriate to use the electronic cigarette in work but that she had used it under the stairs and not in view of the reception desk. The claimant accepted in cross-examination that she was aware that the use of cigarettes (electronic or otherwise) in the workplace and in the respondent's buildings was inappropriate hence her using it while hiding under the stairs.

66. The meeting then turned back once again to the question of internet use. The claimant is recorded at page 415 admitting to using Amazon and Booking.com websites. She denied the use of online banking or Ebay. She told the Tribunal that she does not do online banking and does not have an Ebay account. The Tribunal accepts the claimant's evidence, there being nothing to the contrary to indicate that she was doing online banking or logging on to the Ebay site during working hours.

67. The disciplinary hearing then adjourned. Upon the resumption, Mrs Hammond informed the claimant that she had reached a decision to summarily terminate her contract of employment. Mrs Hammond decided that the third and fifth allegations set out at paragraph 52 above were not proven. Mrs Hammond accepted that the claimant had acted in good faith and upon the advice of Mrs Oates in how she had dealt with the issue of informing the respondent about her situation following her interview under caution and letter advising of the possibility of prosecution.

68. Mrs Hammond said that there had been proven the inappropriate use of the internet and the charging and using of an e-cigarette on site. Also proven was the fact of the claimant's conviction for benefit fraud on 10 October 2016. The note records that Mrs Hammond, *"stated that she believed that the three proven allegations plus the concerns that had been raised after the February incident add up to gross misconduct and that Susan will therefore be dismissed from her job."* She went on to say that, *"her decision was based on the combination of the three proven allegations with the addition of the concerns raised from February 2017."* The Tribunal refers to the note at page 416A.

69. Mrs Hammond then wrote to the claimant on 24 February 2017 to confirm her decision (pages 419 to 421). After reciting the three proven allegations (being the first, second and fourth allegations cited above) Mrs Hammond said about the incident of 2 February 2017 that, *"although not part of the allegations I informed you of my concern regarding your behaviour towards other Trust staff including your line manager, which was detailed in the file note of 2 February 2017 and 2 June 2016. You explained that your behaviour had been due to stress relating to the fraud prosecution and the disciplinary process".*

70. Mrs Hammond went on say that, *"I concluded therefore, in the light of the decisions I had reached concerning these allegations and the serious nature of the misconduct, that when considered together, the cumulative effect was gross misconduct and I informed you that I had no alternative but to dismiss you with immediate effect ie 21 February 2017."*

71. The claimant was afforded a right of appeal. She wrote to Richard Parker, chief executive, on 8 March 2017 invoking this right (page 422). Her grounds of appeal were:-

"1. Lack appropriate and adequate investigation.

2. The Trust's late addition of further allegations after the disciplinary hearing letter had been received. These were not investigated or questioned in the hearing but were referred to in the outcome letter.

3. The respondent's inability to consider other options as an alternative to dismissal.

4. The Trust have saved up previous unrelated allegations and instances from 2016 and not dealt with these as they occurred, instead clustering them together and considering them as a whole.

5. The incorrect application of 'totting up'; utilising a cumulative effect to uphold the gross misconduct outcome and leading to dismissal.

6. The severity of the sanction is too harsh".

72. The letter of appeal acknowledged on 14 March 2017 (page 423). Mr Ferris emailed on 18 April 2017 expressing concern that the appeal had not been

heard within the prescribed timescales within the respondent's policy to which the Tribunal referred earlier. Mr Ferris' email is at page 425. Mr Ferris followed this up on 25 April 2017 (page 433). He said that two months had elapsed following the claimant's dismissal.

73. The appeal was eventually arranged for 7 June 2017. The appeal panel was made up of Mr Jones and Mr Parker. The respondent's statement of case was presented by Lesley Hammond and Jo Dixon. Again the claimant was represented by Mr Ferris. The minutes of the appeal meeting are in the bundle commencing at page 471. The management statement of case commences at page 445.

74. Mrs Hammond said at paragraph 1.1 of her statement of case that the claimant was employed as a member of the reception team from 8 September 2014. There was no reference in the report to her length of service dating from 2003. Mrs Hammond said in evidence that she was aware of the claimant's length of service even though the date in the report is incorrect.

75. There was also cross-examination of Mrs Hammond upon the basis that the decision to dismiss the claimant had not been hers alone. This was suggested by reason of her use of the expression *"the panel"* and frequent reference to the third person plural *"we"* in her report. Mrs Hammond said that the panel had consisted of her and Jo Dixon but the latter had not played any part in her decision making process.

76. That Mr Jones and Mr Parker were aware of the correct date of commencement of the claimant's employment with the respondent can be seen at page 465. This document is headed 'appeal statement of case' and refers to a timeline the first date of which is the date of commencement of the claimant's employment with the respondent. The correct date of commencement is also given in the claimant's statement of case commencing at page 466.

77. Mr Jones comments, at paragraph 6 of his witness statement, about how he and Mr Parker handled the appeal hearing. He says that, *"we conducted an in depth consideration of the evidence and the hearing was more of a re-hearing of the evidence than a review, which is the usual Trust practice."* In this connection, he said that he and Mr Parker assessed the question of alternative to dismissal for themselves. They felt that the respondent had, *"gone on appropriately to consider the appropriate sanction. It was clear alternatives to dismissal were considered and we considered that the disciplinary panel had taken into account the correct matters in reaching their conclusions."*

78. Mr Parker and Mr Jones rejected the claimant's contention that the respondent had saved matters up in order to cluster allegations together. It was accepted by them that there had been delays in the progression of the investigation albeit that some of these were down to sickness leave and annual leave for the claimant (between 17 and 31 July, 7 and 21 September and 19 to 26 November 2016) and delays waiting information from the claimant to supply *"court related information"* between 13 October and 29 October 2016.

79. Mr Parker and Mr Jones rejected Mr Ferris' contention at the appeal hearing that there had been an inappropriate totting up of offences. They said that there was no totting up as there was no extant oral or written warning against the claimant. Mr Jones says at paragraph 20 of his witness statement that, *"We heard the approach that had been taken by the disciplinary panel and that*

they considered the nature of the three separate allegations, the totality of the misconduct and the impact on the employment relationship in determining the finding. On reviewing matters we felt there had been no incorrect totting up and it was reasonable to take this approach where all the issues were ones of conduct".

80. Mr Ferris submitted that the claimant had an exemplary employment record. This representation was investigated. Mr Jones says at paragraph 21 of his witness statement that, "*We noted that Ms Webb had had previous informal warnings and management instructions as to her conduct, particularly as to her attitude to other members of staff as well as her previous misuse of the internet."* Further detail about these was given by Mr Jones in his letter dismissing the claimant's appeal. The letter commences at page 490. In particular at page 496 Mr Jones said that, *"Your personal file indicates a number of instances where managers have had cause to speak to you with regards to your attitude to other members of staff; April 12, June 12 and January 15. Your record also indicates an issue which was raised in March 15 with the Trust internal Fraud Department regarding an episode when you reported being absent for work with D&V in one department and attending work to work a nightshift in another department. The appeal panel felt that the above information contradicted your assertion that you had an exemplary record."* Mr Jones did not ask the claimant to provide her comments upon any of those instances.

81. Mr Parker and Mr Jones concluded that the claimant's misconduct amounted to gross misconduct *"because it fell short of explicit disciplinary rules, expectation and policy resulting in a complete breakdown of trust and confidence in the employment relationship."*

82. The Tribunal now turns to a consideration of the relevant law. The right not to be unfairly dismissed is a statutory right to be found in Part X of the Employment Rights Act 1996.

83. The fact of the dismissal is, of course, admitted in this case and accordingly the burden is upon the respondent to show a potentially fair statutory reason for the claimant's dismissal. In this case, the potentially fair statutory reason relates to the conduct of the claimant. It does not seem to be in dispute that the respondent in this case discharges the burden of proof upon it to show the fact of the respondent's genuineness of belief in the circumstances giving rise to concerns about the claimant's conduct.

84. That being established, the Tribunal must then be satisfied (the burden of proof being neutral) that the respondent had in mind reasonable grounds upon which to sustain that belief having carried out as much investigation into the matter as was reasonable in the circumstances of the case. Should the Tribunal be so satisfied then the question is whether the dismissal is fair or unfair in all the circumstances (including the size and administrative resources of the employer's undertaking) and in accordance with the equity and substantial merits of the case. The Tribunal must not substitute its own view for that of the employer. It is not for the Tribunal to ask whether a lesser sanction would have been reasonable but rather whether or not a reasonable employer might dismiss the employee in the circumstances taking into account all of these matters.

85. The band of reasonable responses test applies to all aspects of the matter from the initial investigation to the decision as to what sanction to impose and any consideration of the matter upon appeal. An appeal hearing can cure any early deficiencies in procedure.

86. Where there are several allegations of misconduct found to have occurred the question for the Tribunal is to look at the totality of the misconduct found and then determine whether dismissal falls within the reasonable band of responses for the totality of the misconduct. There is no need for the acts individually to amount to gross misconduct or acts for which one could individually dismiss. The proper focus is upon the nature and quality of the claimant's conduct in totality and the impact of such conduct upon the sustainability of the employment relationship. The question in this case is whether the claimant's conduct in its totality amounted to a sufficient reason for dismissal of the claimant.

87. Should the Tribunal determine that the claimant's dismissal is unfair, then it will go on to consider remedy. It was directed at the outset that remedy issues (other than those arising from the application of the principles in **Polkey** and of contributory fault should be dealt with at a subsequent remedy hearing. In this case, it is noted that the claimant is seeking reinstatement in addition to compensation.

88. When considering issues of contributory conduct the focus shifts from the actions of the employer to the actions of the employee. Were the Tribunal not to be considering a re-employment order then the Tribunal would be considering making an award of monetary compensation. These are known as the basic and compensatory awards.

89. The basic award is calculated by reference to a mathematical formula. It may be reduced where the Tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.

90. The amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. The compensatory award may be reduced where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant. In such circumstances it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

91. Upon a consideration of what is just and equitable to award by way of the compensatory award, the Tribunal may take into account any procedural lapses and whether the evidence before the Tribunal is such that even had a reasonable procedure been followed the same result would have been reached anyway. The Tribunal's determinations upon the monetary awards are conditional upon any subsequent determination upon the issue fo re-employment.

92. The Tribunal is grateful to both representatives for their helpful written submissions. It is not, the Tribunal thinks, fruitful to set these out in detail here.

Points made on behalf of both parties shall be picked up when the Tribunal deals with its conclusions.

93. As has been said, it cannot be in issue that the respondent has discharged the burden upon it of the fact of its genuine belief in the claimant's conduct that was in question. It is also difficult to see how the Tribunal cannot be satisfied that the respondent had reasonable grounds for that belief.

94. The claimant accepted that she had been warned about improper internet use in December 2015 (page 114). She was then discovered repeating that conduct on 2 June 2016 (page 116). She also repeated the conduct after 2 June 2016 (albeit not after 7 June 2016).

95. The claimant was aware of the respondent's smoking policy. The respondent could, acting within the band of reasonableness, be satisfied that the claimant was so aware by reason of her furtive behaviour in vaporising behind stairs and keeping out of sight when so doing.

96. Plainly, the respondent entertained a reasonable belief that the claimant was guilty of the offences under the 1992 Act. They had ample material before them to that effect and indeed had findings of the court to this effect following a guilty plea.

97. The respondent could also reasonably take the view that the offences were serious. The fraud had taken place over a period of four years and involved a significant sum of public money in the sum of £10,000 or so. The offence is trialable either way. The court dealing with the matter considered that a term of imprisonment of 32 days was warranted reflecting the seriousness of matters.

98. On behalf of the claimant, Mr Conway submitted that there was significant procedural unfairness in this case. He submitted that as of 12 July 2016 Kelly Kendall had sufficient information about the internet and the e-cigarette issues to proceed. No further investigations were carried out by her. There was some suggestion of obtaining witness statements from others but these never materialised and Miss Kendall seems to have taken the view that they were unnecessary anyway given the claimant's admissions. Mr Conway says that by the time that the benefit fraud issue arose the report into the other two matters was not yet complete. Plainly, this is the case (not least by reference to Kerstie Hodgkinson's email to Kelly Kendall of 4 October 2016 asking her if she had had chance to look at Ms Hodgkinson's draft report). The claimant's point was that if the respondent had proceeded with reasonable expedition the first two issues would have been dealt with by the time the third arose in early to mid-October 2016.

99. A difficulty for the claimant with that submission is that she was on annual leave for the last two weeks of July 2016 and on sickness absence between 7 and 21 September 2016. The claimant then first raised the benefit issue with Julie Thornton on 3 October 2016 and with Kelly Kendall on 6 October 2016.

100. The reality therefore is that this point only has merit if the Tribunal considers the respondent to have acted outside the band of reasonableness in not progressing the internet and e-cigarette issues with sufficient expedition prior to the claimant going on sick leave on 7 September. The Tribunal says this because on any view had a disciplinary hearing been held about those two issues after 21 September 2016 the respondent may reasonably have combined that with disciplinary issues arising out of the benefit fraud allegation

anyway. The respondent was unlikely to be able to arrange a disciplinary hearing about the first two allegations prior to 3 October 2016 but after 21 September particularly as it would have been unfair to the claimant and outside the band of reasonableness to arrange a disciplinary hearing very shortly after she returned from a two week period of absence on sick leave.

101. It would have been helpful had the respondent set out clearly who, on their side, was away on annual leave during August 2016 and when. As it is, the Tribunal has had to try to piece together this information. It appears that Kerstie Hodgkinson was on annual leave after 26 July 2016 before returning on or around 10 August 2016 (pages 144 and 148). Kelly Kendall then appears to have been on annual leave shortly after 15 August 2016. She suggests in her email at page 154 meeting on 30 August. Even that was subject to Kerstie Hodgkinson being free that day. A meeting towards the end of August did not take place. The respondent then ran into some staffing issues as alluded to by Kelly Kendall on 13 September 2016 (page 161).

102. The claimant's case that there were unreasonable delays upon the part of the respondent in getting on with any disciplinary action shortly after 12 July 2016 is one that has its attractions. The Tribunal has sympathy for the claimant. She was not informed of the position. It was left as of 12 July 2016 that the respondent would contact the claimant. The claimant then heard nothing for some time. The respondent therefore appears on the face of it to have acted in breach of its disciplinary procedure the first paragraph of which provides that it is intended that such matters will be dealt with quickly, fairly, consistently and reasonably. That said, and as the claimant fairly accepts, the taking of annual leave is common particularly towards the end of July and into August. I therefore accept the respondent's submission that the delays in getting on with the disciplinary action arising from the first two allegations were unavoidable. As the Tribunal has said, the issue boils down to whether the respondent acted outside the band of reasonableness in not convening a disciplinary hearing or getting on with disciplinary action during August 2016 and at any rate before 7 September 2016. Given the practical difficulties that presented by reason of annual leave on both sides I hold that the respondent did not act outside the band of reasonableness in failing to decide upon disciplinary action around the first two allegations before the benefit fraud issue cropped up in early October 2016.

103. There is, in the Tribunal's judgment, less merit in Mr Conway's complaint about Lesley Hammond's conduct of the disciplinary hearing. Mr Caiden is correct, in my judgment, to submit that the decision was that of Mrs Hammond's alone. True it is that she uses the third person plural in places and refers to *"the panel".* That is by no means uncommon and there is no satisfactory evidence that the decision taken was anything other than that of Mrs Hammond. I am satisfied that Jo Dixon did not intermeddle or influence Mrs Hammond in the decision making process. There was nothing in the contemporaneous notes to indicate that she had done so. In any event, there was no suggestion that Mr Jones had been in any way influenced by Jo Dixon or any suggestion that Mr Jones and Mr Parker (both senior executives of the respondent) had been influenced by anyone else. Therefore, if there was improper interference by human resources with Mrs Hammond at an earlier stage this was cured upon appeal.

104. The Tribunal also determines that there was nothing improper in Mrs Hammond having input into the report that she had commissioned about the claimant's conduct. It lay within her prerogative to do so as the commissioning manager. Even if Mrs Hammond's actions in adding charges fell outside the band of reasonableness this was cured by the appeal process as Mr Parker and Mr Jones had no involvement in framing the charges against the claimant anyway. The claimant can have no complaint about the addition to the charge sheet of the fact of the conviction for benefit fraud. The other charge that was added was about a failure to notify Julie Thornton of the outcome of the court hearing in respect of which the claimant was exonerated both at disciplinary and appeal stages anyway.

105. The claimant also complained about the procedure carried out by the respondent in relation to the consideration of the events of 2 February 2017 and the file notes upon the personnel file referred to by Mr Jones in his letter at page 507 (referred to above). In relation to the former, the respondent submitted that this was not a freestanding allegation. The claimant accepted that no further investigation about it was warranted and that her trade union representative had effectively agreed to deal with the matter there and then. In those circumstances, it is difficult to see how the respondent dealing with the 2 February 2017 issue as it did fell outside the band of reasonableness. The claimant admitted the conduct in question. The claimant's trade union had agreed that it should be dealt with at the disciplinary hearing. It did not form a freestanding allegation and was considered by Mr Jones and Mrs Hammond purely as background.

106. The Tribunal is more troubled by Mr Jones' and Mr Parker's consideration of matters upon the claimant's file from 2012 and 2015. Mr Conway submits that that was unfair and contrary to paragraphs 5 and 9 of the **ACAS Code of Practice: Disciplinary and Grievance Procedures (2015)**. Paragraph 5 deals with the carrying out of a reasonable investigation. Paragraph 9 requires an employer to inform an employee in writing of the disciplinary case to be answered and that such notification should contain sufficient information about the alleged misconduct to enable the employee to prepare to answer the case at a disciplinary meeting.

107. It was suggested by Mr Caiden on behalf of the respondent that the trade union had put in issue whether the claimant was or was not an exemplary employee and that the claimant would have got the file notes from the previous occasions at the time anyway. Mr Caiden submitted that not discussing those earlier issues with the claimant would have made no difference because they had been earlier discussed and all admitted.

108. The file notes to which he refers at page 507 were not in the bundle to be considered by the Tribunal. The claimant does not say in her witness statement what she would have said about these matters had Mr Parker and Mr Jones given her the opportunity. The Tribunal is therefore not clear what difference it would have made had the claimant had the chance to comment upon these matters uncovered by Mr Jones in his subsequent investigation.

109. The Tribunal rejects the claimant's case that improper consideration was given to the claimant's length of service. The Tribunal accepts that incorrect dates were given by the respondent in places but Mr Jones says at paragraph 25 of his witness statement that he and Mr Parker were aware of the claimant's

length of service. This appears not to be referred to in the appeal outcome letter but, as has been said, her length of service was referred to in the appeals pack. The Tribunal therefore accepts Mr Jones' evidence that he and Mr Parker were cognisant of the claimant's length of service and took it into account. The Tribunal agrees with Mr Caiden that length of service does not render an employee immune from dismissal.

110. There is merit in the claimant's complaints about the delay in dealing with the appeal. The appeal was heard well outside the respondent's timescale of five weeks from submission. There was no explanation for the delay in Mr Jones' witness statement.

111. In summary, therefore, there are two meritorious complaints that the claimant has that the procedure followed outside the band of reasonableness. The first is that referred to in paragraph 14.2 of Mr Conway's submissions: that the respondent took into account uninvestigated and informal concerns from the claimant's personnel file that were not disclosed or raised with the claimant and as such was contrary to the ACAS code. The second is the delay in dealing with the appeal. The Tribunal accepts the claimant's submission that such conduct fell outside the band of reasonableness.

112. Upon the first of these issues, if an employer is to take account of matters when determining whether or not to dismiss an employee it is a fundamental tenet of fairness that all of the matters being considered are raised with the employee in order that the employee may state a case. In this respect, the respondent failed. True it is, those investigations only took place because the claimant's trade union had put in issue that she had an exemplary record. Nonetheless, to take account of such matters without the claimant's knowledge and which in some cases had taken place several years prior did, in the Tribunal's judgment, fall outside the range of reasonableness. To fail to revert to the claimant and her trade union and to invite representations about the matters under consideration was not the action of a reasonable employer.

113. Upon the issue of the substantive decision, a major plank of the claimant's case was that the respondent reposed trust and confidence in her between October 2016 and February 2017 such as to allow her to continue in role. In answer to this, Mr Caiden submitted that the respondent acted reasonably in avoiding a knee jerk reaction of suspending the claimant in order that matters could be investigated as to the sustainability of the employment relationship. In my judgment, there is much merit in this submission. It is well established that employers should exercise caution when suspending an employee even where it is specifically permitted by the contract. A crucial question when considering suspension is whether there was reasonable and proper cause so to do. Employers when investigating conduct issues are required to respond in a cool and structured manner and to avoid a knee jerk reaction. In these circumstances I accept the respondent's submission that there was no reasonable and proper cause to warrant a suspension of the claimant from her duties pending investigations into the conduct in question. Were the claimant's submission upon this issue to be correct it would place employers in an impossible position. On the one hand, it would bring with it a risk of being held to have breached the term implied into the contract of employment not to act without reasonable and proper cause in a manner likely to or calculated to destroy mutual trust and confidence by reason of a knee jerk reaction of inappropriate suspension. On the other hand, it would leave the employer open

to the contention that by allowing the employee to remain in post trust and confidence had not in reality been damaged or destroyed beyond repair.

114. As with all employers the respondent needed the claimant to follow reasonable instructions. The respondent needed to be able to repose trust and confidence in her that she would do so. In the particular circumstances of her employment, she had access to confidential and sensitive material. She worked unsupervised. Although she did not have access to patient money that does not diminish the need for the respondent to have trust and confidence in the claimant's honesty and capability of following reasonable management instructions and working unsupervised when dealing with members of the public. The respondent could also reasonably take into account the question of its reputation. That at least one of the claimant's colleagues was concerned about her continued employment is evident from the anonymous letter at page 258.

115. In my judgment, the respondent could, acting within the range of reasonable responses, take the view that it could not repose trust and confidence in the claimant given the totality of the evidence with which the respondent's decision makers were presented. There is the question of her not heeding prior warnings about internet use. There is the issue of her ignoring the respondent's smoking ban and acting furtively in order to smoke an electronic cigarette. There is the question then of her committing fraud upon the public purse over several years and for a not insignificant sum.

116. The Tribunal has little doubt that some employers would deal with the claimant more leniently than did this respondent. However, the Tribunal would be substituting its view were it to determine that the claimant had been unfairly dismissed by the respondent when the latter took the view that taking in totality her conduct was such that the respondent could no longer be expected to put up with it.

117. There is nothing in the claimant's point about consistency. She was not forthcoming at the time of the dismissal with the names of others who had also smoked electronic cigarettes or used their computers to look at the internet for personal matters. Even had she done so, there was no evidence that any others who had so acted had both smoked electronic cigarettes and used the internet for personal use and also had been convicted upon a guilty plea of benefit fraud. Drawing a distinction between benefit fraud on the one hand and drinking and driving on the other is not irrational. In any event, the individual apparently convicted of drinking and driving was not also liable to disciplinary action by reason of his or her conduct in relation to the use of the respondent's computers for personal matters and the smoking of electronic cigarettes. An argument by a dismissed employee that the treatment that he or she received was not on a par with that meted out in other cases is relevant in determining fairness of the dismissal only if there is evidence that employees have been led by an employer to believe that certain categories of conduct will be overlooked or where decisions have been made by an employer in truly parallel circumstances. Neither of those considerations applies here.

118. The Tribunal's conclusion therefore is that the claimant was unfairly dismissed by reason of the respondent having stepped outside the band of reasonableness in relation to how previous informal disciplinary issues were dealt with and the time taken to deal with the appeal. However, that procedural

unfairness in reality made no difference to the outcome. Had the respondent acted reasonably and within the band of reasonableness by raising the conduct issues with the claimant prior to Mr Jones and Mr Parker concluding their deliberations upon the claimant's appeal, the outcome would have been the same. There is simply no evidence from the claimant as to how an opportunity for her to discuss those earlier informally-dealt-with issues would have altered the outcome other than by delaying the appeal decision. That has no financial consequences for the claimant as of course she had been dismissed by that date anyway. Similar considerations apply upon the delayed appeal: hearing it earlier would have not altered the outcome.

119. (Subject to the issue of re-employment) it follows from the Tribunal's conclusions that there shall be no compensatory award made in the claimant's favour. This is upon the basis that it is not just and equitable for there to be a compensatory award in light of the Tribunal's conclusion that had the respondent not stepped outside the band of reasonableness procedurally the same outcome would have resulted anyway. There shall therefore be a 100% reduction under the principles in **Polkey.**

120. The **Polkey** principal does not of course apply to the basic award. However, the basic award may be reduced by reason of contributory fault. Mr Caiden submits that the degree of contributory fault here is very high *"namely at least 75%."* He submits that the claimant was dismissed purely because of her own actions and that she was blameworthy for these.

121. The Tribunal agrees with these submissions. In cross-examination the claimant accepted that she did not need help in order to address the e-cigarette and internet issues and that they were not training issues.

122. That being said, it is frankly difficult to understand why the respondent did not revert to the claimant around the earlier informal issues relied upon by the appeal panel to obtain her comments upon them. This would have been a very straightforward step for the respondent to have taken and would have cost the respondent nothing given that the claimant's employment had terminated by that stage anyway.

123. On balance therefore, the claimant must bear the lion's share of responsibility for her own dismissal as her actions could have been avoided and did not come about by reason of a lack of training provided by the respondent. In my judgment therefore it is just and equitable, again subject to the issue of re-employment, to reduce the basic award by 75%.

124. If the Tribunal were to have been wrong to have concluded as it has that the disciplinary hearing around the first two issues should have taken place prior to the end of September 2016 then again the Tribunal finds that that procedural failing would have made no difference anyway. It formed no part of the respondent's case that the claimant's internet use would have warranted anything more than a warning. Certainly, the claimant would not have been liable to dismissal for gross misconduct arising out of her internet use, her conduct falling somewhat short of the examples of gross misconduct for computer misuse set out at page 95. In the Tribunal's judgment the respondent could, acting within the range of reasonableness, have justifiably issued a first or final written warning to the claimant. When the benefit fraud issue arose, the respondent could, acting within the band of reasonableness, have taken action against her for that alone. In my judgment the claimant would then have been

liable to dismissal anyway by reason of having committed a further act of misconduct giving rise to a reasonable decision upon the part of the respondent that the employment relationship could not be maintained.

125. It was left at a remedy hearing would be listed should the claimant succeed with her complaint. Should the claimant pursue her re-employment application then a remedy hearing will be required. If she does not, then it is to be hoped that the remedy issue will be capable of resolution without the need for a further hearing.

126. Should a remedy hearing be required, the parties must file dates of availability (for the next four calendar months) and a time estimate within 28 days of the below promulgation date.

Employment Judge Brain

Date: 27 February 2018