



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms S Craig

v

Canary Trading Company Ltd

Heard at: Watford

On: 29 June 2018 and 24
September 2018 in Chambers

Before: Employment Judge Skehan
Mr Clifton
Mrs Bhatt

Appearances

For the Claimant: Mr Craig
For the Respondent: Mr, Ahari, Counsel

RESERVED JUDGMENT

1. The claimant's claims for detriment contrary to section 10 of the Employment Relations Act 1999 fails and is dismissed.
2. The claimant's claim for unfair dismissal succeeds.
3. The claimant's unfair dismissal basic award and compensatory award are reduced by 100% in accordance with the provisions of the Employment Rights Act 1996 for the reasons set out below.

REASONS

1. There was some administrative confusion at the commencement of this claim. The parties had been informed by the employment tribunal that the matter was listed before a judge sitting alone, however the inclusion of the detriment claim under section 10 of the Employment Relations Act 1999 required this claim to be heard by a full tribunal. There was some unavoidable delay while the parties arranged for sufficient copies of the documentation to be produced with the assistance of the employment tribunal.

2. At the outset of the hearing the parties agreed that the issues to be decided by the employment tribunal were as follows:
 - 2.1. It was agreed that the claimant was dismissed for reasons connected to her conduct on 17/05/2017. What was the misconduct for which the claimant was dismissed?
 - 2.2. Did the respondent have a genuine belief that the claimant was guilty of the misconduct for which she was dismissed? Did the respondent have in his mind reasonable grounds upon which to sustain that belief?
 - 2.3. Was that belief formed after a fair and adequate investigation?
 - 2.4. In reaching the decision to dismiss, did the respondent follow a fair procedure?
 - 2.5. Was the dismissal within the band of reasonable responses open to an employer in the circumstances?
 - 2.6. In the event that the dismissal is found to be unfair, did the claimant cause or contribute to the dismissal and if so by how much should the basic and compensatory award be reduced?
 - 2.7. In the event that the dismissal was unfair due to the respondent following an unfair procedure, should the compensatory award be reduced or limited to reflect the chance that the claimant would have been dismissed in any event and that the employer's procedural errors accordingly made no difference to the outcome. This is commonly referred to as a Polkey deduction (or reduction) following the case of *Polkey v AE Dayton Services Ltd [1987] IRLR 503. A*
 - 2.8. It was agreed that the employment tribunal would hear evidence in respect of issues of liability only, including questions of Polkey and contribution on the claimant's part.
 - 2.9. In relation to the claimant's claim for detriment under section 10 of the Employment Relations Act 1999, did the respondent allow the claimant to be accompanied by a chosen companion who was either a trade union representative or a colleague.

The Law

3. In a claim of unfair dismissal, it is for the respondent to show a genuinely held reason for the dismissal and that it is a reason which is characterised by section 98(1) and (2) of the Employment Rights Act 1996 ("the ERA") as a potentially

fair reason. There are five potentially fair reasons for a dismissal under section 98 of the ERA: conduct, capability, redundancy, breach of statutory restriction and “some other substantial reason of a kind as to justify the dismissal” (SOSR).

4. If the respondent shows such a reason, then the next question where the burden of proof is neutral, is whether the respondent acted reasonably or unreasonably in all the circumstances in treating the reason for dismissal as a sufficient reason for dismissing the claimant, the question having been resolved in accordance with the equity and substantive merits of the case. It is not for the Employment Tribunal to decide whether the respondent employer got it right or wrong. This is not a further stage in an appeal.
5. In a case where the respondent shows the reason for the dismissal was conduct, it is appropriate to have regard to the criteria described in the well-known case of *Burchell v BHS [1978] IRLR 379*. The factors to be taken into account are firstly whether the respondent had reasonable grounds for its finding that the claimant was guilty of the alleged conduct; secondly whether the respondent carried out such an investigation as was reasonable in the circumstances; thirdly whether the respondent adopted a fair procedure in relation to the dismissal and finally whether the sanction of dismissal was a sanction which was appropriate, proportionate and, in a word, fair. In relation to each of these factors, it is important to remember at all times that the test to be applied is the test of reasonable response.
6. A claim for unfair dismissal is a claim to which section 207A applies and the relevant Code of Practice is the ACAS Code of Practice on disciplinary and grievance procedures. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”) provides that where the employer has failed to comply with that Code in relation to that matter, and that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

7. Section 122 (2) of the ERA provides that a tribunal may reduce the basic award if it finds that the claimant's conduct before dismissal was such that it would be just and equitable to reduce it. Section 123(6) of the ERA provides that: "Where a tribunal finds that a dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding." The contributory conduct must be conduct which is 'culpable or blameworthy' and not simply some matter of personality or disposition or unhelpfulness on the part of the employee in dealing with the disciplinary process in which he or she has become involved: *Bell v The Governing Body of Grampian Primary School UKEAT/0142/07*.

8. The right to be accompanied at a disciplinary meeting is contained within section 10 of the Employment Relations Act 1999. This section applies where a worker is required or invited by his employer to attend a disciplinary hearing, and reasonably requests to be accompanied at the hearing. Where this section applies, the employer must permit the worker to be accompanied at the hearing by one companion who is chosen by the worker; and is either a trade union representative or a colleague. The statutory provision also provides that where the chosen companion is not available at the time proposed for the hearing and the worker proposes an alternative reasonable time within five days, the hearing must be postponed to the time proposed by the worker.

The Evidence

9. I heard evidence from Mr Mansour and Ms Pocock on behalf of the respondent. I heard evidence from the claimant, on her own behalf and from Ms Ayre on behalf of the claimant. All witnesses gave evidence under oath or affirmation. Their witness statements were adopted and accepted as evidence-in-chief. Both parties' representatives were allowed to ask supplemented questions to augment witnesses' evidence-in-chief and the witnesses were cross-examined. We received a witness statement from Omolabake Ogungbemile who was not present to give evidence. We read the witness statement however I explained to the respondent that as the witness was not

present to give evidence under oath or face cross-examination, less weight would be given to her witness statement.

10. As is not unusual in these cases, the parties have referred in evidence to a wider range of issues than we deal with in our findings. Where we fail to deal with any issue raised by a party, or deal with it in the detail in which we heard, it is not an oversight or an omission but reflects the extent to which that point was of assistance. We only set out our principal findings of fact. We make findings on the balance of probability taking into account all witness evidence and considering its consistency or otherwise considered alongside the contemporaneous documents.
11. By claim form received at the Employment Tribunal on 06/09/2017 the claimant claimed unfair dismissal and detriment due to the respondent's failure to allow her to be accompanied at a disciplinary hearing in accordance with section 10 of the Employment Relations Act 1999. The claim was defended and the respondent lodged their response form on 23/10/2017.
12. The respondent is a pharmacy business operating in Hemel Hempstead since January 2015. The respondent acquired the previous pharmacy business from his parents and the claimant's employment transferred from the previous owners. The respondent as a small business employed six people in October 2017. The claimant commenced employment as a trainee healthcare assistant on 22/08/2011. She was promoted to trainee dispenser on 13/12/2011 and fully qualified by 21/02/2012. The claimant worked as a pharmacy dispenser for the respondent between 15/01/2015 and 19/06/2017. The claimant's employment was terminated by reason of gross misconduct on 19/06/2017.
13. Mr Mansour is the director and shareholder of the respondent. He is a pharmacist and responsible for the provisions of medications and other pharmaceutical services to the respondent's patients. Mr Mansour's father is also a director of the company. Mr Mansour's father is elderly, English is not his first language and he is in poor health. Mr Mansour's mother is the company secretary, her English is not strong, and she is also in poor health.

14. Mr Mansour is the superintendent pharmacist for the respondent and was the responsible pharmacist on 17/05/2017, being the date of the incident giving rise to the claimant's dismissal. The professional regulators guidance holds the responsible pharmacist to account for the actions and performance of all staff in so far as this relates to the supply of medicines and interactions with patients receiving pharmaceutical services.
15. The respondent offers a free medicine delivery service as a matter of goodwill to some of his patients. The respondent leases a small van which is parked on site and used for scheduled deliveries and occasionally for other purposes as required by the respondent. The claimant was insured to drive this van but very rarely requested to do so by the respondent.
16. A large part of the claimant's workload included preparing dosette or compartment boxes containing medication. The claimant undertook the task for approximately 60 of over 90 patients for whom the pharmacy provided the service. The claimant's duties also included dispensing medication and blister packs for 45 elderly residents of a care home on a monthly basis. As of 17/05/2017, the claimant was the only employee familiar with the particular list of medicines for these patients and the style of packaging required by the care home. All of the claimant's medical dispensing was subject to clinical accuracy checks by the responsible pharmacist before they would be handed out. In addition, the claimant's day-to-day duties included but not limited to ordering, receiving, checking and filing medicines stock counting and filing prescription forms, serving walk-in customers at the front counter which could include the sale of over-the-counter medicinal or non-medicinal products, the provision of self-care advice and referral to a pharmacist, answering the phone and repeat prescriptions for regular patients.
17. Mr Mansour was heavily involved in day-to-day running of the business and the claimant describes him as 'hands on' in his approach. The claimant said that in her witness statement that it was often the case that if a patient in a problem arose, Mr Mansour would ask someone to go and see them and bring the medication back to the pharmacy, so it can be sorted out. We always send

someone straight away there were clearly issues of patient safety if a patient has been wrongly dispensed to. It was not at all uncommon for the claimant to arrange these visits when Mr Mansour was not present in the pharmacy as it was always the claimant's understanding, and the impression Mr Mansour gave, that this should be done as good practice.

18. On 17/05/2017 an issue arose in relation to a patient of the pharmacy Mrs C. The claimant had been responsible for making up the compartment boxes provided to Mr C for a long period of time. Mrs C was a difficult patient. The claimant told us that Mrs C would regularly telephone the pharmacy and be verbally abusive. Mrs C had previously telephoned and called staff at the pharmacy all sorts of names and told them that they were 'fucking useless'.
19. On 17/05/2017, Ms Pocock took a call from Mrs C, and passed the call on to the claimant. The claimant took the call from Mrs C at 2:43 PM. Mr C began her conversation with the claimant with "Who is trying to fucking kill me then?". There is a dispute between the parties as to the claimant's behaviour during this call. Mr Mansour says that the claimant was visibly agitated during the conversation with this patient and the phone call ended abruptly. The claimant denies that she was agitated she told us that she was used to this customer's demeanour. Mrs C believed that there had been a mistake made by the pharmacy in the medicine provided to her. Mrs C said that there were more tablets in the slots than should be there. Mrs C told the claimant that her family would 'share this on Facebook and close the pharmacy'. Ms Pocock told us that the claimant was speaking very abruptly to the patient. The claimant told that following Mrs C's opening line the claimant immediately took the telephone into the consultation room adjacent to the dispensary and disputes that her discussion could be overheard. The claimant said that she spoke to Mrs C alone and tried to discover what was troubling her and then tried to placate her. The claimant denies any allegation that she was agitated speaking to Mrs C.
20. Following the call, the claimant requested that the respondent's counter assistant Ms Pocock go to Mrs C's house to retrieve the prescription. Mr Mansour, who was working in the pharmacy as the responsible pharmacist, told

the claimant that it was not possible for any member of staff to visit Mrs C house at this time. The pharmacy was busy and it was peaktime for business and there were only 3 members of staff present including Mr Mansour.

21. The claimant told Mr Mansour that she wished to visit Mrs C's house herself. It is common ground that Mr Mansour responded 'no, this isn't a fight'. Mr Mansour said that the claimant responded 'yes it is' however the claimant denies this response. Mr Mansour told us during cross examination that the claimant appeared to be more concerned with proving Mrs C wrong and upset at having been sworn at by Mrs C particularly when there was no mistake on her part. Mr Mansour believed that the claimant was angry. He did not wish to send an employee who was angry to the house of a patient. There was a risk of physical harm from confrontation and such action would compromise both patient safety and the safety of the people working in the pharmacy. Mansour Mansour believed that his instruction to the claimant not to attend Mrs C's house was a reasonable instruction.
22. The claimant says that she was worried that she may have given the patient the wrong medication. The claimant told us that she felt responsible and wanted the matter sorted out before she finished her shift. The claimant said that she found Mr Mansour's comment, "no, this isn't a fight" odd. She tried to explain that Mrs C was extremely angry. The claimant said that Mr Mansour did not reply to her and made no move to stop her going. She took this as acceptance, she took the van keys and left the pharmacy at approximately 2:50pm to visit Mrs C. The claimant also told us during cross examination that she accepted that she had disobeyed Mr Mansour's request not to attend Mrs C's house.
23. The claimant said that Mr Mansour put the immediate safety of the pharmacy above the needs of Mrs C. She did not accept that her absence from the pharmacy would cause any staffing issues. The claimant attended Mrs C's house. The notes from the disciplinary meeting record the claimant's description of her visit with Mrs C. Mrs C was highly upset and screaming at the claimant. The claimant was unable to have a proper dialogue with her. Mrs

C seemed even more agitated that she had on the telephone. The claimant said that it was immediately apparent to her that there was no mistake in the prescription. The claimant tried to explain this but Mrs C was shouting over her saying that she did not understand. The claimant offered to return to the pharmacy with the boxes to get them checked by the pharmacist however Mrs C shouted at her "that's it! Just leave then! This isn't the end of this you know! You all the same down there, bloodied useless!" Mrs C was referring to both the pharmacy and the adjoining GP surgery where she was registered.

24. The claimant describes being slightly shaken and returning to the pharmacy at 3.18pm to return the keys of the van. Later that evening the claimant phoned Mr Mansour and apologised for leaving the pharmacy against his wishes. The claimant explained that she felt his apology was required out of concern for his feelings as she had noticed afterwards that he was not happy. She apologised to repair her working relationship with Mr Mansour rather than a sense of any real wrongdoing. Mr Mansour told the claimant that he appreciated her apology but that 'something would be done' in relation to the incident. Mr Mansour also visited Mrs C later that day.
25. On 18/05/2017 the claimant was worried about the incident and spoke to the pharmacist on duty, Ms Ogungbemile about the incident. Ms Ogungbemile subsequently spoke to Mr Mansour reported back to the claimant that she was likely to get a disciplinary letter about the incident. Ms Ogungbemile provided a statement but did not attend tribunal. Within that statement she confirmed that Mr Mansour had told her that he would need to deal with the claimant's misconduct matter formally and Mr Mansour told her that it would be difficult for him to do this while Ms Ogungbemile was on holiday. Ms Ogungbemile was on holiday between 19 May and due to return to work on 07/06/2017, however this was extended until 19/06/2017.
26. Following the above incident, the claimant worked as normal. She was even requested to take the pharmacy van to Kwik-Fit for its MOT. The claimant had a couple of days sick leave and also took some prearranged annual leave between 29 May and 3 June. The week commencing 5 June was a busy week

in the pharmacy. The claimant took Thursday 8 June office annual leave. The claimant said she believed that as Mr Mansour had not started a disciplinary process following the incident, he was not going to do so.

27. On Tuesday 13 June Mr Mansour handed the claimant a letter inviting her to a disciplinary meeting on Saturday 17/06/2017. Mr Mansour told the claimant not to mention it to anyone. The claimant told us that she was effectively prevented from being accompanied as she did not know any trade union representatives and Mr Mansour had previously stipulated that she was not to inform colleagues. Also that while the letter said that she was suspended, Mr Mansour said that the claimant should ignore that part of it as it was not appropriate for her to be absent due to the claimant's workload. The claimant was asked to attend work as normal during this time. The claimant thought that Mr Mansour could not possibly have genuinely believed that her actions amounted to gross misconduct. If this was the case why was she permitted to work for the long period of time and drive the van for its MOT.

28. This letter of 13/05/2017 states inter-alia "... This meeting will seek to address the following allegation of insubordination and misconduct at work:

That you on Wednesday, 17/05/2017 left the pharmacy during your shift, drove the company vehicle to a patient's house, in response to a phone call from that patient with regards to the accuracy of her prescription, without the consent and against direct instruction of your employer and pharmacist in charge.

This meeting will allow you to put forward your case. You have the statutory right to be accompanied by a work colleague not involved in the case, a trade union official or a trade union representative Please inform me in advance if you choose a companion to attend with you or if you would like to request a change of date.

You are suspended from work would pay until Saturday; this period of suspension is to be kept as brief as is necessary and is in accordance with our procedure. No decision has yet been

taken will be taken until after the meeting, but a range of possible outcomes include a 1st warning, final warning, dismissal or no action being taken...

29. The claimant told us that she could not remember much of the disciplinary meeting. We were referred to the notes of this meeting. We note in particular that:

29.1 In response to proceeding without being accompanied the claimant said 'you told me not to tell anyone about it'

29.2 Mr Mansour confirmed that the claimant had called him on the day the claimant appreciated what she had done wasn't correct. The claimant responded 'yes'.

29.3 The claimant explained what had happened on the day in question. She said that Mrs C had told the claimant that she was going to get her son and nephew to come round and destroy us on social media if nobody came down right now to sort it out.

29.4 When asked whether there was any benefit to the claimant or the patient the claimant said that only that I knew there was no error and she couldn't do anything to slam us, and that we weren't wrong. We weren't wrong, and there hadn't been an error because that's what she was getting at [that we were always wrong] and showed her it was right and she did admit what was in there was correct.

29.5 Mr Mansour explained to the claimant that he did not wish for the claimant to attend Mrs C's house to prove her wrong and prove the claimant right, in an argumentative way. The claimant responded 'well she did say 'I want to speak to that bloody girl who does my dosett box because she is trying to 'effing kill me' so yes to an extent, but also I don't like people speaking against the pharmacy, but I suppose I shouldn't care about that, so going forward I'm not going to deal with it when it gets to that stage but just hand it over to the pharmacist, which is what she wanted in the first place.

- 29.6 Mr Mansour explained his concerns in respect of a possible confrontation. The claimant responded 'there wasn't really a confrontation; she wouldn't let me leave. She kept shrieking at me. I asked her how we should go forward. I can take them back or say that paracetamol shouldn't go in her box anymore if she wanted. She said yes, yes that's what I want. So, there was a slight resolution to that
- 29.7 as a final comment the claimant adds, "the second I left I felt horrible which is why I call you later that evening."
30. The respondent terminated the claimant's employment by reason of misconduct by letter dated Monday, 19/06/2017. The dismissal letter states that
- 30.1 *"....You left work during their shift taking the company vehicle to a customer's house following a complaint from the customer against the instruction of your employer and pharmacist in charge....."*
- 30.2 *I have decided that your conduct was a serious enough to constitute gross misconduct on the basis that it is reasonable for the company not to be able to tolerate a member of its staff leaving work against the direct instructions and without consent and this constitutes an unacceptable example of insubordination and that your explanation was not acceptable because we bear ultimate responsibility for customer complaints, and preventing you from leaving to visit them at that stage was correct and reasonable, and your interaction with the customer at her house was not a positive one and could potentially have been damaging."*
31. The claimant appealed by letter dated 20/06/2017. The appeal meeting was set for Saturday, 08/07/2017. The claimant was accompanied by Jennifer Ayre. The appeal was handled by Mr Mansour and notes of the meeting was provided within the employment tribunal bundle. During the appeal hearing the claimant complained of:

- 31.1 effectively being prevented from being accompanied at the disciplinary hearing. The claimant said "I don't know any trade union representatives and am not a trade union member myself. That leaves colleagues; there was a colleague I may have asked to attend but who was on holiday, but the other person I asked, you especially asked me not to. The claimant was asked "did you ask to bring a companion and I told you you could not?" The claimant answered "no";
 - 31.2 delay between the incidents and the disciplinary letter;
 - 31.3 the lack of suspension and delay suggested that the offence was not gross misconduct;
 - 31.4 a recruitment of a new member of staff to replace the claimant prior to the disciplinary meeting indicating a predetermined result;
 - 31.5 failure to consider the claimant's mental health;
 - 31.6 that the events at the Mrs C's house should not have played any part in the disciplinary. The claimant said that, "I am not saying I didn't do anything wrong as I fully admitted to that. But I mentioned what happened at that particular patient house. That wasn't the reason for the original disciplinary"
 - 31.7 There was confusion during the meeting in respect of the actual wording of the dismissal letter and the actual letter was not available during the appeal meeting. Mr Mansour said "we will adjourn that particular point [the wording of the dismissal letter] because it is important.
 - 31.8 the disciplinary sanction was unduly harsh.
32. At the end of the meeting, Mr Mansour told the claimant that he would adjourn the meeting to confirm whether the reason for dismissal wording included the interaction at the patient's house but this was not something that prevents an appeal meeting been heard. Mr Mansour said that, "the appeal meeting is therefore adjourned I will let you know if I need any further information ahead of the decision. You will be informed in writing

the outcome of this appeal which could be the appeal had been accepted rejected required some form of full or partial rehearing.....”

33. During the appeal meeting the claimant confirmed that she had access to the staff Handbook while she was employed but was really busy and didn't get a chance to do it before the disciplinary meeting and therefore did not have a chance to look at the staff Handbook
34. The claimant was informed by letter of 14/07/2017 that her appeal was unsuccessful.

Deliberations and Findings.

35. We heard oral submissions on behalf of both the claimant and the respondent. These were considered carefully and are not set out herein. We accept the evidence of Mr Mansour in relation to the reason for dismissal. It is clear to us having heard the evidence in its entirety that the events of 17/05/2017 constituted the reason for the claimant's dismissal. The claimant has not suggested otherwise during the hearing.
36. What was the misconduct for which the claimant was dismissed? There is a dispute between the parties in respect of the precise allegation for which the claimant was dismissed. The wording of the dismissal letter is set out above. The claimant notes the addition of the words “...*and your interaction with the customer at her house was not a positive one and could potentially have been damaging.*”, within the dismissal letter and claims that she has been dismissed not only for going to the patient's house against the direct instruction of Mr Mansour but also for the interaction with Mrs C while at her house.
37. We have examined the wording of the dismissal letter carefully. In our opinion, the proper reading of the misconduct finding within the disciplinary letter is contained within the paragraph “.....you left work during their shift taking the company vehicle to a customer's house

following a complaint from the customer against the instruction of your employer and pharmacist in charge.....". The following paragraph refers to the earlier allegation and confirms why the allegation was considered serious enough to constitute gross misconduct. The factors set out in the second paragraph are issues considered relevant when assessing the weight to be attached to the misconduct. It is common ground between the parties that during the disciplinary meeting the claimant gave an account of her visits to Mrs C. Mr Mansour had also visited Mrs C on that day. It is in our view, a reasonable summary of the claimant's account to say that the claimant's visit to Mrs C was not a positive one and could potentially have been damaging. This corresponds with Mr Mansour's reasoning behind his request for the claimant not to attend Mrs C's house. We do not consider that the wording of the dismissal letter indicates that the claimant has been dismissed partly because of her interaction with Mrs C at Mrs C's house.

38. Did the respondent have a genuine belief that the claimant was guilty of the misconduct for which she was dismissed? The circumstances in a small employer where by the claimant refused to comply with a direction of Mr Mansour. Mr Mansour witnessed the claimant's actions in disregarding his request and taking the company vehicle to visit Mrs C. We accept Mr Mansour's evidence and conclude that he had a genuine belief that the claimant was guilty for the misconduct for which she was dismissed.
39. Did the respondent have in his mind reasonable grounds upon which to sustain that belief and was that belief formed after a fair and adequate investigation? We have carefully considered the investigation carried out by the respondent. We note that the respondent is a small employer and that Mr Mansour directly witnessed the alleged misconduct as the claimant refused to comply with his direct request not to visit Mrs C. However we do not consider Mr Mansour's personal knowledge and involvement sufficient to allow him to effectively skip the investigation

stage. By way of investigation Mr Mansour produced a single sheet of paper contained at page 75 of the employment tribunal bundle setting out his recollection of the events of 17/05/2017. This note states that the allegation took place in front of the claimant's colleague, TP. There is no comment from TP sought as part of the investigation. The allegations are not discussed with the claimant as part of the investigation. It is also the case that Mr Mansour visited Mrs C on the evening of 17/05/2017, however he did not provide any written note of his conversation with Mrs C for the purposes of the investigation or disciplinary process. We note the account of Mr Mansour's visit with Mrs C as contained within the tribunal bundle was written following the conclusion of the disciplinary process. Although we have found that the interaction between the claimant and Mrs C, at Mrs C's home, did not form part of the disciplinary allegation, it was clearly relevant to the allegation. We appreciate that the respondent is a small employer and this is a scenario where by Mr Mansour was directly involved in the allegation. However, even taking that into account, we conclude that the investigation as carried out by Mr Mansour was deficient and did not fall within the band of reasonable responses of a reasonable employer. We have concluded that the respondent's failure to deal properly with the investigation stage of the dismissal has resulted in a finding of unfair dismissal.

40. The claimant raises various other issues in respect of the procedure followed by the respondent, we address each one in turn.

40.1 Independence: The claimant complains that the investigation, disciplinary and appeal were all conducted by Mr Mansour and that this resulted in a predetermined biased unfair outcome. The ACAS code provides that [where possible] the different stages within the disciplinary process should be conducted by people who have not previously been involved in the process. It is important in this case is that the employment tribunal takes the size and administrative resources of the respondent into account. We heard evidence in relation to the inability of Mr Mansour's

parents to assist with the disciplinary process. This evidence is accepted by the tribunal. We note that the other potential employees who could have been tasked with a step of the disciplinary process within the respondent company are either pharmacists or junior employees. We accept Mr Mansour's evidence that it was inappropriate to involve these individuals within the process. While it would have been possible for Mr Mansour to seek external input into the process, we do not consider that his failure to do so renders the process unfair. We note that a finding that, in these particular circumstances Mr Mansour may legitimately undertake each part of the process, does not detract from the respondent's obligation to properly undertake each part of the process and, in the circumstances, the investigation stage has been found lacking.

- 40.2 Delay: the claimant argues that the delay taken by the respondent to deal with the disciplinary matter renders the dismissal procedurally unfair. It is obviously best practice for disciplinary matters to be dealt with promptly without unreasonable in this case the disciplinary letter was forwarded approximately four weeks after the incident. We accept Mr Mansour's explanation in relation to the delay. This was caused by the respondent being a small business with limited administrative resources, one of the pharmacists was away on holiday, the pharmacy was particularly busy and there was sickness and holiday absence on the part of the claimant. Taking all of the circumstances into account we do not consider that the delay renders the dismissal procedurally unfair.
- 40.3 Confusion within the appeal process and an expectation on the claimant's part of a resumption of an adjourned appeal hearing. It is accepted that there was confusion on the claimant's part and an expectation on the claimant's part that the appeal hearing may be reconvened. However while the notes of the appeal meeting are conflicting, it is clear that the only outstanding issue in the

wording of the dismissal letter, that was not available during the appeal meeting. In the circumstances, taking the wording of the disciplinary letter into consideration, Mr Mansour's evidence is accepted. There was no reason for the respondent to reconvene the appeal hearing. This potential scenario was discussed during the appeal meeting and is provided for in the notes, albeit we acknowledge that the references to adjourned hearings are confusing. In the circumstances an appeal hearing was convened, once the wording of the dismissal letter was checked there were no other outstanding issues that required a reconvened meeting. We do not consider that the confusion in relation to an adjournment of the appeal meeting renders the dismissal unfair.

41. We have concluded that the investigation as carried out by the respondent was in these particular circumstances inadequate. However, this is an unusual case, in that due to the close involvement of Mr Mansour in all aspects of this disciplinary issue, the absence of a reasonable investigation, did not result in relevant information being unavailable or denied to the decision maker. The relevant information was in the knowledge of the ultimate decision maker. For this reason, although we find that the claimant's dismissal was unfair, we go on to consider contribution on the part of the claimant and Polkey are set out below.
42. Did the claimant cause or contribute to the dismissal and if so by how much should the basic and compensatory award be reduced? We have carefully considered the evidence produced during the course of this employment tribunal hearing on behalf of both the claimant and respondent with a view to determining the appropriate contribution, if any.
 - 42.1 We first consider the events that occurred on 17 May. There is a direct conflict in the evidence relating to the claimant's demeanor when speaking to Mrs C. The claimant denies that she was

agitated speaking to Mrs C. Miss Pocock describes the claimant as speaking very abruptly to the patient. Mrs C was rude and derogatory towards the claimant. It is common ground that Mr Mansour told the claimant, when refusing a request to visit Mrs C immediately that "this is not a fight". Taking the evidence as a whole we conclude that it is more likely than not that the claimant was visibly agitated either during or after her call with Mrs C and this was directly witnessed by Mr Mansour. Such a reaction under provocation from Mrs C, is entirely understandable.

42.2 The claimant questions whether she acted against a direct instruction from Mr Mansour, to the extent that Mr Mansour was silent when she took the keys and did not make any further attempt to try to stop her. The claimant's evidence in relation to whether she acted against the direct instruction of Mr Mansour was inconsistent as set out above. The claimant was fully aware of the pharmacist's obligations and responsibility towards his patients. There was no confusion on the claimant's part that Mr Mansour had told her not to visit Mrs C. The claimant disagreed with Mr Mansour and chose to visit Mrs C in any event. In considering the entirety of the evidence we do not accept that Mr Mansour in failing to physically stop the claimant from leaving the premises or reiterating his instructions in circumstances where his instructions were entirely clear constitutes acquiescence on the part of Mr Mansour. The claimant apologised after the incident. We do not accept that there was any grey area of possible acquiescence on the part of Mr Mansour that mitigates the seriousness of the allegation.

42.3 The claimant argues that the delay, as set out above, on the part of the respondent in proceeding with the disciplinary allegation is evidence that the respondent did not consider the allegation to be a serious allegation capable of constituting gross misconduct. Further, although the disciplinary letter referred to the claimant suspension, the claimant points to the lack of suspension as an

indication that the misconduct was not considered to be serious misconduct. We have considered whether the delay and lack of suspension are indicators that the allegation of misconduct was not considered serious by the respondent. We acknowledge that we are dealing with a very small employer that runs a busy pharmacy business. It was the case that the claimant had valuable information in relation to the dispensing work required by the nursing home following the incident. Mr Mansour was also understaffed as one of his pharmacists Ms Ogunbemile was on holiday. Suspension is viewed as a neutral act and there is no obligation on an employer to suspend an employee. The question is only raised in this case because the respondent within correspondence sought to suspend whereas in reality it did not. In considering the evidence in the round we conclude, when taking the size and administrative resources of the respondent into account, that neither the delay nor the lack of suspension can be reasonably taken to indicate that the respondent did not view the allegation as a serious one. Both the delay and lack of suspension can be reasonably explained by the respondent being a busy small business. We accept that the respondent viewed the allegation as a serious one for the reasons set out within the dismissal letter.

- 42.4 We note that the misconduct allegation refers to the claimant taking the company vehicle, yet the claimant was allowed to drive the company vehicle following the incident before her dismissal. Her The misconduct allegation related to taking the vehicle contrary to Mr Mansour's instruction. We conclude that the respondent's request for the claimant to drive the company vehicle with his consent following the incident is irrelevant.
- 42.5 Lack of benefit to the claimant. The claimant complains that the respondent failed to consider that the alleged conduct brought no financial or other benefit to the claimant personally. We accept that there was no financial benefit to the claimant and her actions.

However, viewing the evidence as a whole we conclude that the claimant had a personal interest in showing that she had not made a mistake and that Mrs C's behaviour was unwarranted. This mindset was highlighted by Mr Mansour's comment, "this isnt a fight".

42.6 The claimant submitted that it was not considered that there was a mistake in the patient's medication which could have caused difficulty for the patient. The claimant insisted that a visit at that time was necessary and that the claimant was simply acting in the best interests of the patient. There is agreement between the parties that the superintendent pharmacist and the responsible pharmacist in charge on the day in question was Mr Mansour. It was his obligation to ensure the well-being of the pharmacy's patients. This was not the claimant's responsibility. Mr Mansour was fully aware of the circumstances with Mrs C and visited her in person later that day. In light of our findings in respect of the claimant's demeanor and motivation in wishing to show that she has not made a mistake, Mr Mansour's presence in the pharmacy and his direct instruction to the claimant, we conclude that the claimant's concerns for Mrs C due to a potential mistake in her medication were a secondary concern.

42.7 the claimant submitted that the patient, by making an incorrect allegation of error on the part of the respondent, had threatens to damage the reputation of the respondent on social media and the claimant was acting to protect the respondent's reputation claimant acting in the best interest of the respondent. We have considered this submission on the part of the claimant carefully and we accept that this was a motivating factor on the claimant's part. However, this concern was not the claimant's responsibility. Further we consider that this concern was directly addressed by Mr Mansour when he told the claimant not to visit Mrs C. He told her 'it's not a fight'. The claimant disregarded his direct instruction.

- 42.8 The claimant claims that her personal circumstances and those of her daughter together with her mental health issues that were known to the respondent were not taken into account by considering the allegations her actions and the appropriate response on the part of the respondent. There is no allegation that the claimant's mental health in any way affected her actions on 17/05/2017.
- 42.9 The claimant complains that the respondent did not give any consideration to sanctions other than dismissal. Mr Mansour says that the full range of potential disciplinary sanctions were considered and consideration was given to potential sanctions less than dismissal. The respondent evidence is that the respondent was considered serious to the extent that no other sanction was considered appropriate in the circumstances. When taking the evidence as a whole, Mr Mansour's evidence is accepted.
- 42.10 We note the claimant's allegation that the decision to dismiss her was premeditated. We were provided with very little information in support of this allegation however we note Mr Mansour's evidence that the decision to dismiss the claimant was taken following the disciplinary meeting and his evidence is accepted.
- 42.11 The claimant's submits that the decision to dismiss her was too harsh in the circumstances. We have accepted Mr Mansour as evidence in relation to the seriousness with which he viewed the claimant's misconduct. His view, in light of his responsibilities to his patients and the potential safety risk to both to the claimant and Mrs C arising from the claimant's actions falls, in our view, squarely within the band of reasonable responses of a reasonable employer for the reasons set out above.
43. Notwithstanding the fact that we found the claimant's dismissal to be unfair due to the inadequacy of the investigation, we have also concluded, on the basis of the entirety of the evidence, that the claimant left work on 17/05/2017 during her shift, taking the company vehicle to

Mrs C's house following a complaint from the customer against the direct instruction of her employer and pharmacist in charge. Although the investigation stage of the process was inadequate, Mr Mansour was aware of all of the relevant circumstances due to his presence in the pharmacy on 17/05/2017, his discussion with the claimant that evening, his position as superintendent pharmacist and responsible pharmacist on the day in question, his interaction with Mrs C, and his role in concluding the remainder of the disciplinary process. We have identified blameworthy conduct on the part of the claimant. This is a case where the claimant, in disregarding Mr Mansour's instructions created an obvious risk to both patient and her own safety. Mr Mansour's evidence in respect of his view of the seriousness of the claimant's misconduct is accepted. The claimant, in the circumstances, is essentially the author of her own misfortune. In light of the circumstances of this particular case and taking the evidence as a whole we conclude that the claimant's basic and compensatory award should be reduced by 100%.

44. We have found that the dismissal was unfair due to the respondent following an unfair procedure, with particular reference to the investigation stage. We have considered whether the compensatory award should be reduced or limited to reflect the chance that the claimant would have been dismissed in any event and that the employer's procedural errors accordingly made no difference to the outcome. For essentially the same reasons as set out above in relation to the claimant's contribution, while the investigation was lacking, the circumstances of this particular matter within this small employer are such that the claimant's compensatory award should be reduced by 100% to reflect the chance that the claimant would have been dismissed in any event by the respondent.
45. In light of our findings above, to the extent that procedural inadequacies highlighted by the claimant, other than the investigation, during the course of the hearing rightly amount to an unfair dismissal, we have concluded regardless of such procedural irregularities the circumstances

of the misconduct are such that in reality they have made no difference to the outcome and as such any of the compensation awarded for any procedurally unfair dismissal should be reduced by 100%.

46. As we have found procedural inadequacies in the respondent's handling of the claimant's dismissal, we have considered whether or not there should be any uplift in accordance with Section 207A of the 1992 Act. We refer to our findings in respect of the claimant's contribution and the nature of the procedural defects. When taking the evidence as a whole, we do not consider that it would be just and equitable to award any uplift in this matter.

47. We have carefully considered the claimant's claim for detriment under section 10 of the Employment Relations Act 1999. We note that the claimant stated during the disciplinary hearing that she felt that she had effectively been prevented from bringing a chosen companion due to the fact that the respondent had asked her to keep the disciplinary matter confidential. It is common ground between the parties that the claimant was informed of her statutory right to be accompanied at the disciplinary hearing in writing within the disciplinary letter. The claimant told us that she could not be so accompanied because she was not a member of a trade union and the respondent had told her to keep the matter confidential, therefore she could not ask a colleague. However, this evidence is contradicted by the claimant's further evidence that she considered bringing a colleague who was unavailable. The claimant did not request for the hearing to be postponed to allow her chosen companion to attend. Further the fact that the claimant considered bringing a colleague who was unavailable is inconsistent with the claim that she was not permitted to bring a colleague by the respondent. It is commonplace in the workplace for the employer and employee to seek to keep disciplinary processes confidential. This instruction is not inconsistent with the employee's rights to be accompanied under section 10. The claimant had been informed in writing of her entitlement and should she have had any query in relation to this entitlement she could

have raised it with the respondent. We do not accept the claimant's evidence that she was prevented from bringing a colleague to the disciplinary hearing as she has claimed contrary to section 10 of the Employment Relations Act 1999 and this claim fails.

Employment Judge Skehan

Date: ...19.10.18.....

Sent to the parties on:05.11.18....

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For the Tribunal Office