EMPLOYMENT TRIBUNALS

Claimant: Ms A Doran

Respondent: Knowsley Metropolitan Borough Council

HELD AT: Liverpool **ON:** 30 January 2019 & 11 February 2019 (in chambers)

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimant: In person
Respondent: Mr A Johnson, solicitor

RESERVED JUDGMENT

The judgment of the Tribunal was the claimant was not unfairly dismissed and her claim for unfair dismissal is not well-founded and is dismissed.

REASONS

Preamble

1. In a claim form received on the 7 October 2018 following ACAS early conciliation between the 12 July 2018 to 8 August 2018, the claimant who had been continuously employed as a social worker between 15 February 2015 and 11 June 2018 claimed that she had been unfairly dismissed on the 16 January 2013 for an act of misconduct which, she believed, did not amount to misconduct under the respondent's disciplinary procedure. The claimant also maintained that the respondent had failed to take into account mitigation and the decision did not fall within the band of reasonable responses. At the outset of the liability hearing the claimant explained her defence further, which was that the information she shared or was alleged to have shared with her sister did not amount to personal information and therefore she did not breach client confidentiality.

2. The claimant asked the Tribunal to consider and look behind the final written warning issued on 16 October 2017, as she believed it was unfair. The Tribunal

refused. There is no reference to the final written warning in the Grounds of Complaint and no criticisms of it. Further, it is undisputed the claimant did not appeal the final written warning and there was no evidence the final written warning had been issued for an oblique motive or was manifestly inappropriate, absent good faith and without prima facie grounds for making it, in accordance with the guidance in the well-known case of Wincanton Group plc v Stone 2013 ICR D6, EAT. As indicated to the claimant orally, the Tribunal cannot have substituted its own view for that of the reasonable employer. It must consider the fairness of the dismissal against the existence of a valid final written warning, which it has done and set out its reasons below.

3. The respondent denies the claimant's claim of unfair dismissal on the basis that the claimant had breached strict rules on client data when she had improperly discussed a customer with her sister and the decision to dismiss fell within the band of reasonable responses.

4. The Tribunal heard evidence from the claimant on her own behalf and on behalf of the respondent it heard from four witnesses, Paul Dalby, head of adult safeguarding and the dismissing officer, Dan Howarth, data protection officer (who provided two witness statements) and Sue Welsh, senior human recourses advisor and Kevin O'Neill, social worker and investigating officer. There were no relevant conflicts in the evidence, the Tribunal found all the witnesses to be credible and cogent, with the exception of the claimant on occasion and it has dealt with the resolution of conflicts in the evidence below.

5. The issues were agreed between the parties, they are straightforward, namely – has the respondent satisfied the Buchell test and whether the decision to dismiss fell within the band of reasonable responses. If the Tribunal were to find in the claimant's favour the "no difference rule" under the well-known case Polkey and contribution were issues to be decided, and upon which submissions were heard. One procedural irregularity was relied upon by the claimant, namely, that the disciplinary hearing was adjourned and reconvened when the dismissing officer had indicated he would come to a decision in 7-days.

6. The Tribunal was referred to an agreed bundle of documents and having considered the oral and written evidence and oral submissions presented by the parties (the Tribunal does not intend to repeat all of the oral submissions, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons), it has made the following findings of the relevant facts.

Facts

7. The respondent is a local authority and a large employer. It takes client confidentiality seriously, and employs Dan Howarth as a data protection officer to advise managers on data protection and various other guidelines. A key document to which the Tribunal was referred is the Health & Care Professional Council Guidelines (known as "HCPC") to which the claimant, as a social worker, was subject.

Health & Care Professional Council Guidelines

8. The HCPC acts as the claimant's regulator and set up to protect members of the public. The claimant signed a declaration confirming she was familiar with the standards and continued to meet them. Clause 5 provided "you are personally responsible for the way you behave. You will need to use your judgment so that you can make informed and reasonable decisions and meet the standards. Clause 5 confirmed the claimant must "respect confidentiality…about service users" "must only disclose confidential information if: you have permission, the law allows it, it is in the service users bests interests, or it is in the public interest.

Health & Care Professional Council Standards of Proficiency

9. The HCPC provides standards for "safe and effective practice" and social workers such as the claimant "must meet" them all. A number of standards were set out including at clause 7 the need to understand the "importance of and be able to maintain confidentiality", and clause 7.3 to "understand the principles of information governance and be aware of the safe and effective use of health and social care information."

Claimant's contract of employment

10. The claimant was issued with a contract of employment on 12 February 2016. Her employment as a social worker commenced 15 February 2016. The claimant received a copy of the respondent's Data Policy, had received training on data security and the consequences of breaching the respondent's Data Protection Policy. She was aware that the respondent considered breaches of data security seriously, and breaching the policy could result in dismissal of employment. She was aware of the need to keep client information confidential.

Managing Conduct, Performance and Information Policy

11. The respondent's Managing Conduct, Performance and Information Policy integrated with its Code of Conduct provided the respondent had responsibility to "securely manage its own information assets, the information made available to it by service users…and all information in its case" and it clearly applied to the claimant.

12. The Policy does not prevent a manager from seeking additional evidence before coming to a decision following a disciplinary hearing, that manager having considered what is at issue after the hearing and deciding the issues could become clearer if he or she heard more evidence.

Data Protection Policy

13. In clause 5.1 the Policy defined sensitive personal information to include "physical or mental health or condition."

14. The claimant was required to keep a "Critical Log." In her 'Critical Reflection Log' the claimant conformed that she was "mindful to ensure that confidentiality was maintained for service users, their families and carers."

Final written warning

15. Following a disciplinary hearing on 16 October 2017 before Paul Dalby, the claimant was found guilty of gross misconduct that could have resulted in her dismissal. The allegations raised were a "continued failure to follow reasonable management instructions and continued failure to follow guideline in relation to the HCPC."

16. A final written warning was issued by letter dated 20 October 2017 to remain on the claimant's file for 24-months. The claimant was advised, in writing, that it may be considered if further action was taken against the claimant for misconduct.

17. The claimant was also required to re-take her Assisted and Supported Year in Employment ("ASYE") programme in social care with reviews. She was informed of her right to appeal. The claimant did not appeal and there was nothing to suggest in the contemporaneous correspondence that the claimant believed Paul Dalby had any oblique motives or that the 2-year final written warning was manifestly inappropriate, absent good faith and without prima facie grounds for making it. In direct contrast, the claimant did appeal Paul Dalby's later decision to dismiss her as set out below. The Tribunal accepted Paul Dalby's oral evidence concerning the issuing of a final written warning as credible; he had considerable sympathy for the claimant as a newly qualified social worker and took mitigation into account when he decided on the disciplinary action falling short of dismissal.

The incident on 2 February 2018

18. On the 2 February 2018 Michael Wharton, a social worker, overheard the claimant in discussion with someone who he knew to be the claimant's sister at the time. He reported the claimant and completed a corporate information security incident report form. Michael Wharton had been appointed to support the claimant through her retake of the ASYE year and carry out her professional supervision. Until the incident there was no issue him and the claimant and they got on well. The claimant gave evidence confirming she found Michael Wharton to have been supportive.

19. On 9 February 2018 Michael Warton was interviewed by Kevin O'Neill and he confirmed he had overheard the telephone conversation in which the claimant discussed that she had just had a visit with a client, who was not named, she and her sister had "gone to school with the daughter of the person she had just been out to assess" and during this conversation she had "disclosed confidential information pertaining to the service user with whom she had just assessed. Disclosing medical information such as diagnosis, background of the service user and the level of care needs they required." He explained how he had initially been "shocked" at what he had heard, and turned to a colleague, Andrew McKenzie, and asked if the claimant was "indeed" on the phone to her sister since the level of information sounded as if she was in conversation with another professional. He asked the claimant "are you on the phone to your sister" and when the claimant did not answer said "so you're having a discussion with someone who does not work for Knowsley MBC" at which point the claimant put down the phone. It undisputed her response was "I did not say

the name." It is also undisputed the claimant did not actually name the claimant; and this was the basis of her defence to the allegations.

20. Andrew McKenzie, the ASYE lead accessor, as had the other witnesses, provided a signed witness statement. He was interviewed on 12 February 2018 and confirmed he had also overheard the claimant's telephone conversation with her sister. He confirmed the claimant did not disclose any names, he could recall she was discussing "a couple living in the community who were struggling and needed some type of support, but did not catch any further detail." His version of the conversation was different to that of Michael Wharton in that Andrew McKenzie had bene under the impression the claimant was discussing a couple and not just one client.

21. It is accepted by the claimant immediately following the 2 February 2018 telephone call she went to see the team manager of the respondent's Urgent Response Team, who provided a witness statement to Kevin O'Neill on 9 February 2018 concerning a discussion she had with the claimant on the 2 February 2018 who referred to the telephone conversation and described that she was "feeling foolish." She recounted the claimant indicating that Michael Wharton had said "you are aware of confidentiality" and the claimant's response that she had not given any details. A discussion then took place on personal and professional boundaries in respect of sharing personal details of visits. It is notable in cross-examination the claimant explained the reason why she had used the words "feeling foolish" as follows; "I thought because I was caught using the landline in the office on a personal call" which was a less than credible explanation. The Tribunal concluded she felt foolish because her line manager had caught her discussing a client, she understood her actions amounted was a breach of confidentiality owed to the client and she had made a "foolish" mistake.

22. The claimant was suspended on full pay pending an investigation.

23. Kevin O'Neill interviewed Dan Howarth on 22 February 2018 who produced a statement emphasising the risk facing the respondent as follows; "depending on the outcome of the investigation his service would need to determine the level of risk to KMBC and indeed, if such information needs to be reported to the …ICO. Following this the level of risk can vary to the value of £500,000. In addition, what has happended is a deliberate disclosure of personal data that could led to criminal prosecution." On balance, the Tribunal (who is not an expert in the DPA) found Dan Howarth had greatly exaggerated the effects of the claimant's actions, both during the disciplinary process and the liability hearing. Had Mr Howarth stood back and viewed the allegation objectively and dispassionately, no doubt he would have realised that there no prospect of a £500,000 fine or police involvement for the alleged office, which included beyond any doubt the claimant not relating to her sister any names or addresses. Dan Howarth, just short of 4-months after the incident, set a hare running which may in other circumstances have resulted in an unfair dismissal. As evidenced in both witness statements before this Tribunal, Dan Howarth blinds with detailed knowledge of Data Protection Act, providing information that appears to have no connection with logic or the reality of the 2 February 2018 incident, and for this he can be criticised. He has set himself up as an "expert" at the disciplinary hearing and before this Tribunal when in reality he appeared to be far from impartial and did not deliver an objective analysis of the allegation with

reference to any breach of data protection. It is notable there was no subsequent report to the ICO or the police, and nor was any fine levied.

24. In a letter dated 23 April 2018 sent to the respondent the claimant's confirmed she had spoken with the claimant and told the client's daughter had gone to their school, but no other details apart from the reference to a visit.

Disciplinary hearing took place on 24 April 2018 before Paul Dalby

25. A disciplinary hearing took place on 24 April 2018 before Paul Dalby, who considered the investigation documents submitted by Kevin O'Neill that included a number of witness statements. The claimant was supported by a member of the British Association of Social workers ("BASW"). Evidence was heard from Michael Wharton and Andrew McKenzie.

26. At the hearing Kevin O'Neill explained the relevance of the HCPC standards, and when asked to define a breach he stated, "information going from one source to another without the permission of the person or if the person has no legal requirement or reasons to share the information…personal data was around individual diagnosis, and their address. The fact that they have had a social work assessment can narrow this down to identify the service user. No one other than Knowsley's Adult Social Car should be aware they have had the assessment." He confirmed he probably could not tell the name of that person and the user was not identified by name based on the information shared by the claimant.

27. Andrew McKenzie was questioned about what he had heard and he said, "LD had been to school with the service user's daughter…she was working with a couple…" When asked to confirm the concerns he had, Andrew McKenzie responded "details of the visit that she had completed, and the outline of the visit she had completed…. I think it because she disclosed that she went to school with them that they could be identified. They are the only details I captured and that as enough for me to have concerns."

28. Michael Wharton confirmed he did not remember the name of the medical condition that was discussed, and it sounded like a professional to professional call regarding the needs and services of the service user after a visit, and as the claimant's manager he could find out information about who the service user was.

29. The claimant gave evidence at the investigation meeting that she did not "remember talking about anything about the service user or her daughter. I do remember saying I have been on a lovely visit and the service user's daughter went to our school, but not when I was there." The claimant's union representative confirmed the argument was that as no personal identifiable information was shared about the client, client confidentiality was not breached.

30. After the hearing it was Paul Dalby's intention was to come to a decision, however, he decided that he did not have sufficient information on data protection and sought to reconvene the hearing later. He wrote to the claimant on 21 May 2018 indicating additional information was being sought from Dan Howarth and Michael Wharton regarding professional standards. BASW raised objections believing the respondent was seeking to build a stronger case against the claimant. Paul Dalby

understood the claimant's defence to be whilst she whilst she could not recall discussing a client's medical information, care and support needs, she could recall the fact the adult's daughter had gone to the same school as her at different times (a break of approximately 10 years although the claimant increased this period at the liability hearing).

Reconvened disciplinary hearing 4 June 2018 before Paul Dalby

31. At the outset of the meeting the claimant's trade union representative read from a prepared statement alleging policy was being breached by the hearing being reconvened. Both continued to be present under duress. Michael Wharton and Dan Howarth attended as witnesses, the former dealing with confidentiality, the latter data protection. Paul Dalby felt he needed to understand the difference between the Data Protection Act, HCPC, the respondent's Data Protection Policy and the overall duty of confidentiality owed by social workers to their clients. He believed the only way of obtaining this understanding was to speak with Michael Wharton and Dan Howarth.

32. It was at this meeting that Michael Wharton answered a question put to him queried by the claimant in her appeal. The question asked by Paul Dolby was; "In your view, in reference to the HCPC's document "Confidentiality – guidance for registrants' Section 5 'What information is confidential? Do you consider that the information that may have been disclosed to have been 'identifiable' or 'anonymised?' Michael Wharton's response was "No. The information was not directly identifiable however it was personal information and I managed to cease the discussion before the disclosure of personal information tipped into identifiable information."

33. Taking into account the fact the claimant was unable to recall all of the conversation, Paul Dalby accepted the evidence (which was different in part) of what Andrew McKenzie and Michael Wharton reported that had overheard. There was no reason for Paul Dalby to disbelieve them; both had got on well with the claimant, a conversation had taken place with her sister and Paul Dalby took the view the evidence given by the managers who overheard the claimant was more credible than the claimant, who could not remember. Paul Dalby considered what Dan Howarth had to say about the Data Protection Act. However, in arriving at his decision that the claimant was guilty of misconduct, he relied upon the information provided by Michael Wharton concerning the duty of confidentiality the claimant had owed to the client, and believed on balance that she had breached that duty. Paul Dalby held a genuine belief based upon a reasonable investigation that in disclosing the details she had concerning the client, including gender, age bracket and possible care needs represented a breach. He confirmed the claimant had been referred to the HCPC. At the time of this liability hearing the HCPC investigation was under way, and it has no bearing on the Tribunal's findings.

34. The minutes of the hearings and the outcome letter of 11 June 2018 reflect the care and objectivity by which Paul Dalby dealt with the matter, and the fact he considered in some detail the defence put forward by the claimant and her union representative.

The disciplinary outcome 11 June 2018

35. The outcome of the disciplinary appeal dated 11 June 2018 confirmed Paul Dalby did not accept the claimant had been guilty of gross misconduct. He found that her actions amounted to misconduct and were "sufficiently serious to terminate employment, given that you are already in receipt of a live written warning." He concluded that the claimant had breached the HCPC Standards of Conduct, Performance and Ethics at standard 5.21 "it has been evidenced that you have not treated information about a service user as confidential," and standard 5.2 "regarding disclosing information, there was no evidence presented which showed you had permission form the service user to disclose the following information; that the service user's daughter had attended the same school as yourself; or the needs and well-being of the service user…" He also found the "identified breach is that personal, identifiable and sensitive information regarding a service user had been disclosed by you to your sister" despite Michael Wharton's evidence that the information was not directly identifiable. However, he went on to find the claimant had breached client confidentiality by disclosing their information without consent and justification and it amounted to serious misconduct.

36. Paul Dalby's decision was to impose a final written warning holding a genuine belief based on evidence given by witnesses who had been questioned by the claimant's union representative during the disciplinary hearing, that she had disclosed client data to her sister, who was not an employee of the respondent, in sufficient detail to amount to a breach of confidentiality and the Data Protection Act. He considered the sanction issues in October 2017 "for a similar concern about your practice…. these matters were significantly likely have impacted on your continued employment." Bearing in mind Paul Dalby had issued the final written warning in October 2017 and was well-aware of the allegations that gave rise to the warning, the Tribunal found it was not unreasonable for him to link the two final written warnings and decide dismissal was the appropriate sanction.

37. The effective date of termination was 11 June 2018.

38. The claimant appealed before Julie Moss, executive director, adult social care, which was dismissed on 2 August 2018. There are no procedural irregularities claimed by the claimant in respect of the appeal process. The claimant provided detailed reasons for her appeal, including "failure to follow procedure" when she wrote; "…I had not received the outcome within the time limit set by the Policy. It was only at this point that I was made aware of the fact the hearing was to be reconvened. I understand that more information may be needed and I believe that the hearing can be adjourned to allow this information to be gathered but the chair should be clear that more information is required and not conclude the hearing saying the outcome will be provided within 5-working days."

39. The claimant also referred to the inaccuracy of the witness statements evidenced by the different accounts given by Michael Wharton and Andrew McKenzie, including Michael Wharton's response to a question asked by Paul Dalby that he did not consider the information disclosed to have been "directly identifiable and I managed to cease the discussion before the disclosure of personal information tipped into identifiable information." Understandably, the claimant queried how

Michael Wharton could have known what was in her mind and that she was about to disclose personal information.

40. An appeal pack was produced that included all the evidence before Paul Dalby, the claimant's reasons for the appeal and the Management Statement of Case prepared by Paul Dalby. In that document Paul Dalby recorded the claimant had not disputed part of the conversation in respect of discussing an adult with care and support needs she had visited that day, and could not remember disclosing information in respect of a diagnosis, care needs or medical information. In respect of the HCPC Standards he wrote "I accept that the decision whether there has been a breach is a matter for the HCPC." It is clear Paul Dalby considered in detail the HCPC standards and personal data as defined by the DPA prior to arriving at his decision, taking into account the fact that both Michael Wharton and Andrew McKenzie believed there had been a breach of the HCPC and considering all the arguments put forward on behalf of the claimant by her union representative. He also took into account the effect of the respondent's 'Managing Conduct, Performance and Information Policy' at section 4.8.1 which he considered to be relevant and believed "there was not an authorised disclosure of the Council's information held on the service user by Ms Doran…and on the balance of probabilities…there had been a breach of the Council's policy, a breach of the Data Protection Act and a breach of confidentiality…owed to the service user by the Council."

41. The appeal outcome was set out in a letter dated 7 August 2018. Julie Moss found it was fair and reasonable for Paul Dalby to conclude that there had been misconduct on the part of the claimant, it was appropriate to take into account the final written warning and the decision to dismiss was a reasonable response.

42. It is uncontroversial that the client in question was a resident of Knowsley, she was an open case in adult social care, visited by the claimant on a specific date, had a diagnosis of dementia and was the mother of a daughter who had attended the same school as the claimant and her sister, albeit with a large gap of many years.

Law

43. Section 94(1) of the Employment Rights Act 1996 ("the 1996 Act") provides that an employee has the right not to be unfairly dismissed by her employer. Section 98(1) of the 1996 Act provides that in determining whether the dismissal is fair or unfair, it is for the employer to show the reasons for the dismissal, and that it is a reason falling within section 98 (2) of the 1996 Act. Section 98(2) includes conduct of the employee as being a potentially fair reason for dismissal.

44. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

45. Where the reason for dismissal is based upon the employee's conduct, the employer must show that this conduct was the reason for dismissal. For a dismissal

to be procedurally fair in a case where the alleged reason for dismissal is misconduct, Lord Bridge in Polkey –v- A E Dayton Services Limited [1981] ICR (142) HL said that the procedural steps necessary in the great majority of cases of misconduct is a full investigation of the conduct and a fair hearing to hear what the employee must say in explanation or mitigation. It is the employer who must show that misconduct was the reason for the dismissal, and must establish a genuine belief based upon reasonable grounds after a reasonable investigation that the employee was guilty of misconduct – British Home Stores Ltd v Birchell [1980] CA affirmed in Post Office v Foley [2000] ICR 1283 and J Sainsbury v Hitt [2003] C111. In short, the Tribunal is required to conduct an objective assessment of the entire dismissal process, including the investigation, without substituting itself for the employer.

46. The Court of Appeal in British Leyland (UK) Ltd v Swift [1981] IRLR 91 set out the correct approach: "If no reasonable employer would have dismissed him then the dismissal was fair. But is a reasonable employer might reasonably have dismissed him, then the dismissal was fair…in all these cases there is a band of reasonableness, within which one employer might reasonably take one view and another reasonably take a different view. In between extreme cases of misconduct there will be cases where there is room for reasonable disagreement amongst reasonable employers as to whether dismissal for the misconduct is a reasonable or unreasonable response: LJ Mummery in HSBC Bank Plc v Madden [2000] ICT 1283.

47. The question for the Tribunal is the reasonableness of the decision to dismiss in the circumstances of the case, having regard to equity and the substantial merits of the case. The Tribunal will not substitute its own view for that of the respondent. In order for the dismissal to be fair, all that is required is that it falls within the band of reasonable responses open to employer. It is necessary to apply the objective standards of the reasonable employer – the "band of reasonable responses" test – to all aspects of the question of whether the employee had been fairly dismissed, including whether the dismissal of an employee was reasonable in all the circumstances of the case.

Conclusion; applying the law to the facts

48. With reference to the first and second issue, namely, had the respondent satisfied the Buchell test the Tribunal found it had for the reasons set out above. Misconduct is potentially a fair reason for dismissal under S.98(2) ERA, and it was reasonable for the respondent to treat that reason as a sufficient reason to dismiss in the circumstances under S.98(4) ERA. The Tribunal found the dismissal was within the range of reasonable responses and a fair procedure was followed. Section 98 (4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal if fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this was determined in the respondent's favour in accordance with equity and the substantial merits of the case.

49. The real issue in this case was whether the decision to dismiss fell within the band of reasonable responses taking into account the live final written warning

issued to the claimant, and the Tribunal found the decision to dismiss did not fall outside the band of reasonable responses open to an employer acting reasonably for the reasons set out above.

50. It was not unreasonable for Paul Dalby to prefer the recollection of Michael Wharton and Andrew McKenzie, even if they were not identical, to that of the claimant who when interviewed consistently stated she had not disclosed a name, date of birth or address, but could not remember if she had discussed the client's care and support needs. Paul Dalby was entitled to conclude that the claimant stating she did not remember was different to her saying she did not do it. It was notable that in her cross-examination of Paul Dalby on this point the claimant made it clear that she did not want to accuse Paul Dalby of lying and therefore did not want to say that she had not mentioned the client's medical condition, care and support needs. The claimant was thus an author of her own misfortune as she did not offer the correct information up to the investigating officer at the time, leaving the only evidence before Paul Dalby as to whether or not information about the client's health and treatment being provided mainly by Michael Wharton, who overheard the claimant. In cross-examination the claimant also attempted to suggest Michael Wharton and Andrew McKenzie had overheard her talking to her line manager about the client and confused both conversations; this was not the evidence given at the time and it was far from credible given Michael Wharton's initial understanding that the claimant was talking to a fellow professional due to the nature of the detail given by her of the client, he then realised it was the claimant's sister and stopped the conversation going any further, concerned that the claimant may provide more personal information, including the client name. The claimant's allegation that Michael Wharton could not have known she would have provided a name and address has some cogency, the point is that Michael Wharton was so concerned he wanted to stop the conversation before it went any further because he believed it was inappropriate and a breach of client confidentiality.

51. The claimant has missed the point in this case, as she and her union official have been preoccupied with the Data Protection Act and whether or not the claimant's actions fell under it, which is understandable given the rather extreme position taken by Dan Howarth as an expert of data protection matters. The real issue as perceived by Paul Dalby, who gave credible and cogent evidence on this point, was that the claimant had breached client confidentiality and there was no legitimate reason why she should have discussed a client requiring the care of social services, her medical condition, care package and family with her sister, who was not an employee of the respondent, and in doing so she had breached not only the client's trust, but the trust of the respondent in the claimant especially taking into account the incident had taken place during a period when the final written warning involving the HCPC code of Conduct remained live. As Paul Dalby put it on cross-examination "to simply pick the phone up and ring a sister and talk about an adult who hasn't given permission is not appropriate. The respondent needs to have confidence in its employees that when they have information in confidence they will not simply ring their relative." This is the nub of the case, and the Tribunal found having heard evidence from Paul Dalby as to his decision-making process, that he held a genuine belief the claimant committed an act of misconduct based upon a reasonable investigation, and considering the final written warning the decision to dismiss fell well within the band of reasonable responses.

52. One procedural irregularity was relied upon by the claimant, namely, that the disciplinary hearing was adjourned and reconvened when the dismissing officer had indicated he would come to a decision in 5-days. The Tribunal found that Paul Dalby acted reasonably when he felt further evidence was necessary and was therefore unable to come to a decision within the time-scale promised. His decision reflects an open mind and an intention to leave no stone unturned before coming to his decision. In the claimant's appeal she conceded "more information may be needed and I believe that the hearing can be adjourned to allow this information to be gathered but the chair should be clear that more information is required and not conclude the hearing saying the outcome will be provided within 5-working days." The Tribunal took the view Paul Dalby was very clear, and as soon as he came to the view he needed more time the claimant was informed.

53. The Tribunal, who cannot substitute its view for that of the respondent in an unfair dismissal case, has considerable sympathy for the claimant, she made a mistake early on in her career, but every case is heard on its individual merits, and it is not inconceivable that another employer faced with a similar fact case could have been dealt with it differently and not dismissed. The Court of Appeal in British Leyland (UK) Ltd cited above held that in some cases there is a band of reasonableness, within which one employer might reasonably take one view and another reasonably take a different view, the Tribunal took the view that this was one of those cases.

54. As the Tribunal has not found in the claimant's favour there is no requirement for it to consider the "no difference rule" under the well-known case Polkey and contribution. For the avoidance of doubt, had the claimant succeeded it would have gone on to find she contributed one hundred percent and the damages would have reflected this accordingly. A reduction must be made from the basic award on the ground of the employee's conduct where 'the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent' — S.122(2).

55. In Steen v ASP Packaging Ltd 2014 ICR 56, EAT, the EAT, summarising the correct approach under S.122(2), held that it is for the tribunal to:

• identify the conduct which is said to give rise to possible contributory fault

• decide whether that conduct is culpable or blameworthy, and

• decide whether it is just and equitable to reduce the amount of the basic award to any extent.

56. For the reasons set out below gleaned from the factual matrix in this case, the Tribunal found sufficient evidence of misconduct such as to warrant a reduction of one hundred percent from the basic award.

57. **F**or conduct to be the basis for a finding of contributory fault under S.123(6) ERA, it has to have the characteristic of culpability or blameworthiness: the Court of Appeal in Nelson v BBC (No.2) 1980 ICR 110, CA, where the Court said that it could also include conduct that was 'perverse or foolish', 'bloody-minded' or merely

'unreasonable in all the circumstances'. In Ms Doran's case the Tribunal found she had precipitated the dismissal in the knowledge that she was on a final written warning and was guilty of contributory conduct. Her conduct was found to be both culpable and blameworthy under the Nelson test.

58. Once the element of contributory fault has been established, the amount of any reduction is a matter of fact and degree for the tribunal's discretion- S.123(6) ERA: 'Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award *by such proportion as it considers just and equitable* having regard to that finding.' In the claimant's specific case, the Tribunal would have unusually found she had contributed 100 per cent to the dismissal, reducing the compensatory award to nil, in the knowledge that 100 per cent deductions are rare on the basis that her dismissal was wholly justified. As set out above in the finding gf if facts, the claimant's conduct was found to be the sole reason for the dismissal.

59. In conclusion, the claimant was not unfairly dismissed and her claim for unfair dismissal is not well-founded and is dismissed.

18.2.19

_____

Employment Judge Shotter

JUDGMENT & REASONS SENT TO THE PARTIES ON

22 February 2019

…….

FOR THE SECRETARY OF THE TRIBUNALS