EMPLOYMENT TRIBUNALS

Claimant: Miss S Charles

Respondent: London Borough of Hammersmith & Fulham

Heard at: London Central **On:** 8, 9, 12-16 July 2021
29 July (in chambers)

Before: Employment Judge H Grewal
Ms C Ihnatowicz and Mr P Madelin

Representation

Claimant: Miss V Brown, HR Consultant

Respondent: Mr S Harding, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1 The complaint of unfair dismissal is well-founded, and the basic award is reduced by 50% and the compensatory award by 100%. The Tribunal makes a basic award of £6,825.

2 The complaint of breach of contract (wrongful dismissal) is not well-founded.

3 The Tribunal does not have jurisdiction to consider the complaint of direct race discrimination.

REASONS

1 In a claim form presented on 16 December 2019 the Claimant complained of unfair dismissal and breach of contract (wrongful dismissal). In her particulars of claim the Claimant referred to "discrimination" but did not specify any protected characteristic. The Claimant was subsequently given leave on 22 May 2020 and 25 June 2020 to amend her claim to include two complaints of direct race discrimination.

The Issues

2 It was agreed at the outset that the issues we had to determine were as follows.

Unfair Dismissal

2.1 What was the reason for the dismissal? The Respondent contended that it related to conduct.

2.2 If the reason for the dismissal was conduct, whether the dismissal was fair.

2.3 If the dismissal was unfair, what was the likelihood that the Claimant would have been dismissed in any event and whether her conduct had contributed to the dismissal.

Breach of contract (notice pay)

2.4 Whether there was a repudiatory breach of the contract of employment by the Claimant. The Respondent contended that the Claimant had undermined the implied term of trust and confidence by her conduct.

2.5 Whether the Respondent accepted the repudiatory breach.

Direct race discrimination

2.6 Whether the Respondent directly discriminated against the Claimant by:

(a) Initially suspending her on 18 October 2018 without pay; and/or
(b) Mr Filus telling the Claimant on the same day, "you took our money, so we're taking yours."

2.7 Whether that complaint was presented in time and, if not, whether the Tribunal has jurisdiction to determine it.

The Law

Unfair Dismissal

3 The onus is on the employer to prove a reason for the dismissal. A reason relating to the conduct of the employee is a potentially fair reason (**Section 98(1) and (2)** of the **Employment Rights Act 1996** ("ERA 1996"). **Section 98(4) ERA 1996** provides,

"*Where the employee has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with the equity and the substantial merits of the case."

4 The well-established authority of **British Home Stores Ltd v Burchell [1978] IRLR 379** provides that in a conduct dismissal the Tribunal has to ask itself the following three questions:

(i) Did the employer believe that the employee was guilty of the alleged misconduct;
(ii) Did he have in his mind reasonable grounds upon which to sustain that belief? and
(iii) At the stage at which he formed that belief on those grounds had he carried out as much investigation into the matter as was reasonable in the circumstances of the case?

5 In determining the issue of fairness the Tribunal also has to see whether there were any substantial flaws in the procedure which were such as to render the dismissal unfair, and, finally, whether dismissal was within the band of reasonable responses open to a reasonable employer in all the circumstances of the case.

6 The case of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439,** approved by the Court of Appeal in **Post Office v Foley [2000] IRLR 827** lays down the approach that the Tribunal should adopt when answering the question posed by Section 98(4). It emphasises that in judging the reasonableness of the employer's conduct the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer and that the function of the Tribunal is to determine whether in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

7 Section 123 ERA 1996 provides,

"*(1) Subject to the provisions of this section and … the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*

…

(6) 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."

Section 122(2) ERA 1996 provides,

> "*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, the tribunal shall reduce or further reduce that amount accordingly."*

8 If the Tribunal finds that there were flaws in the procedure, It should consider at the compensation stage whether the employee would still have been dismissed if a fair procedure had been followed. If the employment tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment – **Polkey v A E Dayton Services Ltd [1987] IRLR 503**.

9 On a proper interpretation of section 123(6) an award of compensation to a successful complainant can only be reduced on the ground that he contributed to his dismissal by his own conduct if the conduct on his part relied upon for this purpose was culpable or blameworthy. The concept of culpability or blameworthiness includes conduct which is perverse or foolish or bloody-minded. It may also include action which is unreasonable in all the circumstances. Whether it does so depends on the degree of the unreasonableness involved – **Nelson v BBC (No 2) [1979] IRLR 346**. Under section 122(2) ERA 1996 the Tribunal has a discretion as to whether to reduce the basic award if it finds that the conduct of the Claimant contributed to or caused the dismissal. The deductions made under section 122(2) and 123(6) do not have to be the same. As Holland J said in **Charles Robertson (Developments) Ltd v White [1995] ICR 349,**

> "*[Sections 122(2) and 123(6)]: a judgment made pursuant to the former section reflects factors that are materially different from those bearing upon a judgment made pursuant to the latter section, and vice versa. That said, the circumstances of any particular case may readily result in like reductions being made under both subsections."*

Wrongful dismissal

10 An employer is entitled to dismiss an employee without notice where the employee's conduct amounts to a repudiation of the fundamental terms of the contract and makes the continuance of the contract impossible. The implied term in a contract of employment not to act without reasonable or proper cause so as to damage the relationship of trust and confidence applies to an employee as much as to the employer (**British Heart Foundation v Roy EAT/0049/15**.) In **Mbubaegbu v Homerton University Hospital NHS Trust EAT/0218/17** Choudhury J said,

> "*It is quite possible for a series of acts demonstrating a pattern of conduct to be of sufficient seriousness to undermine the relationship of trust and confidence between employer and employee. That may be so even if the employer is unable to point to any particular act and identify that alone as amounting to gross misconduct. There is no authority to suggest that there must be a single act amounting to gross misconduct before summary dismissal would be justifiable or that it would be impermissible to rely upon a series of acts, none of which would, by themselves, justify summary dismissal.*

As stated in Neary, conduct amounting to gross misconduct is conduct such as to undermine the trust and confidence inherent in the relationship of employment. Such conduct could comprise a single or several acts over a period of time."

11 Where there is a repudiatory breach by the employee, the employer must ensure that he does not delay unacceptably or act in some other way inconsistent with electing to terminate the contract. However, an employer faced with a potentially repudiatory action by the employee does not waive the alleged breach merely by taking the employee through the proper disciplinary procedure – **British Heart Foundation v Roy**.

Race discrimination

12 Section 13(1) of the Equality Act 2010 ("EA 2010") provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. Race is a protected characteristic. It is unlawful for an employer to discriminate against an employee by subjecting the employee to a detriment.

13 A complaint of race discrimination must be presented to the employment tribunal not after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the tribunal thinks just and equitable (Section 123(1) EA 2010). The time limit for presenting complaints is extended to take account of the amount of time in which the parties are engaged in Early Conciliation.

The Evidence

14 The Claimant and Desmond Stewart gave evidence in support of the claim. The following witnesses gave evidence on behalf of the Respondent (the positions given in brackets are the positions that they held at the material time) – James Filus (Head of Contacts), Bibier Gungor (Accredited Counter Fraud Specialist, Corporate Anti-Fraud Services), Mark Dalton (Fraud Manager, CAFS), Sharon Lea (Strategic Director of Environment), Mary Lamont (Head of HR Operations, People and Talent), Dave Rogers (Deputy Head of HR Operations), Valerie Simpson (Strategic Lead for Environmental Health and Regulatory Services), Nicola Ellis (Assistant Director Resident Services) and Arpan Fatania (Investigations Officer). Having considered all the oral and documentary evidence the Tribunal made the following findings of fact.

Findings of fact

15 The Claimant was employed by the Respondent from 1 October 1993 to 17 September 2019. For the last 8 -10 years of her employment she worked as a Senior Visitor Service Officer. She was the first point of contact for people attending the Respondent's office with inquiries relating to Planning, Housing Benefits, Council Tax and Business Rates. She describes herself as black of Caribbean descent.

16 At the relevant time (i.e. from 2015 onwards) the Claimant lived at an address in in Greenford and she and Desmond Stewart were joint proprietors of the property at that address.

17 Mr Stewart's father owned two properties in Claybrook Avenue, one in which he lived and one which he rented. In the property where he lived the council tax was paid by direct debit every month. That was not the case with the second property. In respect of that property (no. 35) there was £312 owing in January 2015. On 13 January 2015 two payments were made to pay the outstanding council tax – a cash payment of £100 and a cheque payment for £56. That left £156 owing from that year. On 2 March 2015 Mr Stewart senior was sent a council tax bill for 2015-2016 which said that there was still £156 owing from a previous period. That document also set out the different ways in which the council tax could be paid.

18 On 9 March 2015 Desmond Stewart received £156 from another account into an account that he held with NatWest and on the same day he transferred £156 to Hammersmith and Fulham Council. That evidence was available to us but only a part of it was made available to the Respondent (see para 43 below). The Respondent's suspense account shows that payment having been received from Mr Stewart on 9 March 2015. The suspense account is where money is held if the Respondent does not know to what it relates. That sum was not allocated to the property in Claybrook Avenue.

19 On 9 March 2015 at 17.05 the Claimant called British Gas in respect of the provision of gas for the property where she lived. The account was in her name. At that time the account had a debit balance of £445.92. We had a transcript of the recording of that call. At the start of the call the Claimant gave her 12-digit British Gas customer reference number. She said that she wanted to set up a direct debit and to clear the arrears on her account. The Claimant was asked for a meter read and she gave a figure that was not correct. After a discussion it was agreed that the Claimant would set up a direct debit to pay £158 a month starting from 24 March 2015. The Claimant was then asked to give her bank account number and sort code. She gave the an account number and a sort code, which was the number of the Respondent's Council Tax collection account with NatWest. The Claimant was then asked the name of the bank where she held the account. She replied, "*I think, I think it's with Halifax".* She was told that that it was not a Halifax account. She then asked whether it was Santander, and was told that it was not. The person at British Gas asked her whether it was NatWest account and the Claimant said that it was. She was then asked whether the account was in her name and she responded, "*Its joint, yeah it's a joint name."* The Claimant's evidence to us was that she did not have any account with NatWest.

20 Following that conversation British Gas sent the Claimant a letter confirming the setting up of the direct debit and the details of the bank account from which the payments would be taken.

21 The requests for payments on 24 March and 24 April 2015 were rejected. On 22 and 27 April 2015 the Claimant received letters form British Gas that her direct debit had been cancelled. On 6 May 2015 the Claimant contacted British Gas and reinstated the direct debit using the same bank account details. There was no recording of that call. We do not know what either British Gas or the Claimant said in that call.

22 Thereafter for a period of two years payments were made from the Respondent's bank account to British Gas to pay the Claimant's gas bills. Payments of £185 per

month were made until 24 September 2015. From October 2015 to April 2016 there were payments of £242 per month. From May 2016 they were reduced to £103.63 a month. After that there were payments of £185 a months for 5 months and then £242 a month for 7 months. Thereafter they went down to £103.63 per month.

23 In May 2017 the Respondent's Finance department became aware that a direct debit had been set up from their Council Tax account to pay someone's gas utility bill. The person was identified as Sandra Charles. It was identified that she was employed by the Respondent. The matter was passed to the Respondent's Corporate Anti-Fraud Services (CAFS) to investigate. Bibier Gungor conducted the initial investigation.

24 The Respondent also contacted British Gas. On 2 June 2017 British Gas sent the Claimant a letter terminating her direct debit.

25 On 13 June 2017 the Claimant called British Gas. We had a transcript of the recording of that call. The Claimant said that she had received a letter that her direct debit had been cancelled but she did not know why. The person at British Gas told her that they had a note dated 2 June saying "*instruction cancelled by payer."* The Claimant said "*no"* which was understood as her saying that she had not cancelled it. British Gas said that it could be reinstated but they needed a meter reading because they had been estimating the reading since September 2015.

26 A further six weeks lapsed before the Claimant called British Gas back with a meter reading. She called on 2 August 2017. We had a transcript of the recording of that call. The Claimant said that British Gas had come round and done a reading. She said that she wanted to reinstate her direct debit. She was asked whether she had changed her bank details and she replied that nothing had changed. She was informed that the direct debit had been reinstated and that payments would be taken from her account on the 24th of each month.

27 On 31 August 2017 some of the money taken from the Respondent's account to pay the Claimant's gas bill was returned to the Respondent by British Gas. At the same time British Gas wrote to the Claimant that her direct debit had been cancelled and that she owed them £2,847.

28 On 22 September 2017 the Claimant called British Gas and told them about the letter that she had just received. She said that she could not understand it because they paid every month. The British Gas employee told her that the account showed that a large number of direct debit payments had been returned to her account. He asked the Claimant whether she had received a large sum of money into her account. The Claimant said that she did not have access to the account but it was one into which money was paid for bills and no money was withdrawn from it. The British Gas employee asked her whether the payments came from her account or someone else's account. The Claimant responded that they came out of someone else's account. She was then told that the person whose account it was had made an indemnity claim, i.e. the person had recalled all the payments going back to 2015. The Claimant said that she would have to speak to the person but she knew that he had not done that. The Claimant said that she would speak to her "other half" about it and asked the British Gas employee to call her back in ten minutes. When he called her back, she said that she had sent her other half a text and told him that British Gas had said that they owed nearly £3,000 because he had done an indemnity claim

and he had sent a text message saying "*What the hell. I'll call you."* She said as a result of that she knew that he had not done that. She said that it would make no sense for them to recall the money because then they would owe that sum to British Gas.

29 On 5 October 2017 the remaining payments that had been made out of the Respondent's account were returned to the Respondent. A total of £4656 was retuned to the Respondent.

30 On 9 November 2017 the Claimant contacted British Gas and made inquiries about the direct debit and how they had got the details of the account from which payments were to be taken. She gave them Mr Stewart's email address to reply to her.

31 On 14 November British Gas sent the Claimant an email in which they said,

> "*We were first provided these bank details on the 9th March 2015, when a new Direct Debit was set up. I was able to locate a call recording from this date where you called from a mobile ending 4574 at 17.05. I have listened to this call and a Direct Debit was set up on your instruction with the bank account number ending 3317.*
>
> *If these were not your bank details as you have suggested in our conversations, the owner of this bank account is within their right to recall any monies paid towards your energy bills. Unless you can evidence any payments you have made via other means, the outstanding balance of £4403.96 remains payable to British Gas for the unpaid energy used from 2015 to date.*
>
> *…*
>
> *Please get in touch by 21st November 2017 on the details above, so we can progress this for you."*

32 The investigation being conducted by Ms Gungor proceeded at a very slow pace. It was established fairly early that the Claimant and Mr Stewart were the joint owners of the property to which the gas had been supplied. However, there was a delay in getting information from British Gas under the Data Protection Act. The initial request for information was refused and it was only in September 2018 that British Gas confirmed that it would supply the requested information. On 21 September Ms Gungor requested information from British Gas under the Data Protection Act 2018 on the grounds that she was conducting a criminal investigation.

33 British Gas responded on 9 October 2018. It provided the following information. The Claimant was the only named account holder for energy supplied to the relevant address. It did not have a recording of the call from 2015 requesting the direct debit to be set up. On 9 March 2015 it had sent confirmation by post setting up the direct debit to the Claimant. It had confirmed the name of the bank, the account number and sort code of the account from which payments would be taken. The account had a debit balance of £445.92 when the direct debit was set up. After the direct debit had been set up there had been a letter of termination on 22 April 2015, a letter of reinstatement on 6 May 2015, a letter of termination on 2 June 2017 and a letter of reinstatement on 2 August 2017. The reinstatement requests had been made by the Claimant and there were call recordings. It set out in a table all the payments that

had gone out of the Respondent's account and the dates on which they had been returned.

34 On 10 October 2018 Ms Gungor produced a short CAFS report which was headed "*Employee Misconduct – Interim Report"*. It set out the evidence that she had obtained. She stated that they had not interviewed yet because they were waiting for additional information from British Gas. That related to the recording of the call of the Claimant reinstating the direct debit in August 2017. Ms Gungor's conclusion was that the evidence that they had showed that the Claimant had benefitted from the fraudulent use of the Council's bank account to pay her utility bills by direct debit on 26 occasions (a total of £4,656) and that when the Council had terminated the direct debit in June 2017, the Claimant had quickly contacted British Gas to reinstate it. She said that the Council had been refunded the lost revenues. The report was sent to Mark Grimley, Director of Corporate Services, and Carol Yorrick, Head of HR Operations.

35 The Respondent's disciplinary procedure provides for suspension with pay where it is necessary. There is no provision to suspend without pay. In this case a decision was made to suspend the Claimant without pay. Mr Filus was informed of the investigation and the interim report and that a decision had been made to suspend the Claimant without pay as the Respondent had lost money and did not know whether it would recover all the money.

36 On 11 October 2018 Mr Filus called the Claimant into meeting with him and Kay Odubanjo (from HR). He told her that she was being suspended without pay pending investigation into a serious allegation. The allegation was that she had fraudulently used the Council's bank account to pay her British Gas direct debit from March 2015 to August 2017 to the total value of £4,656. He said that she was being suspended without pay because the Council did not know whether it recover that money. He did not say, "*You took our money, so we are taking yours."* The meeting lasted only 5-10 minutes and was a difficult meeting. The Claimant was upset and kept saying that she wanted to leave. Mr Filus did not give her any letter at that stage. The Claimant was escorted back to her desk to collect her belongings and she left the building.

37 On 12 October Ms Odubanjo sent Mr Filus the draft suspension letter. She used a standard template but altered it to indicate that the Claimant was being suspended without pay. The decision to suspend without pay, however, was never put into effect and the Claimant received full pay at the end of every month.

38 On 15 October 2018 Mr Filus wrote to the Claimant that he was conducting an investigation under the Respondent's disciplinary procedure and invited her to an investigatory interview on 25 October. The allegation was the same as she had been given when she was suspended. She was advised that she could be accompanied by a trade union representative or a work colleague. The following day Mr Filus wrote to her that the interview on 25 October would be postponed but that the Fraud team would contact her to arrange an interview with her.

39 On 17 October Ms Gungor invited the Claimant to an interview on 30 October 2018 about the direct debit set up from the Council's account. She told her that the interview would be formal, tape-recorded and held under caution. She was warned that it might lead to a criminal prosecution. She was advised that she could bring a legal adviser with her if she so wished.

40 The interview under caution took place on 31 October 2018. Ms Gungor conducted the interview. The Claimant was accompanied Dave Green, Branch Secretary of GMB. The interview was tape-recorded. It lasted a little over two hours. At the start of the interview Ms Gungor gave the Claimant a notice which set out her rights and entitlements and asked her to read it. It stated that the Claimant was entitled to have a lawyer and to seek legal advice and that the interview would be re-scheduled if she wanted a lawyer. The Claimant read it and signed it. She did not say that she wanted a lawyer present at the interview.

41 The Claimant confirmed that she lived at the address to which the gas had been supplied. She had lived there for 18 years. She said that she lived there with her partner and children. She and her partner had a joint mortgage for the property. All the utility accounts were in her name. All the bills were paid by direct debit. They came out of a Halifax account which was in joint names but she had no access to it. Her partner was the one who paid money into the account. The Claimant said that she did not have an account with NatWest, and had not had one for many years.

42 The Claimant said that when she had been accused of using the Council's account to pay her gas bill, she had gone home and tried to find out how she had used that number in 2015. She had found her mobile phone from then. She showed Ms Gungor paper copies of screen shots from her mobile. We also had copies of those. She said that these related to communication between Mr Stewart and herself relating to the council tax for his father's property in Hammersmith and Fulham. It shows her as saying in a message on 25 February 2015 that there was an outstanding balance of £156. The next screenshot was of message on 5 March 2015 at 8.42 from her to Mr Stewart in which she asked him to send her the bank details and a gas meter reading. The reference to the bank details were the details of the account from which the direct debits were paid. There was a message on 6 March from Mr Stewart asking where he should make the payment for his father's property. He said that he needed to make a bank transfer and needed the account details and the sort code. There is then a message from the Claimant giving the Council's account number and sort code. The Claimant said that she had got the Council's account number and written it down to text to Mr Stewart. When she called British Gas she gave them the Council's account number by mistake. She said that she thought that she was giving British Gas the account number of the joint Halifax account. The person at British Gas had told her that it was not a Halifax account but a NatWest account. She was aware that Mr Stewart had a NatWest account and she wondered why he was using it but did not think anything of it.

43 The Claimant also showed Ms Gungor a single page relating to a NatWest account. We had a copy of that document. It appeared to be a copy of two different pages put together on one page. The account was in the name of Mr D M Stewart. Parts of the document had been redacted. It showed an online transfer of £156 to H&F Council but not the date of the transfer.

44 The Claimant was asked questions about the direct debit being cancelled and reinstated after that. The Claimant had with her at the interview a record of the various letters that she had received from British Gas in connection with that. The documents from which she had compiled that record were not disclosed either to the Respondent or to the Tribunal. She said that on 22 April 2015 she had received a letter from British Gas that her direct debit had been cancelled. On 30 April British

Gas had sent her a letter that the bank had refused the payment. She said that on 6 May she had set up a new direct debit. She had received letters on 5 April 2016 and 5 April 2017 to advise her of changes to the monthly payments. She had then received a letter on 2 June 2017 that the direct debit had been cancelled and she had reinstated it. She had then received a letter on 31 August that it had been cancelled again. The Claimant was asked whether during that period when those problems arose she had ever checked her account number and she said that she had not because the bills did not come out of her account. She said that when she received letters that the direct debit had been cancelled, she would ask Mr Stewart whether there was enough money in the account to pay the direct debit and he always assured her that there was enough money and told her to reinstate the direct debit. The Claimant showed Ms Gungor some screenshots of messages from her to Mr Stewart on 26 September 2017. She said in the message that she had received a letter from British Gas that they owed about £3,000 and that they had told her that the account holder had made an indemnity claim requesting all the payment back. There is then a message in which she said to him "*Can I have the account number and the sort code of the Halifax."* She said that she asked him to print off all the statements from Halifax of all the payments that they had made to British Gas. According to the Claimant, there was then a message on 1 November 2017 in which she had told Mr Stewart that British Gas had given her the account number from which the payments had been made. She set out the number and asked him whether it was one of his accounts.

45 In the course of the interview she said that she understood banking processes as she had worked for Citibank for five years, three of them as a senior officer. She said that she had dealt with payment transfers and missing payments. The Claimant was asked whether they had financial difficulties that had led to the British Gas account being in arrears and the Claimant responded that she was "*financially stable"* and that her partner was *"very very well off."*

46 On 5 November 2018 Karen Sullivan, Assistant Director, Resident Services, invited the Claimant to a disciplinary hearing on 19 November. She said that she had received a report from CAFS who had undertaken preliminary investigation into allegations of gross misconduct and had concluded that there was a case to answer. She advised the Claimant that Mr Filus would present the management case and would call Ms Gungor as a witness. The allegation was that she had fraudulently used the Council's bank account to pay her British Gas direct debit from March 2015 to August 2017 to the total value of £4,656. She was warned that the allegation constituted gross misconduct and, if substantiated, might lead to summary dismissal. The Claimant was advised of her right to be accompanied. Ms Sullivan sent the Claimant a copy of the CAFS interim report, a transcript of Ms Gungor's interview with her and a copy of the disciplinary procedure. She advised the Claimant that she could put forward any documents she wished or call witnesses at the hearing. The date of the disciplinary hearing was changed to 21 November as the Claimant's trade union representative was not available on 19 November .

47 On 8 November CAFS wrote to the Claimant and asked her to provide within 7 days the mobile phone that she had had in 2015 and from which she had produced data at the interview and a list of all the accounts held by Mr Stewart and to sign forms authorising CAFS to obtain information from banks where they held accounts. She was reminded of the caution and that any information provided would be treated as being provided under caution.

48 At the disciplinary hearing Ms Sullivan was assisted by Kay Odubanjo from HR. The Claimant was represented by Mr Green from GMB. Mr Filus called Ms Gungor as a witness. She said that they were still waiting for audio recordings from British Gas. She also said that following the interview they had done credit checks on the Claimant as she had said that she and her partner were very comfortable and had found that she had unsecured debts of £22,000. These included debts on various credit cards. She also said that they believed that Mr Stewart did not live at the property. The Claimant repeated what she had said at the PACE interview. Ms Sullivan asked the Claimant a number of questions. She could not understand why the Claimant had set up the direct debit once she knew that the bank account details that she had given were not for the joint Halifax account and then when the direct debit had been cancelled she had not made further inquiries about the account number with Mr Stewart. Ms Sullivan adjourned the hearing in order for the recordings to be obtained from British Gas and to give the Claimant the opportunity to provide any evidence, including her mobile phone, to support what she was saying. She also wanted to look further into whether the Claimant had been in breach of any policy on accessing and handling data of friends or close family members.

49 On 28 November 2018 CAFS wrote again to the Claimant to ask her for her mobile phone from 2015 and to sign forms giving them authority to access bank accounts and to get information from British Gas.

50 At the end of November CAFS received a CD-ROM from British Gas with audio recordings. It was encrypted and password protected. Mr Dalton and Ms Gungor were unable to access the CD at the Respondent's offices. Mr Dalton took it home on 6 December and was able to access it. The CD contained five audio files – four of them were of conversations between the Claimant and British Gas (on 13 June 2017, 2 August 2017 and two on 22 September 2017) and one of a conversation between someone from the Respondent and British Gas. Mr Dalton copied the audio files onto a memory stick which he gave to Ms Gungor the following day. Ms Gungor passed it on to HR on 17 December 2018.

51 The disciplinary hearing was reconvened on 13 December 2018. Mr Filus said that they had received five audio recordings from British Gas and that four of them were of the Claimant reinstating the direct debit. He also said that they had obtained a breakdown of the Claimant's debts on her credits cards. The email giving that information was provided to the Claimant and her trade union representative. The Claimant provided a transcript of text messages between Mr Stewart and her in 2017. The Claimant showed Ms Odubanjo two text messages on her phone – one on 8 November 2017 and the other on 20 November. Ms Sullivan then asked everyone to leave while she considered the evidence. After they returned she asked a few more questions. The Claimant and Mr Green emphasised that it had been a mistake and that there had been no intent to defraud. Ms Sullivan then gave her decision without having consulted HR. She said that the Claimant's "*mitigation*" was that she had made an error. There was some evidence to support two of the four points that she had made. She is then recorded as having said,

> "*Taking into account your 20 plus service however I cannot get my head round the fact that you didn't do more. I believe that you could have done more to follow up British Gas. I feel that you could have done much more. However,*

the allegation is on fraud. It's about knowingly deceiving. I can't find evidence that you did."

She decided, however, that the Claimant had been guilty of misconduct in respect of a separate issue which had never been formalised as an allegation. She said that the Claimant had been in breach of the Council's Code of Conduct by looking at the details relating to residents (Mr Stewart's father) at the request of someone else. She said that that amounted to misconduct and she imposed a first written warning for that which was to remain on the Claimant's file for 12 months. She said that they would write to her within ten days.

52 Mr Filus confirmed in an email to someone the following day that based on the information provided at the hearing and the lack of evidence to show intent (as opposed to error) the decision had been to find that there had been no gross misconduct.

53 On 19 December Ms Odubanjo informed the Claimant that it would take longer than ten days to send the letter.

54 Ms Sullivan and/or Ms Odubanjo drafted an outcome letter to send to the Claimant. The letter repeated what Ms Sullivan had said to the Claimant at the end of the hearing on 13 December 2019.

55 Ms Odubanjo sent the Claimant a letter on 3 January that she would get the outcome letter at the end of that week and another letter on 11 January that she would get at the end of that week. At the same time she was liaising with Mr Grimley as to whether she could send out the outcome letter and she was advised by Sharon Lea, Strategic Director, Resident Services, not to send it.

56 On 24 January 2020 Ms Lea sent Mr Grimley an email **176** that she had reviewed the outcome and wanted the matter to be investigated again. She said that they had not properly followed their procedures. The two procedural "flaws" that she identified were that there had been an incomplete investigation carried out by CAFS and that no management case had been presented at the hearing. The Respondent had chosen to proceed with the disciplinary hearing on the basis of the investigation conducted by CAFS – that included the interim report, the PACE interview with the Claimant and the recordings that were provided by British Gas in the course of the hearing. If it considered that that investigation was incomplete, it should not have proceeded with it. Furthermore, Mr Filus had presented the management case at the hearing. Ms Lea rightly stated that the residents of the Borough had the right to expect the Council's officers to operate to the highest standards of honesty and professionalism. We found that the reason that Ms Lea wanted to re-open the matter was because she felt that Ms Sullivan had failed to consider the matter properly and had reached a wrong outcome.

57 There was no further correspondence between the Claimant and Respondent between 18 January and 23 May 2019. No one from the Respondent told the Claimant that the matter was going to be re-investigated. The Claimant remained suspended on full pay. The Claimant did not ask anyone why she was not back at work or when she was going to return to work. The Claimant's case was referred to by Mary Lamont in monthly meetings that she had with GMB representatives

between March and June 2020. It was not clear whether they passed any information back to the Claimant.

58 On 10 May 2019 Ms Gungor produced the CAFS final report. The additional points made in the final report were as follows. Following the interview under caution the Claimant had been asked to provide bank statements from the joint Halifax account to show that the household bills had been paid from that account and the handset holding the text messages from 2015 to show that the messages were genuine. The Claimant had failed to provide either of those. Mr Stewart did not live with the Claimant and had not done so for a long time. He lived at another address. A payment of £156 had been made to the Council for Mr Stewart's father's property but it had been made in January and there had been a cheque for £56 and a cash payment of £100; it had not been an online transfer. As far as the second matter was concerned, the Respondent later discovered that that was a different Mr Stewart and that matter was no relied on at the later disciplinary hearing.

59 On 23 May 2019 Mr Grimley wrote to the Claimant. The letter was headed "*Decision of disciplinary hearing on 13 December 2018."* The letter began by apologising to the Claimant for the delay in providing the outcome of the hearing and said that it was due to the fact that they were awaiting the final report from CAFS. It completely ignored the fact that the Claimant had been given an outcome at the end of the hearing on 13 December 2018. The letter of 23 May made no reference to that outcome. It set out a summary of what had happened until that stage. The allegation was recorded as being,

> "*you used the council's published bank account to pay your British Gas direct debit from March 2015 to August 2017 to the total value of £4,656. These direct debits were made in your name to supply address…"*

The word "*fraudulently*" was noticeably excluded from that allegation. The impression given was that that had always been the allegation and it was not made clear that the allegation had changed. The letter stated that Ms Lea had requested that the matter be re-examined and that consideration be given as to "*whether the original allegation is substantiated."* The Claimant was asked to attend a further re-convened hearing on 13 June which would be heard by Valerie Simpson (Strategic Lead, Environmental Health and Regulatory Services).

60 On 31 May 2019 a senior GMB officer wrote to the Director of HR about inviting the Claimant to a disciplinary hearing. He said that the Claimant had been given the decision of the disciplinary panel at the hearing on 13 December 2018 which was that it had been unable to find any intent on the part of the Claimant to defraud the Council and that she would be notified of her return to work. He pointed out that in those circumstances a further disciplinary hearing was "*a most unusual turn of events"* and that it was *"most unusual for an employer to question a decision determined by a panel that they have appointed."* He asked for the notes of the meeting on 13 December to be provided to him.

61 On 10 June 2019 the Claimant lodged a formal grievance. The Claimant's complaints were all related to the disciplinary process – they were about her suspension without pay, the length of her suspension, the conduct and the content of the investigation and continuing with the investigation after the disciplinary panel had concluded the hearing and given its decision on 13 December 2018. She said that

that constituted unfairness and discrimination against her. She asked that the decision given at the hearing on 13 December be upheld.

62 On 10 June 2019 GMB chased up on its previous letter not having received a reply. It said that for whatever reason Ms Sullivan's decision had been undermined and disregarded and that that was a contravention of the Respondent's Disciplinary Policy and the ACAS Code of Practice.

63 On 11 June 2019 the Claimant sent in a detailed written response to the CAFS final report and her objections to the matter being opened again. The hearing scheduled for 13 June was postponed while the Respondent considered the communication from the Claimant.

64 On 26 June Dave Rogers, Deputy Head of HR, wrote to the Claimant. He said that the Respondent's grievance procedure provided that matters that were being dealt with under its disciplinary procedure would not be dealt with under the grievance procedure. He said that all the matters raised in the Claimant's grievance related to the disciplinary process they would be considered at the reconvened disciplinary hearing which would take place on 8 July 2019. He sent her copies of the typewritten notes taken of the hearings on 21 November and 13 December 2018. He also asked her to confirm her address so that he could send her by recorded delivery a copy of the audio recordings from British Gas which were on a USB memory stick. They were then sent to her.

65 The disciplinary hearing took place on 8 July 2019. Ms Simpson was advised by Mr Rogers. There was no note-taker at the hearing and the only notes available are the brief manuscript notes of Mr Rogers. Mr Dalton presented the management case and he was advised by Ms Lamont. The Claimant was represented by Keith Williams of GMB. Mr Williams expressed concern about the matter being re-opened when it had been concluded at the hearing on 13 December and a decision had been reached. Mr Dalton read from the final CAFS report. He made it clear that they were no longer relying on the part that said that Mr Stewart did not live with the Claimant. A reference was made in the hearing to the fact that the £156 paid by Mr Stewart might have ended up in the Council's "suspense account". It is not clear from the notes who made that suggestion.

66 On 17 July Ms Simpson sent Mr Rogers an email that she was struggling to come to a different conclusion from the one reached by Ms Sullivan. She said that she wanted to talk to him about it.

67 In the middle of August Ms Simpson and Mr Rogers worked together on the outcome letter to send to the Claimant. There was a delay in sending it out because Ms Simpson was on holiday for two weeks from 20 August.

68 On 17 September Mr Rogers sent the Claimant the outcome letter from Ms Simpson by email. It stated that the allegation had been that the Claimant had used the Council's bank account to pay her British Gas account for supplying gas to her home from March 2015 to August 2017 to the value of £4656. Ms Simpson referred in her letter to this as being the "original allegation". That was not correct as the original allegation had been different and had included the word "fraudulently". In respect of the Claimant's explanation of how she had come to use the Council's account when setting up the direct debit in March 2015, Ms Simpson said,

> "*I do not find it credible that you had forgotten that in just three days (i.e. from the date you confirmed you had made the note of the account details, until the date that you had set up the direct debit instruction) and that you did not seek to double check over these details."*

She said that she considered that there had been a series of events initiated by the Claimant that had resulted in £4656 being paid from a Council bank account rather than an account of the Claimant or her partner. She said that in addition the Claimant had failed to provide when asked complete copies of bank statements or access to any accounts to substantiate any of the points that she had made and she had refused to allow the investigators to examine her mobile phone. She had only provided printouts of text messages and a brief look at the screen.

69 Ms Simpson said that she considered that the allegation had been substantiated. It was not in dispute that payments had been made from the Council's bank account to pay the Claimant's gas bills and that she had set up the direct debit that had caused that. She continued,

> "*I did not find it credible with your background in banking, that you would not have known or did not think it diligent to have checked the details of the bank account that the direct debit was set up against. This is in the context of British Gas contacting you, on at least two occasions, to advise that the request for a direct debit payment had been rejected. The understanding is that you had not bothered to check the information supplied to British Gas to confirm that the payment arrangements were correct. You reinstated the direct debit payments from the Council's bank account, in May 2015 and again in August 2017, whilst maintaining that the bank account was controlled by your partner. Although you have stated that you have limited access to the Halifax bank account which is controlled and used by your partner to pay the bills, it is noted that you are a joint account holder. I therefore see no reason, why you have not been able to provide access to your bank statements, which raises concerns about your integrity."*

Ms Simpson continued,

> "*I find it concerning that you did not exercise any due diligence over this matter while you spoke directly with British Gas, even to just simply double check the details with your partner. Whilst it is somewhat plausible on the first occasion, it is not clear why you did not take any positive action to verify the details on the subsequent times that the direct debit was challenged."*

70 Ms Simpson said that she had considered the points made that the matter had been concluded in December but had found that it had not because no formal outcome (including advising the Claimant of her right of appeal) had been circulated, the audit investigation was still ongoing, no arrangements were put in place for a return to work and following receipt of the final report the Director of Environment had asked for the matter to be reconsidered. She concluded that the reasons given by the Claimant for the repeated establishment of the direct debit arrangements were "*not credible"* and the amount involved had been significant. Her decision was that the Claimant would be dismissed without notice for gross misconduct. The Claimant was advised of her right of appeal.

71 On the sixth day of the hearing before us (on 15 July 2021) the Claimant produced an email dated 12 June 2019 from Mr Stewart to her attaching statements from a Halifax account and an email from herself to Monique, who she said was her daughter, forwarding the Halifax statements. The Claimant gave evidence on 15 July that she had produced those Halifax statements at the disciplinary hearing on 8 July 2019 and had handed them to Ms Simpson. It was pointed out to the Claimant that she had made no reference to that in her witness statement and had not suggested to any of the Respondent's witnesses that she had provided those statements at the disciplinary hearing. The Claimant could not offer any satisfactory explanation for those omissions. She relied on what she had said in a letter dated 16 October 2019 to Ms Simpson. In that letter she said,

> "*You also asked if I had brought in my Halifax bank account statements (during the meeting on the 8th July 2019) to which I answered, yes. Please ensure that the minutes reflect the entirety of this conversations."*

It is inconceivable that if that exchange had taken place that Ms Simpson would not have asked to see the statements or that she would have said what she did in her outcome letter (see paragraph 69 above). What Ms Simpson said in the outcome letter is inconsistent with the Claimant having given her the Halifax statements. We found that the Claimant did not offer to show the Halifax statements to anyone at the disciplinary hearing and did not show them or give them to anyone at that hearing. The Claimant was not being honest when she said that she had.

72 We have looked at those statements. They do not assist the Claimant. They show that the statements were requested by Mr Stewart and that the address given for him is not the address at which the Claimant lives. They do not show that the Claimant was a joint account holder of that account. They show that from January 2014 to April 2014 there was a direct debit of £112 to British Gas and from May 2014 to August 2014 there was a direct debit of £31 to British Gas. In August 2014 the account was overdrawn and all the direct debits from that account were returned (not paid). From September 2014 to March 2015 there were no direct debits to British Gas.

73 On 26 September the Claimant appealed against the outcome of the disciplinary hearing on the grounds that the decision was too harsh and unjust and that the Respondent had not followed its Disciplinary Procedure.

74 On 15 and 16 October the Claimant wrote to Ms Simpson and asked her for a copy of the handwritten notes taken at the meeting on 8 July 2019. She asserted that various things had been said at the meting and asked Ms Simpson to ensure that they were reflected in the minutes. On 1 November the Claimant also asked for the handwritten notes of the hearing on 13 December 2018. Ms Simpson chased Mr Rogers on a number of occasions to respond to the Claimant's requests for notes.

75 On 31 December Nicola Ellis, Assistant Director, invited the Claimant to an appeal hearing on 22 January 2020. The Claimant responded on 12 January that she would attend the appeal hearing. The hearing was then postponed to 11 March 2020.

76 On 9 March 2020 the Respondent sent the Claimant an appeal pack for the appeal hearing. Mr Rogers's manuscript notes of the hearing were included in the pack. On 10 March the Claimant sent HR an email that she was unable to attend the

hearing because she had still not received the handwritten notes of the meetings on 13 December and 8 July which she had requested many times. She also said that she was no longer represented by Mr Williams of GMB and said that she did not believe that the appeal hearing would be fair and impartial. Mr Rogers responded that he had provided his manuscript notes of the hearing on 8 July 2019. He said that the handwritten notices of the meeting on 13 December had been used to create the typewritten notes and had been destroyed shortly after that. He said that both Ms Sullivan and Ms Quartey, who had taken the notes, had agreed that the typed notes were an accurate record of the hearing.

77 The Claimant informed Mr Rogers that she would no longer take part in the appeal process. She said that the Respondent had destroyed key documents and was wilfully tampering with evidence to make her look like a dishonest black woman. She said that she had brought a complaint in the Tribunal and that one of her complaints was of discrimination because the decision to reopen the investigation had been an act of discrimination. Ms Ellis wrote to the Claimant on 11 March that as she no longer wished to participate in the appeal process the appeal hearing that afternoon had been cancelled. She said that she would investigate the points raised in the Claimant's appeal and in her email and her new allegation of race discrimination. She asked the Claimant to provide further particulars of the race discrimination within 14 days.

78 The Claimant did not provide any particulars of race discrimination. Ms Ellis then looked just at her points of appeal. She sent the Claimant her decision on 4 May 2020. She upheld Ms Simpson's decision.

79 On 11 May 2021 Ms Brown, who represented the Claimant at the hearing before us, sent the Respondent a CD rom with a recording of the Claimant setting up the direct debit on 9 March 2015. At the outset of the hearing we asked the parties who had produced that recording. The Respondent's position was that the Claimant had provided them with the recording and that they had transcribed it. The Claimant's position was that the Respondent had sent her the recording as part of her Subject Access Request. An Investigations Officer from the Respondent collected from the Claimant the recording that she had of that call and analysed it. It showed that the audio file had been created on 21 November 2017 and that the CD the Claimant had given to him been copied ("burnt") on 8 April 2020. The source from which it had been copied could not have contained an audio file created after 21 November 2017. The Claimant's evidence was that she had received it between November and December 2018 and that she had played it to a legal advisor around that time. She said that she had not copied ("burnt") it after that date.

80 The evidence from the Respondent's witnesses about the recordings that they received is consistent with the British Gas letter dated 9 October 2018 that British Gas did not have the recording setting up the direct debit in March 2015. What they had was provided to HR after the disciplinary hearing on 13 December 2018 and sent to the Claimant at the end of June 2019 before the disciplinary hearing on 8 July 2019. On the other hand, British Gas told the Claimant on 14 November 2017 that they had managed to locate the recording of the call setting up the direct debit and that the person dealing with the Claimant had listened to it. The Claimant was advised that if she wished to pursue the matter she should contact British Gas by 21 November 2017. That is the date on which the audio file was recorded. It was also clear from the answers that the Claimant gave at the PACE interview in October

2018 that she must have had that recording. She gave some details of what had been said during that call. She could not have recalled those details three and half years after that conversation. We found that British Gas supplied the Claimant a recording of that call to the Claimant soon after 21 November 2017 and that she chose not to disclose it to the Respondent and to use it at her disciplinary hearing.

Conclusions

Breach of contract/wrongful dismissal

81 It was not in dispute that the Claimant, an employee of the Respondent, set up and reinstated on two occasions a direct debit using the Respondent's Council Tax account to pay the gas bills for her home. As a result the Respondent's funds were used to pay her private gas bills from March 2015 to August 2017 to the tune of £4656. It was not in dispute that when the direct debit was sent up the Claimant owed British Gas £445.92.

82 The Claimant's evidence was that this had arisen as a result of an error and she had been unaware that anything was wrong until November 2017. She had discovered how the error had occurred after her suspension in October 2018 by finding an old mobile phone and finding on that text messages that passed between her and Mr Stewart in March 2015 (the details of the messages are set out at paragraph 42 (above). That mobile phone was not shown to the Respondent or the Tribunal (another mobile phone which had messages from 2017 was shown to Ms Sullivan at the disciplinary hearing). The Claimant refused to hand the mobile with the purported 2015 messages to the Respondent for forensic examination.

83 The Claimant's case in essence was that when she gave British Gas the account details, she believed that she was giving them the details of the joint Halifax account which Mr Stewart had provided to her. We did not find that account to be credible for a number of reasons. According to the text messages, she had asked Mr Stewart for the bank account details and a meter reading on 5 March. There was no evidence that he provided her those details between 5 and 9 March. There was no text message with the details and no evidence that he provided them to her at home and that she wrote them down. The Claimant did not have a meter reading on 9 March. If he never provided her with the details, it is difficult to see how she could have believed that the bank details that she gave to British Gas had been provided by him. She could not have forgotten on 9 March that he had not given her what she had asked him for four days earlier. Nor is it credible that if she wrote the Council's bank details on a piece of paper on 6 March to give them to Mr Stewart that she could have forgotten three days later to what those details related. It was made clear to the Claimant in the course of the conversation that the bank details were not for a Halifax account. As her case was that all the household bills were paid out of the joint Halifax account it must have been clear to her that she was not giving the correct details. The Claimant then lied to British Gas by saying that she was an account holder of the NatWest account when she knew that she was not. The Claimant would not have been allowed to set up the direct debit from that account if British Gas had known that that was not her account.

84 It would be very surprising if after that conversation with British Gas the Claimant had not queried with Mr Stewart why he had not given her the details of the Halifax account and asked him about the account number that she had used. It is

inconceivable that she would not have asked Mr Stewart questions about the account number she had used when the payments for March and April 2015 did not go through and the direct debit was cancelled. She had the details of the account that she had used because British Gas had sent them to her in a letter confirming the setting up of the direct debit. The natural reaction would have been to ask him to check on that account to see why the payments had not gone through. It would be equally surprising if there were no conversations between the Claimant and Mr Stewart when the direct debit was cancelled in June and September 2017. If the Claimant's account is true, it is surprising that once she discovered in November 2017 that the account being used was not Mr Stewart's account, that she was not able to discover how the error had occurred but was able to do so in October 2018.

85 The Claimant did not co-operate with the Respondent in the course of the investigation. She did not produce the mobile with the 2015 texts, she did not produce the Halifax Bank statements, she did not produce the unredacted version of Mr Stewart's NatWest statement, she did not produce the recording of the call setting up the direct debit on 6 March 2015. The Claimant did not provide to the Respondent or the Tribunal the original documents from which she had compiled notes about her communications with British Gas which she used at her interview in October 2018.

86 Having taken into account all the above matters (in particular, the fact that we did not find the Claimant's account to be credible and her failure to disclose all the relevant material) we concluded, on the balance of probabilities, that the Claimant knew when she set up the direct debit and when she reinstated it in June 2015 and August 2017 that the bank details that she had given were for the Respondent's Council Tax account. That amounts to gross misconduct and a repudiatory breach of contract. Even if we are wrong in that conclusion and the Claimant did not know that the details that she had given were those of the Respondent's account, she knew that they were not the details of the account from which she normally paid her household bills and she lied to say that it was one of her accounts and she made no effort then, or when the payments were stopped in June 2015, to check whether they were the bank details of one of Mr Stewart's accounts. Those actions of hers which resulted in the Respondent paying her gas bills for nearly two and a half years would have amounted to a repudiatory breach of the implied term of trust and confidence.

Unfair Dismissal

87 The reason for the dismissal (as set out in Ms Simpson's letter of 17 September 2019) was that there had been a series of actions by the Claimant that had resulted in £4656 of the Respondent's money being used to pay her gas bills and that the Claimant had failed to co-operate in the investigation by refusing to provide access to relevant evidence. The actions of the Claimant included the setting up of the direct debit and reinstating the direct debit when it had been rejected or cancelled without carrying out any checks. The explanations given by the Claimant in respect of both matters were not credible. That is a reason relating to conduct.

88 We then considered whether the Respondent acted reasonably in treating that as a sufficient reason for dismissing the Claimant on 17 September 2019. The Claimant's case was that there were substantial flaws in the procedure which rendered the dismissal unfair. The Claimant argued, in particular, that the continuation of the disciplinary process in relation to this matter after Ms Sullivan had concluded on 13 December 2018 that the allegation that that the Claimant had

fraudulently used the Council's bank account to pay her gas bill had not been substantiated because she could not find evidence that the Claimant had knowingly used the Council's account was unfair and that any subsequent dismissal was unfair.

89 We found that until the conclusion of the hearing on 13 December 2018 the process had been fair. The fact that the investigation was done by CAFS did not, in our view, render the process unfair. The matter had been investigated. The Claimant had attended an investigatory interview. She had been advised that she could be accompanied by a legal advisor. She had chosen to be accompanied by a trade union representative. She had been invited to a disciplinary hearing. Prior to that she had been provided with the material that would be used at the disciplinary hearing. She was advised that she could present evidence at the disciplinary hearing. The disciplinary hearing took place on 19 November and 13 December 2018. Mr Filus presented the management case. Ms Sullivan gave her decision verbally at the end of the hearing on 13 December and said that it would be sent out in writing in ten days' time. It would appear that she did not consult with HR before she gave that decision. Her view was that as the allegation contained the word "fraudulently", if she was not satisfied that the Claimant had knowingly used the Respondent's account, that was the end of the matter. Her conclusion was that that allegation had not been made out.

90 We have found that Ms Lea and Mr Grimley decided to reopen the matter because they felt that Ms Sullivan had not properly considered the matter and that her outcome was not correct. Perhaps they hoped that a further investigation by CAFS would reveal further evidence. As it happened, no further evidence came to light. The attempt in the letter of 23 May 2019 to pretend that the disciplinary hearing had not concluded and was to be reconvened is ludicrous. What the Respondent did was to change the allegation and to pretend that the new allegation had always been the allegation. It was not made clear to the Claimant that she was facing a new and a different allegation. We concluded that continuing with a disciplinary process that had concluded and changing the allegation, without making it clear that it had changed, was a substantial procedural flaw that rendered the dismissal unfair. Any dismissal that flowed from that was unfair.

91 In order to determine whether it would be appropriate to make a Polkey reduction, we considered whether the Respondent could have fairly dismissed the Claimant after Ms Sullivan had concluded that the allegation that she had <u>fraudulently</u> used the Council's bank account to pay her gas bill had not been substantiated. That involved considering the following two questions - could the Respondent have started fresh disciplinary process with a different charge but based on the same facts and would a dismissal on the different charge have been fair. We concluded that as matter of principle starting a second disciplinary hearing on a different charge but based on the same facts is not in itself unfair, provided that it is clear to the employee that that is what is taking place and a fair process is followed in respect of it. We concluded that if the Respondent had given the Claimant the outcome of the first disciplinary hearing and had then informed her that it was starting a fresh disciplinary process on a different charge (which did not include the allegation that she had knowingly used the Respondent's council tax account), and had invited her to a disciplinary hearing to respond to that allegation and advised her what the outcome would be, the process would have been fair. No further investigation would have been necessary because the Respondent was relying on the same facts. We considered that if that process had been followed and Ms Simpson had heard the disciplinary hearing, the outcome

would have ben the same. Her evidence was that she focused on the allegation and whether it was negligent or deliberate was not a factor.

92 We then considered whether a decision to dismiss on the alternative charge (which did not involve the Claimant knowingly using the Respondent's account) would have been within the band of reasonable responses. In considering that we took into account that the Claimant had almost 26 years' service with the Respondent and an unblemished disciplinary record. We concluded that, notwithstanding the length of service and the clean disciplinary record, dismissal was within the band of reasonable responses in circumstances where an employee of the Respondent had set up and reinstated on several occasions a direct debit to pay her private gas bills from the Council's Tax account for a period of almost two and a half years to the tune of £4656, being fully aware when she set up the account that the account details that she gave were not for the account from which she paid her household bills, they were for a NatWest account and she did not have a NatWest account, and she had not taken any steps then or when the direct debit was cancelled to establish whether that was an account that her partner held and why payments were not being made and had not put all the relevant material before the disciplinary panel. The Claimant had chosen to ignore all the clear signs that something was not right and had acted in a reckless and cavalier way. We were satisfied that if a fair process had been followed the Claimant could and would have been fairly dismissed at the same time and that it was just and equitable to make no compensatory award .

93 We have found that the Claimant continued with the setting up of the direct debit when she knew that the account details that she gave were not of the Halifax account, she lied to say that she was the account holder of a NatWest account when she knew that she was not, she did not make any attempt to check whether the details that she had were for an account that she or Mr Stewart, even when the direct debit was rejected or cancelled. She did not co-operate in the investigation. The Claimant's conduct was the reason for her dismissal. We concluded that the Claimant's conduct caused the dismissal. We are, therefore, obliged under section 123(6) ERA 1996 to reduce the compensatory award by such proportion as we consider just and equitable. In light of our findings we considered it just and equitable to reduce the compensatory award by 100%

94 We then considered, in light of those conclusions, whether it would be just and equitable to reduce the basic award and, if so, by how much. We took into account the manner in which the basic award is calculated and its direct relationship to length of service. It is an award that is made to all employees who are unfairly dismissed regardless of whether they have suffered any loss as a result of the unfair dismissal. The Claimant had 26 years' unblemished service. We have found that there was a serious procedural flaw which made her dismissal unfair. We concluded that in those circumstances, it would be just and equitable to reduce the basic award by 50%.

Race Discrimination

95 The complaints of race discrimination were presented many months after the time limit for presenting those complaints had expired. The Claimant was a trade union member and had the benefit of trade union assistance and advice at the time. She has not put forward any reasons why it would be just and equitable to consider those complaints. We concluded that we did not have jurisdiction to consider those complaints.

96 In case we are wrong in that conclusion we set out briefly what our conclusions would have been had we considered the complaints. We have not found that Mr Filus made the comments that he was alleged to have made. It is correct that the decision was made to suspend the Claimant without pay, and the reason given was that the Respondent did not know whether it would recover all the money that it had lost. Suspending without pay was contrary to the Respondent's policy and Ms Gungor had indicated in her report that the Respondent had been refunded the money. The suspension without pay was not put into effect and the Claimant was paid her full salary throughout her suspension. There was no evidence before us from which we could infer that the decision to suspend without pay was made because of the Claimant's race.

Employment Judge - Grewal

Date: 20 Sept 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

20/09/2021.

FOR THE TRIBUNAL OFFICE