EMPLOYMENT TRIBUNALS

Claimant: Mr N Barnes

Respondent: Manchester City Council

Heard at: Manchester **On:** 7, 8 and 9 January 2020

Before: Employment Judge Phil Allen
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Miss A Smith, Counsel

JUDGMENT

The judgment of the Employment Tribunal is that the claimant was not unfairly dismissed; the claim of unfair dismissal is not well-founded.

REASONS

Introduction

1. The claimant was employed by the respondent from 21 January 1991 until his dismissal on 25 May 2018, latterly as a Senior Social Worker. The claimant alleges that he was unfairly dismissed. The respondent contends that the claimant was dismissed by reason of conduct following a full and fair procedure.

The Issues

2. The issues were confirmed by Regional Employment Judge Parkin at a preliminary hearing held on 24 April 2019. The issues were as follows (page 22):

(1) Whether the respondent has proved a potentially fair reason for the dismissal of the claimant within section 98(1) and (2) of the Employment Rights Act 1996. The respondent relies on misconduct, contending that it summarily dismissed the claimant for a combination of failures and breaches in relation to safeguarding duties and procedures and

recording obligations and practice standards, including not seeing children in his care and supervision alone.

(2) If the respondent proves a potentially fair reason, the Tribunal will apply section 98(4) of the Employment Rights Act 1996 in determining whether the dismissal was fair or unfair i.e. whether in all the circumstances (including size and administrative resources of the respondent) it acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and will determine this in accordance with equity and the substantial merits. The claimant especially points to unfairness of procedure from his suspension onwards and to inadequate investigation and procedure during the disciplinary process and the failure to take on board his whistle-blowing concerns during the appeal.

3. The order from the preliminary hearing also records that it was confirmed that the claimant was pursuing a claim of "ordinary" unfair dismissal only and he was not contending that he had been automatically unfairly dismissed as a result of making a public interest disclosure. However, as part of his unfair dismissal claim, the claimant does contend that he was unfairly treated or scapegoated during the serious case review of his casework, and that he made disclosures on 11 May 2017 during a conversation with Ms A Amesby.

4. At the start of this hearing it was confirmed that these were the issues to be determined. During submissions, the parties also agreed that the issues of *Polkey* and contributory fault would also be determined as part of the liability Judgment. Other issues in relation to remedy were left to be determined at a subsequent remedy hearing, should that be required.

The Hearing

5. The claimant represented himself throughout the hearing. The respondent was represented by Miss A Smith of counsel.

6. The tribunal considered a two volume bundle of documents which ran to approximately 725 pages, the content of which was agreed. Only pages referred to in the witness statements or expressly referred to by the parties were read by the Tribunal. On the first morning of the hearing the tribunal read the witness statements together with the relevant pages from the bundle.

7. The tribunal was provided with a chronology prepared by the respondent, but the claimant made clear that he did not agree the content of that chronology.

8. A timetable had been included in the case management order following the preliminary hearing. The final hearing followed the order outlined in that timetable (pages 20-21), although the evidence took longer to be heard than had been envisaged in that timetable.

9. The tribunal heard evidence from the claimant. He was cross examined on his statement throughout the afternoon of the first day (7 January) and the morning of the second day (8 January).

10. The tribunal heard evidence on behalf of the respondent from: Miss L Curry, Team Manager with Children's Services; Mr S Walsh, Head of Service, North Locality, Children and Education Services; and Ms J Heslop, Strategic Head of Early Help and a member of the Senior Management Team.

11. At the end of his evidence the claimant indicated that he had not had a full opportunity to read the respondent's witness statements and he had not appreciated that he needed to challenge each of the witnesses on all matters with which he disagreed. As a result, the claimant was given an extended period of time between the end of his evidence and Miss Curry's evidence to prepare his questions. Miss Murray was cross examined on the afternoon of 8 January and both Mr Walsh and Ms Heslop were cross examined on the morning of 9 January.

12. At the end of the morning of the third day (9 January) Miss Smith made oral submissions on behalf of the respondent. That afternoon, the claimant made his oral submissions. Neither party produced any written submissions for the tribunal. Judgment was reserved.

13. Based on the evidence heard, and insofar as relevant to the issues that must be determined, the tribunal makes the findings set out below.

Findings of Facts

Background

14. The claimant was employed by the respondent from January 1991. He was initially a Residential Social Worker. From 1994 to 1996 he trained as a Social Worker, and from 1996 he was a qualified Social Worker. The claimant described himself as an experienced social worker.

15. In 2013, as part of a departmental restructure, the claimant took on the position of team manager in the locality team. The claimant's evidence was that this was not a role which he particularly wished to take on. In June 2015 the claimant was suspended and, following a disciplinary hearing on 27 May 2016, he was demoted to the position of Senior Social Worker. The decision resulted from issues relating to a child who suffered harm, child A, and primarily related to the claimant's supervision of another social worker. The claimant in his evidence accepted his part in the departmental failings around the decision-making process and accepted his part in the fact that at times he did not supervise the other social worker.

16. The issues relating to child A also led to the claimant's fitness to practice as a social worker being considered by the Health and Care Professions Tribunal Service whose conduct and competence panel heard the claimant's case on 26-29 March 2018 and 25-27 June 2018. That panel found that the claimant had failed to comply with the standards of conduct, performance and ethics established by the Health and Care Professions Council (HCPC), and made a finding of impairment on public interest grounds (page 569). The panel also found that it was not concerned that the claimant posed a risk to the public in a non-managerial role. It also concluded that it was appropriate and proportionate to impose a Caution Order on the claimant for a period of three years (page 572).

17. On 11 July 2016 the claimant returned to work with the respondent, working in a different department and reporting to a different manager. The claimant's evidence was that, following his demotion and period of suspension, his confidence had been knocked. His evidence to the tribunal was that, whilst he had returned as a Senior Social Worker, his position was akin to a recently qualified social worker who required significant management support. It is not in dispute that upon the claimant's return to work there was supposed to be an action plan in place for him and additional extra support, which did not transpire. The claimant's own evidence was that on the day upon which he returned to work the most senior person in his new team thought he had been sent to fix the photocopier.

18. The claimant's evidence was that, following his return to work, he had a good relationship with his manager. There were records provided to the tribunal of supervision meetings which were held with him at least monthly throughout the period he was at work. The claimant confirmed that these meetings lasted approximately 2½ hours each. The contemporaneous records of those meetings do not record the claimant as saying he had concerns about his workload and ability to fulfil his work, although the claimant's evidence was that he did. The tribunal did not hear evidence from the claimant's manager, who has left the respondent's employment. The claimant says that he spoke to his manager on a regular basis and she was kept up-to-date about his cases and the steps undertaken.

19. A contemporaneous record of how the claimant perceived his return to work and subsequent support, was recorded in a statement of reflective practice which he prepared for the HCPC which is dated 31 March 2017. In that the claimant said (page 324): *"My new manager has been supportive and I have had good supervision about my work practice"*.

20. The claimant also said in the same document, about the respondent's section 47 policies, *"I am very clear on the departmental policies and I worked within them"* (page 325). Section 47 assessments were something that was referred to throughout the tribunal hearing. An agreed document which defines such terms (page 160) describes these as an "*Investigation required under section 47 of the Children Act 1989. This is the investigation completed when there is reason to believe that a child has experienced or is likely to experience significant harm…These investigation needs to decide whether any further action is needed to safeguard the child. Within section 47 enquiries a child will be seen alone. They may be interviewed by police. They may need to be seen by a paediatrician…A written record is to be kept on the child's file.*" It was common ground that these reviews were very important for a child's welfare.

The triggers for the disciplinary process

21. In April 2017 the claimant did not complete a secure review for a child, MG, or at least did not record that he had completed such a review. A secure review was agreed to be (as defined at page 160) a formal review by an independent reviewing officer to consider whether the criteria to keep a child in secure accommodation still applied. The claimant accepted in evidence that the absence of a completed review on the respondent's systems resulted in an automatic flag being sent to someone senior that it had not been undertaken.

22. This flag triggered the subsequent audit process. As a result of this trigger, Ms S Rathore undertook a review of the MG file and, in the light of what she had identified, an audit dip of a sample of five of the claimant's ongoing cases. Ms Rathore identified that she had concerns with the claimant's case management and professional practice from reviewing those five cases.

23. There was some uncertainty in the evidence before the Employment Tribunal about when this audit was undertaken and when it was completed. It occurred in April or May 2017. The report (pages 374-377) was undated. Ms Rathore did not give evidence to the tribunal. The claimant argued that the audit appeared to have been completed before he undertook other work with children and, in particular, before he undertook some significant work with a particular child on the day prior to his suspension. It does appear to be the case that there may have been some limited delay between the audit report and suspension. The claimant said this indicated that the concerns identified could not have been that serious. The tribunal understands the claimant's contention but does not find that there was a sufficiently material delay in the decision to suspend being undertaken or actioned, to impact upon the fairness of the ultimate decision to dismiss, or to genuinely evidence that any failings identified were not genuinely perceived by the respondent to be serious.

24. Miss Curry was subsequently requested by Ms Amesby to carry out a full investigation into the claimant's professional conduct and management of his allocated cases. Miss Curry's evidence to the tribunal was that the audit led to this investigation being requested and resulted in Ms Amesby deciding that the claimant should be suspended (on full contractual pay) pending the outcome of the investigation into the handling of his cases.

25. On 11 May 2017 the claimant met with Ms Amesby and his manager to discuss his upcoming HCPC proceedings. The claimant was informed that the respondent would not be providing a report to support him. At that meeting the claimant informed Ms Amesby and the other attendee that he believed he was being singled out for action, would defend himself rigorously before the HCPC, and would as a result be highlighting failings in the practice of individual senior managers and of management processes at the council. It is the claimant's case that it is because of what he said in this meeting, that he was subsequently suspended and subject to the disciplinary process which led to his dismissal.

26. On 15 May 2017 the claimant attended a meeting with Ms Amesby in which he was suspended. The tribunal did not hear any evidence from any of the attendees at that meeting save for the claimant. Both the claimant's manager and Ms Amesby have subsequently left the respondent's employment. Those witnesses called by the respondent were unable to give direct evidence of the decision-making process for the investigation or suspension.

Investigation

27. Miss Curry first wrote to the claimant on 19 June 2017 (pages 423-424) about her investigation. She undertook a review of all of the cases for which the claimant was responsible at the time.

28. The tribunal heard evidence from Miss Curry who gave clear and forthright evidence. Miss Curry was junior to Ms Amesby within the respondent's structure,

but in her evidence emphasised that she could be quite assertive, and was very clear that if she had identified from her own review that there were no conduct issues identified she would have reported this. She undertook a complete review of the claimant's entire caseload in order to identify whether the five cases reflected his workload generally, and in order to ensure that she had considered for herself the issues identified. Her statement says that she uncovered significant practice concerns in relation to 17 of the 19 cases which the claimant had at the time. The claimant accepted that Miss Curry's audit identified issues in relation to a substantial proportion of his cases. Miss Curry did not rely upon Ms Rathore's report or Ms Amesbury's decision regarding the need for an investigation. The tribunal finds that Miss Curry's investigation effectively started from scratch in considering the claimant's case load and Miss Curry determined for herself whether there were issues with his cases (in her own view).

29. Miss Curry wrote to the claimant on 25 July 2017 confirming that she had undertaken the review of his cases and listing the concerns which she had identified (pages 471-472). She subsequently met with the claimant (on each occasion accompanied by his trade union representative) and undertook investigatory interviews on 18 August, 29 August, 26 September, 28 September, 19 December 2017 and 5 January 2018. Part of the reason for there being so many interviews was because the claimant's trade union representative had asked for matters to be addressed in separate meetings.

30. In evidence, Miss Curry was questioned on the delay between 28 September and 19 December meetings and she explained this by reference to the fact that she sought access to all of the claimant's emails in order to investigate whether they contained records appropriate to her investigation. She explained that there had been some technical issues in her obtaining access and she needed to review a large number of emails.

31. On 10 February 2018 Miss Curry completed a report containing her findings in relation to the claimant's conduct and management of his cases (pages 527-549). Her report identified what she described as "*significant concerns*" in relation to the following areas: failing to address safeguarding issues on cases; failing to ensure children were seen alone on visits (which was important for reasons that were addressed in evidence at the tribunal); and inadequate case recording, liaising with professionals and failing to complete tasks on time. Her report detailed at length a number of very specific concerns related to the children/cases for which the claimant was responsible as part of his caseload, safeguarding issues, section 47 enquiries and record keeping. Her view was that the conduct and management identified constituted potential gross misconduct.

32. On 13 March 2018 a letter was sent to the claimant confirming to him that Miss Curry had completed her investigation, providing the report and confirming the allegations which were to be addressed at the disciplinary hearing (pages 550-553).

33. The disciplinary hearing took place on 12 April 2018. That was eleven months after the claimant's suspension. Miss Curry's evidence was that she would have liked the investigation to have been completed quicker. She was sorry that it was not, and indeed she apologised for the time taken in her investigation report. In providing the reasons for her delay, Miss Curry referred to her own workload and

maternity leave in her team, as well as the complexity of, and number of meetings in, the investigation.

34. The tribunal accepts that there was some explanation for the length of time taken to investigate. It was a very full and thorough investigation into relatively complex issues, involving a significant number of files and a large amount of paperwork. There were a very large number of investigatory meetings with the claimant, and the inevitable delays inherent in arranging so many meetings (with accompaniment). However, the tribunal finds that the investigation was not conducted promptly and the cumulative impact of the delays between the various steps undertaken resulted in a very significant delay to the overall process.

35. At the tribunal hearing, the claimant complained that the investigation did not speak to other witnesses. Miss Curry did speak to a limited number of other people as part of her investigation. The claimant did not provide any names to the investigator of people he believed she should have spoken to, and he did not arrange for any witnesses to attend his internal hearing to give evidence (or ask that they should attend).

36. At the tribunal hearing, the claimant argued that he had been the subject of inconsistent treatment, because a number of others in the respondent had similar issues with record-keeping. The claimant was reticent to provide any names to the tribunal and only provided the name of one person (first name only) as an example. The claimant confirmed that he did not give the name of anybody to Miss Curry or to anyone else as part of the internal procedures, in contending that he was being treated inconsistently.

37. More generally the claimant contended that Miss Curry should have spoken to colleagues in his department about the work that he undertook and she should have looked at his work throughout the years in which he had been employed (to identify whether the failings identified were a blip or a pattern). Miss Curry's evidence was that she focussed on the issues that she was being asked to investigate and that was the claimant's current case load. Her evidence was that she quite deliberately did not look back into the issues which had resulted in the previous disciplinary action being taken against the claimant in fairness to him. Her evidence was that she had looked at his entire caseload at the time of the investigation to identify whether this was an isolated or wider issue, but she did not consider to be relevant the claimant's historic working practices and/or what he had done in the past.

38. The tribunal finds that the investigation undertaken was a very full and thorough one. It does not find that significant further interviews and/or investigations should have been undertaken, as contended by the claimant.

The disciplinary hearing

39. The claimant's disciplinary hearing was heard on 12 April 2018 by Mr Walsh. He considered all of the documents that were presented to him. At a detailed and lengthy hearing, Miss Curry presented her investigation and the claimant, accompanied by his trade union representative, presented his case. The notes of the hearing are at pages 573-608 of the bundle. Both parties were given a full opportunity to present their case to Mr Walsh.

40. At the end of the disciplinary hearing on 12 April 2018, Mr Walsh asked for some additional documentation to be obtained. As a result subsequent documentation was obtained and provided to the parties prior to the case reconvening.

41. One issue that had arisen was that the claimant's manager had left employment approximately two months after the claimant had been suspended. Miss Curry accepted in evidence before the tribunal that with hindsight, and if she had known the manager was leaving, she would have tried to speak to her before she left. However, the reason she had not done so at the time was because she wished to speak to the claimant first before speaking to anyone else in accordance with her preferred practice, and that occurred after her review of the cases. She highlighted in evidence that she believed it was better to speak to the individual about whom allegations had been raised prior to speaking to others. Once the manager had left the respondent's employment Miss Curry did approach her on two occasions to ask her to provide evidence to the investigation but the manager refused to do so. A document was prepared at Mr Walsh's request that detailed the conversations that Ms Curry had had with the manager (page 611).

42. A report was also compiled (page 610) which looked at the activity on the claimant's cases in the period following his suspension. Part of the claimant's argument, both at the internal hearings and before the tribunal, was that the failings which were evident in his record-keeping were also present throughout the respondent. Mr Walsh did not consider this to be the case, nor did Miss Curry. Nonetheless, as part of his consideration, Mr Walsh asked for a comparison of activity on the claimant's cases since his suspension to compare with the claimant's own activity. Mr Walsh's conclusion was that the report provided demonstrated significantly greater activity by those who subsequently worked on the cases, and he used this as a benchmark (in addition to his own experience) to identify whether the claimant's recordkeeping was outside the normal practices within the respondent.

43. The disciplinary hearing reconvened on 11 May 2018 and a lengthy decision letter was sent dated 25 May 2018 confirming the decision (pages 621-631). Mr Walsh's decision was that all of the allegations were proven, and that the allegations clearly constituted gross misconduct. He confirmed that he had considered the suitability of alternatives to dismissal but considered in the circumstances there was no alternative to dismissing the claimant.

44. The conclusions in the decision letter ran through the specific cases in detail and identified what Mr Walsh found. Amongst other things, these included that: for a child who was at significant risk of harm where a strategy meeting and subsequent risk assessment were urgently needed there had been no section 47 enquiry undertaken; the claimant had failed to adequately assess risk; the claimant had admitted some cases where he had not seen children alone when he should have done, and Mr Walsh concluded that there were numerous such examples; and the claimant's case recording on the system was poor across 14 of his cases. He also concluded that there were numerous examples of the claimant failing to undertake, what he considered to be, basic tasks.

45. Mr Walsh did consider the issues raised by the claimant in mitigation and these were addressed in the decision letter (those issues being many of the same matters which the claimant emphasised in the tribunal hearing). He did consider the

claimant's caseload. He agreed that the claimant should have had extensive refresher training on his return and should have had more regular supervision than occurred, but he concluded that this did not explain the professional failings which had been identified. He did not think that issues in relation to management of the claimant excused what he described as *"basic and significant practice failings".*

46. The tribunal heard evidence from Mr Walsh about the process he had followed and how he reached a decision. The tribunal finds that he had fully considered the decision he reached, based upon the evidence before him. In his evidence the claimant accepted that both Mr Walsh and Ms Heslop (who subsequently heard his appeal) were professional and experienced in social work.

47. In his evidence to the tribunal, the claimant accepted that he had failings. He accepted that Mr Walsh had considered the issues, and appeared to accept that he made decisions based on the material before him. The claimant's primary contention was that Mr Walsh did not give the right weight to the factors that the claimant emphasised. It was the claimant's case that the issues identified as misconduct were not that serious, and that if Mr Walsh had given appropriate weight to the issues that he raised in mitigation and his explanations, Mr Walsh would not have dismissed him.

Delay

48. Whilst the claimant did complain about the delay prior to the decision to dismiss, he was clear at the tribunal hearing that he raised no issue about any delay in the respondent's process following the disciplinary hearing commencing.

The appeals

49. On 7 June 2018 the claimant submitted an appeal (pages 632-625). The matters he raised were effectively the same points that formed the basis of his contentions at the tribunal hearing. The claimant's appeal was heard by Ms J Heslop at a hearing on 4 October 2018. The claimant was accompanied by his trade union representative. At the outset of that hearing it was explained to the claimant that it was a full re-hearing of the case. Ms Heslop's evidence to the tribunal was that she had fully considered all the matters. An outcome was provided in a lengthy letter from Ms Heslop which addresses the allegations and explained the decision reached in some detail, dated 16 October 2018 (pages 658-670).

50. Ms Heslop concluded that there were basic and significant practice failings and that dismissal was the appropriate outcome. She did not believe that the claimant had adequately assessed risk to ensure that appropriate safeguarding measures were put in place, and had not operated within the section 47 framework. Ms Heslop also found that the claimant's recording was insufficient. She concluded that it was not unusual for recording to be a couple of weeks behind, but in the claimant's case he was many months out of date.

51. At the appeal hearing, the claimant presented a report issued by the Strategic Director Children's Services following an Ofsted monitoring visit on 6 and 7 June 2017 (pages 378-382, a document upon which the claimant also relied at the tribunal hearing). That recorded that a finding from the Ofsted visit had been that at the respondent strategy meetings were poorly recorded. The claimant's contention was

that as a result he should not have been dismissed for something that was clearly prevalent in the respondent's organisation. Ms Heslop did consider this issue in reaching her outcome. Her conclusion was (page 666): *"Whilst there may have been variable performance by some social workers, this does not mean that serious examples of practice failings involving significant safeguarding risk should not be treated as gross misconduct and therefore potential dismissal".*

52. Ms Heslop also considered the lack of management and supervision of the claimant and accepted that the claimant's manager should have provided him with better support and challenge, however she did not think that that meant that an alternative sanction should be imposed. She acknowledged the claimant's long service and that he had been praised for work on high profile cases. She also acknowledged that some of his practice was of good quality, especially in his relationships with others. However, her conclusion was *"None of these points can excuse basic and significant practice failings".* Ms Heslop acknowledged that the claimant should have received more support but she felt this did not excuse the professional failings she identified. She also agreed that the disciplinary process was too long and said it was regrettable.

53. The tribunal finds that this appeal constituted an entire re-hearing of the case. It also finds that the claimant was able to raise in the appeal all of the issues which he subsequently raised in the tribunal hearing (save only for the evidence referred to at paragraph 57 below).

54. Under the respondent's procedures the claimant had a further right of appeal. He appealed on 26 October 2018. The claimant's appeal was heard by the respondent's Employee Appeal Committee which consisted of a sub-committee of councillors. That appeal was heard on 12 June 2019. This was not a re-hearing and those hearing the appeal were not experienced social workers. The outcome of 24 June 2019 was provided to the claimant in a letter (pages 716-721). The appeal panel also found the issues upheld, rejected the appeal and confirmed that dismissal had been the right sanction.

55. At page 718 the appeal panel record the admissions made by the claimant during the hearing. In the tribunal hearing the claimant accepted that these were all accurate (save for the word "intentionally" in the final bullet point). These admissions included that:

- The claimant accepted that some of the failings outlined were basic requirements/standards of the role of a social worker;
- The claimant was aware of the standards required as a social worker;
- The claimant had not notified or indicated to his manager or any other member of staff at any point before or after he accepted the senior social work role that he felt unable to do it; and
- In respect of the relevant matters, he was aware of the relevant standards and requirements and had *"consistently acted in a manner that contradicted these standards and requirements".*

Other evidence

56. In evidence to the tribunal the claimant accepted that his conduct had failings and that those failings were sufficiently significant to warrant demotion from his position as a senior social worker, to that of a social worker.

57. The issues which led to the claimant's dismissal were also referred to the HCPC. Provided to the tribunal was the decision of the interim order panel considering an application for an interim order to be made (dated 6 November 2018). The panel's view was that it was not appropriate or proportionate to impose an interim order on the claimant (page 680). The claimant placed great emphasis on this decision. There was no evidence before the tribunal about any substantive proceedings before the HCPC. The claimant's evidence was that matters were not being progressed.

The Law

58. The respondent bears the burden of proving, on the balance of probabilities, that the dismissal was for misconduct. If the respondent fails to persuade the tribunal that it had a genuine belief in the claimant's misconduct and that it dismissed him for that reason, the dismissal will be unfair.

59. If the respondent does persuade the tribunal that it held the genuine belief and that it did dismiss the claimant for that reason, the dismissal is only potentially fair. The tribunal must then go on and consider the general reasonableness of the dismissal under section 98(4) Employment Rights Act 1996. That section provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the claimant. This is to be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.

60. In conduct cases, when considering the question of reasonableness, the tribunal is required to have regard to the test outlined in **British Home Stores v Burchell [1980] ICR 303**. The three elements of the test are:

(1) Did the employer have a genuine belief that the employee was guilty of misconduct?

(2) Did the employer have reasonable grounds for that belief?

(3) Did the employer carry out a reasonable investigation in all the circumstances?

61. The additional question is to determine whether the decision to dismiss was one which was within the range of reasonable responses that a reasonable employer could reach.

62. It is important that the tribunal does not substitute its own view for that of the respondent, **London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220** at paragraph 43 says:

> "*It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question- whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal*"

63. It is important that the tribunal does not substitute its own decision for that of the respondent. It is not for the tribunal to weigh up the evidence that was before the respondent at the time of its decision to dismiss (or indeed the evidence before the tribunal) and substitute its own conclusion as if it were conducting the process afresh. Whether or not the tribunal considers the decision to be harsh is not the question which the tribunal needs to determine, nor should a view that it is harsh alter the outcome (if the decision was within the range of reasonable responses). The key question is whether the decision was within the range of reasonable responses.

64. Relevant to this decision was consideration of consistency. In **Post Office v Fennell [1981] IRLR 221** Brandon LJ said (of the word equity in section 98(4)):

> "*It seems to me that the expression equity as there used comprehends the concept that employees who misbehave in much the same way should have meted out to them much the same punishment, and it seems to me that an industrial tribunal is entitled to say that, where that is not done, and one man is penalised much more heavily than others who have committed similar offences in the past, the employer has not acted reasonably in treating whatever the offence is as a sufficient reason for dismissal*"

65. If an employer is inconsistent in the sanction applied to comparable circumstances that can render a dismissal unfair, even if the dismissal would otherwise have been fair. However that concept is subject to the following: to consider how similar situations have been dealt with, the previous situations must be truly similar (see for example **Paul v East Surrey District Health Authority [1995] IRLR 305**); an employer cannot be considered to have treated other employees differently if it was unaware of their conduct; an employer can fairly distinguish between two cases if there is a rational basis for the distinction; and if an employer has been unduly lenient in the past, he will be able to dismiss fairly in the future notwithstanding the inconsistency.

66. The parties referred to very little law in their submissions.

67. The respondent's representative referred to the case of **OCS v Taylor [2006] ICR 1602** in making a submission that any issue which may constitute a procedural imperfection and/or a breach of the ACAS code of practice on disciplinary and grievance procedures, was only one factor to be considered. That case confirms that the tribunal's task is to decide, whether in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss the employee.

68. The tribunal itself referred to the ACAS code of practice on disciplinary and grievance procedures to which it is required to have regard, and, in particular, the statement that *"employers and employees should raise and deal with issues **promptly** and should not unreasonably delay meetings, decisions or confirmation of those decisions".* When this was highlighted to her, the respondent's representative placed emphasis on the word "*unreasonably*" but in any event contended that it was only one fact to be taken into account when determining fairness generally, was not determinative on its own, and submitted that the claimant had suffered no adverse impact from any delay in the processes being followed.

69. It is also relevant to highlight something which the tribunal does not need to determine and which is not a matter determined by this judgment. The claimant's fitness to practise as a social worker is not an issue to be determined by this tribunal, nor has this tribunal considered this as part of its reasons.

Discussion and Analysis

70. The tribunal is satisfied that the reason for dismissal was the claimant's misconduct, as evidenced by Mr Walsh and Ms Heslop. They both had a genuine belief that the claimant was guilty of misconduct and there were reasonable grounds for that belief.

71. The claimant accepted that his failure to undertake/record the MG review triggered an alert. The tribunal is unable to determine precisely what was the motivation of those who progressed the internal processes after this trigger prior to Miss Curry's investigation, albeit it would appear from the documentation that Ms Rathore's initial audit would have identified issues as those issues were subsequently confirmed by Miss Curry's audit and indeed (at least some of them) were accepted by the claimant. Ms Rathore's initial audit was also commenced (if not concluded) before the claimant's disclosures at 15 May meeting (meaning his disclosures at that meeting could not have been the motivation for the initial audit). Whatever the motivation for the claimant's suspension and for the full investigation being undertaken, Miss Curry undertook a fresh review of all of the claimant's cases, and it was that review and investigation which led to the disciplinary action taken. All of Miss Curry, Mr Walsh and Ms Heslop were clear in their evidence that they considered the claimant's failings to be so serious as to amount to gross misconduct, and that was the reason for the investigation's recommendations, dismissal and appeal outcome. The tribunal finds that any issues raised by the claimant on 15 May did not contribute to those decisions.

72. The investigation undertaken was full, thorough and detailed. Miss Curry reviewed all of the claimant's existing case load and undertook a detailed investigation including a large number of meetings. The tribunal does not accept that the respondent was obliged to benchmark the claimant's recent failings against his work over 27 years and/or to compare his recent work performance with his performance in the past. An employer is able to investigate what it considers to be failings by focussing upon those issues, without investigating an employee's past (positive) performance. In any event, Mr Walsh and Ms Heslop both gave evidence that they accepted that the claimant's previous work had been undertaken well, and therefore any further investigation would not have further assisted the claimant. The claimant also had the opportunity to call his own witnesses and evidence at the internal hearings, had he wished to do so.

73. A major focus of many of the claimant's arguments was that the decision to dismiss was not one which a reasonable employer could reach within the range of reasonable responses (he says that he should not have been dismissed for what was identified). The tribunal does not agree. The claimant's failings in the cases were considered by two senior and experienced social workers who determined that dismissal was the right sanction. Those decisions focussed upon the basic failings identified, the seriousness of the issues and the reasons for dismissal were fully explained. The tribunal accepts the respondent's witnesses evidence about the basic nature of the failings they believed they had identified. In the context of the claimant's role and the potential implications of that role not being undertaken appropriately (which could hardly be more serious), the tribunal accepts that the decision to dismiss was one a reasonable employer was able to reach. The tribunal draws support from the claimant's own evidence that he would have accepted demotion from the post of senior social worker, which it considers not to be consistent with an argument that dismissal was outside the range of potential reasonable responses.

74. The tribunal does find that the delay in the respondent's process (prior to the disciplinary hearing) does mean that the respondent failed to comply with what is said in the ACAS code of practice on disciplinary and grievance procedures. The process was not undertaken without undue delay. As confirmed above, the tribunal accepts that there were reasons for this being a lengthy investigation and for some of the specific delays in the process, but overall and cumulatively the respondent certainly did not deal with matters promptly. The delay did cause three issues for the claimant: his manager did not contribute to the investigation; there would have been some loss of recollection; and he had to undergo an extended period of being subject to the stresses of being suspended and investigated. However, the manager did leave the respondent's employment only a short period into the process and it does not necessarily follow that she would have contributed to the investigation even had it been progressed promptly. This is one factor to be taken into account in all the circumstances of the case, in determining whether the employer acted reasonably in treating the misconduct identified as a sufficient reason to dismiss the claimant. The tribunal does not find that the delay alone means that the employer was not acting reasonably in doing so.

75. The claimant's argument that insufficient weight was given to the arguments he put forward to Mr Walsh (and Mrs Heslop) and that if the right weight had been given he would not have been dismissed, is an argument that it is not appropriate for the tribunal to determine. It has been considered when determining whether: there were reasonable grounds for the respondent's belief (that the claimant was guilty of misconduct); and the decision reached was one which a reasonable employer could reach. However, determining the weight to be applied to the claimant's arguments, would otherwise involve the tribunal in engaging in substituting its view for that of the employer which is something the tribunal should not do.

76. In terms of inconsistency, the evidence presented by the claimant did not prove that there had been any inconsistency in the respondent's decision-making in cases involving comparable circumstances. The announcement relied upon by the claimant, evidenced only that there were record-keeping issues at the respondent. The claimant did not identify any other individual who had received a different sanction in comparable circumstances. He declined to identify those who may have

been as equally poor at record-keeping within the respondent (save for providing one first name to the tribunal and no evidence) and, even had he done so, that would not have identified inconsistent treatment relevant to the tribunal's decision unless the respondent itself had previously been aware of those individual failings. The tribunal also accepts the respondent's submissions that: the issue with the claimant was the length of time for which records had not been made (the respondent's witnesses' evidence was that short-term failures would not have been addressed in the same way); and that the record-keeping issues were only part of what was considered, alongside the other findings which led to dismissal which were not about record-keeping (and for which there was no evidence of comparable failings by others).

77. In the hearing, the claimant placed considerable emphasis on the decision of the HCPC in its interim order (on the same issues as those for which the claimant had been dismissed). The tribunal finds that the decision of the HCPC on an interim order application was one which applied a very different test to: that which was considered by the respondent when determining the disciplinary outcome in the claimant's case; and the test applied by this tribunal. The fact that they concluded that the claimant should be able to continue to practice does not mean that the respondent's decision to dismiss was unfair.

78. As a result of the tribunal's conclusions, it is not necessary for the tribunal to determine the issues of *Polkey* or contributory fault.

Conclusion

79. For the reasons given above, the conclusion of the tribunal is that the claimant was not unfairly dismissed.

Employment Judge Phil Allen

Date: 20 January 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
27 January 2020

FOR THE TRIBUNAL OFFICE