Case No: 2300894/2019

EMPLOYMENT TRIBUNALS

Claimant: **S Unthank**

Respondent: **Spire Healthcare Limited**

Held at: **London South Employment Tribunal by video hearing**

On: **15 and 16 September 2021**

Before: **Employment Judge L Burge**

Representation
Claimant: C Payne, Counsel
Respondent: N Thornsby, Counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is:

1. The Claimant's application to amend his claim by adding a complaint of breach of contract is granted;

2. The Claimant was unfairly dismissed by the Respondent;

3. There shall be no reduction to the compensatory award under the principles of *Polkey v A E Dayton Services Limited* 1988 ICR 142 or to the basic/compensatory awards for contributory conduct.

4. The Claimant's claim of breach of contract is well founded.

5. The Respondent shall pay to the Claimant the sum of £55,320.48, comprising a basic award of £11,424.00 and a compensatory award of £43,896.48.

REASONS

Introduction

1. The Claimant was employed by the Respondent from 4 April 2004 until he was dismissed on 31 October 2018 for alleged gross misconduct.

2. The Claimant claimed that his dismissal was unfair within section 98 of the Employment Rights Act 1996. He also claimed, following amendment of his claim at the beginning of the hearing, that the Respondent breached his contract of employment by failing to give him the required notice of termination of his employment. The Claimant said that if he had not been dismissed he would have been made redundant on 31 July 2018.

3. The Respondent said that the Claimant was fairly dismissed for misconduct because he had taken direct payments from a patient (PM) for services rendered under the guise of the Respondent and it was entitled to terminate his employment without notice because this was gross misconduct.

The evidence

4. Louise Holbert (Hospital Director of a hospital owned by the Respondent) and Dan Rees Jones (Operations Director of a hospital owned by the Respondent) gave evidence on behalf of the Respondent. The Claimant, Stuart Unthank, gave evidence on his own behalf and Marian Mack, Marcella Thorp and Patt Taylor also gave evidence on the Claimant's behalf.

5. The Tribunal was referred during the hearing to documents in a hearing bundle of 326 pages. The Claimant provided the Tribunal with an updated Schedule of Loss and the Respondent provided a Counter Schedule of Loss.

6. Both Mr Payne and Mr Thornsby provided the Tribunal with written and oral closing submissions.

Issues for the Tribunal to decide

7. At the beginning of the hearing the Claimant made an application to amend his claim to include a claim for wrongful dismissal. The Claimant was not legally represented at the time he wrote his ET1 and it was clear that he disputed the misconduct charge and the manner and fact of his dismissal. The parties would be able to deal with the issue during the hearing, no additional evidence would be needed. Taking into account the Presidential Guidance on General Case Management and in particular the balance of hardship to the parties, the Tribunal decided that it was in the interests of justice to grant the amendment.

8. The Tribunal agreed with the parties the issues to be decided. These were:

Unfair dismissal

a. What was the reason or principal reason for the Claimant's dismissal? The parties agreed that the Claimant was dismissed for alleged misconduct and that this was a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA").

b. Was the dismissal fair or unfair within section 98(4) ERA, and, in particular, did the Respondent in all respects act within the band of reasonable responses? In accordance with the test in *British Home Stores v Burchell* [1980] ICR 303, the Tribunal would decide whether:

   i. there were reasonable grounds for that belief;
   ii. at the time the belief was formed the Respondent had carried out a reasonable investigation;
   iii. the Respondent otherwise acted in a procedurally fair manner;
   iv. dismissal was within the range of reasonable responses.

Remedy if the dismissal was unfair

a. The Claimant said he did not want to be reinstated or re-engaged to the Respondent.

b. Is the Claimant entitled to a Basic Award and/or a Compensatory Award, and, if so, should there be any of the following adjustments:

   i. any reduction or limit in the Compensatory Award to reflect the chance that the Claimant would have been dismissed in any event and that any procedural errors accordingly made no difference to the outcome in accordance with the principles in *Polkey v AE Dayton Services Ltd [1987] UKHL 8; Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40;* and *Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR* and/or

   ii. any reduction in either award to reflect any contributory fault on the Claimant's behalf towards his own dismissal?

Wrongful dismissal / Notice pay

9. How much notice was the Claimant entitled to receive? The parties agreed it was 12 weeks' notice.

10. Did the Claimant fundamentally breach his contract of employment by committing an act of gross misconduct? This required the Respondent to prove that the Claimant committed an act of gross misconduct.

11. For the breach of contract claim the Tribunal had to decide for itself whether the Claimant was guilty of conduct serious enough to entitle the Respondent to terminate the employment without notice.

Findings of Fact

12. The Respondent is a company providing private healthcare which runs a number of private hospitals including the Alexandra Hospital ("the Hospital")

where the Claimant was employed. The Claimant was employed by the Respondent as a physiotherapist from 4 April 2004. In 2006 the Claimant was promoted to physiotherapy manager, in 2013 he completed a master's degree in physiotherapy and obtained membership of the Musculoskeletal Association of Chartered Therapists. In 2013 the Claimant was asked to mentor the Imaging Manager by Linda Dineen, the hospital director, and in 2014 the Claimant took over as head of diagnostic imaging. The Claimant was well-regarded at the Hospital and so his roles and responsibilities increased with time. Ms Holbert gave evidence that the Claimant taking on various other departments as head was the norm for those seeking to gain experience but Mr Rees Jones gave evidence that this practice was "unusual". Neither Ms Holbert nor Mr Rees Jones worked at the Hospital, they worked at other hospitals run by the Respondent.

13. The Claimant's background was in sports injuries and he continued to perform private physiotherapy work outside of the Respondent as well as some health and safety training for corporate clients. As he took on more management responsibility at the Hospital he had less and less time for private clients.

14. Prior to the disciplinary proceedings that ultimately lead to his dismissal, the Claimant had an exemplary record with no previous disciplinary action taken against him.

15. When the Claimant took over the Imaging Department in 2013, in addition to his existing role, he was offered a £5000 pay rise. The Claimant gave evidence, that is accepted by the Tribunal, that he told Ms Dineen that this was not enough. Ms Dineen did not give evidence to the Tribunal and she was not asked by the investigator about the negotiations in relation to his £5000 pay rise. Ms Dineen did tell the investigator that taking over Imaging was not linked to the Claimant working at the Saturday Sports clinic.

16. The Claimant was a credible witness. He answered questions directly and he said when he did not recall an incident. The Tribunal believed him. The person whose job the Claimant was subsuming earnt over £30,000-£40,000 per annum. The Claimant gave evidence that Ms Dineen and the Claimant negotiated over the course of a week and then agreed that he would accept the new role on a salary of £5000 but that he could retain his private clients in order to boost his earnings on the conditions that he would refer them to the hospital for surgical treatment and imaging and that the numbers of private clients would not be excessive. The Claimant's evidence was that a letter was drawn up reflecting the contents of the agreement. Ms Mack, Ms Dineen's PA, gave evidence that she had not drafted the letter but Ms Dineen often typed her own letters and documents. Ms Mack had not seen the agreement but knew that the arrangement existed. Ms Thorpe was managed by the Claimant at the time in her role as Senior Physiotherapy Administrator and then Para Services Team Leader. Ms Thorp saw the agreement and had a conversation with the Claimant who assured her that there would be no impact on her administration team until the patient was referred into the hospital for treatment. Ms Thorp gave evidence that the agreement was signed by both Ms Dineen and the Claimant and that she took it to Ms Dineen's office to give to her.

17. Ms Dineen retired in 2015 and the Claimant became a member of the Senior Management Team. The Claimant was ambitious and interviewed for the post of Hospital Director in 2017. Chloe Senneck got the role.

18. The Claimant treated a few private clients at the Hospital but he was mainly busy in his employed role with the Respondent and the numbers of private patients he saw dropped.

19. In early July 2018 the Claimant was put at risk of redundancy. He had redundancy meetings and subsequently signed a settlement agreement that would give him £12,769.15 in lieu of 12 weeks' notice and £40,435.65 enhanced redundancy payment which included a statutory redundancy payment. His employment was to end on 31 July 2018. The agreement was not signed by the Respondent but the Tribunal accepts Ms Holbert's evidence that had the disciplinary not arisen the Respondent would have signed the settlement agreement and the agreement would have become binding.

20. In July 2018 "PM" (a private client of the Claimant) wished to obtain further treatment on the NHS but had paid up front for treatment with the Claimant. The suggested course of treatment was not approved by PM's GP and PM was unhappy. The Claimant suggested that he speak to his neighbour (a consultant at the Hospital). The issue was reported to Ms Senneck (Hospital Director) on 23 July 2018, who spoke to PM on 24 July 2018 and subsequently called the Claimant into a short meeting on 25 July 2018 and told him he was being suspended. In the letter of suspension given to the Claimant it said he was being suspended for receiving payments for services "under the guise of Spire Healthcare". One of the terms of suspension was:

> *"you must not communicate with any of our employees, contractors or customers unless authorized by Holly Jessop. You must certainly not communicate with others on the matters being investigated".*

21. An investigation was carried out by Adrian Brady, a director at another of the Respondent's hospitals.

22. The Respondent had a Disciplinary Procedure. Clause 4.0 stated the Respondent would ensure that "the facts are fully established before any disciplinary action is taken". At 8.0 the policy stated "Before any disciplinary action is taken the following steps will be taken: - There will be an investigation to establish the facts". Clause 8.3 said that the purpose of the investigation "is to establish a fair and balanced view of facts before a decision is made as to whether matters should progress to a disciplinary hearing".

23. The minutes of meeting show that the Claimant had "no idea" what the allegations related to until the beginning of the investigation meeting with Mr Brady on 17 August 2018. The minutes of meeting are disputed. Ms Mack was the note taker. She remains employed by the Respondent but gave evidence on behalf of the Claimant. The Tribunal found her to be a

credible witness, she answered questions carefully but directly and she was clear when she could not recall. The Tribunal believed her. Ms Mack's evidence to the Tribunal was that she could not guarantee that her notes of this meeting were verbatim, she did not do shorthand, found it difficult to keep up with what was being discussed and she was in a large meeting room in a hotel where she was positioned quite a distance away. It was possible that there was information missing. The Claimant provided an amended version of the minutes. Ms Holbert (the decision maker) accepted in cross examination, and the Tribunal finds as a fact, that she disbelieved the Claimant's minutes because she believed the main allegation against him. Ms Mack's notes recorded the Claimant as saying "I accept that paying me was the wrong this to do – it was a mistake…". The Claimant's notes said "But I accept that in paying me to much early that it was the wrong thing to do – it was a mistake…" The Claimant gave evidence that his mistake was in taking too much money too early.

24. Twenty five minutes after the meeting the Claimant telephoned the investigator and said that PM could be classed as a sports client and that he had an agreement with Ms Dineen that allowed him to do some private work. He told them to look on his personnel file for the letter and to speak to Ms Mack and Sue Broughton.

25. On 17 September 2018, following a telephone conversation, Ms Dineen emailed Mr Brady saying that there had been no agreement with the Claimant that patients should pay the Claimant directly and that the policy was very clear, all changes in employees terms and conditions or agreements would be documented in writing and filed in their personnel file.

26. Ms Senneck and Robert Tritton (the Respondent's Finance and Commercial Manager) stated to Mr Brady that they were unaware of and had never seen an agreement.

27. Kelly Moody, Lyle Smith and Linda Phillips were interviewed about the SAP process and logging clients onto SAP as part of the investigation. None of them were asked about whether or not the Claimant saw private clients nor whether they were aware of an agreement existing that the Claimant could do so.

28. The investigation report was compiled on 20 September 2018 and the Claimant was sent a letter on 25 September 2018 inviting him to attend a disciplinary hearing. This letter raised additional allegations including an allegation of contacting patients to advise them he was setting up his own physiotherapy practice, that he had removed patient data from the Hospital for his own use and that he had not followed procedures in relation to recording patients on SAP.

29. The Claimant wrote to the Respondent on 7 October 2018 setting out his concerns with the process and saying that he had at least 3 witnesses to his private client work. He requested a copy of his personnel file as well as numerous other documents.

30. The disciplinary hearing took place on 15 October 2018 chaired by Louise

Holbert. The Claimant attended with his union representative, Patt Taylor. The Claimant questioned why his suggested witnesses had not been interviewed as part of the investigation. Ms Holbert said that as part of the Senior Management Team the Claimant should have been aware of the Consultant's Practicing Privileges policy. The meeting was adjourned to enable the Claimant's witnesses to be interviewed:

a. Ms Mack could recall conversations with others about the Claimant being able to see his own patients but did not recall being involved in documenting the agreement.
b. Sue Broughton knew about the agreement but could not recall who told her. She did not know that the Claimant could see his own patients and did not get involved in the billing
c. Marcella Thorp was absent and so would be interviewed another day.

31. The interviews were short and did not probe to provide further detail when questions were asked.

32. The disciplinary hearing resumed and Ms Holbert asked the Claimant about the Saturday Sports clinic, insurance and overtime. The Claimant requested email searches be carried out. When they were later carried out, these searches did not return anything of relevance. At multiple times throughout the disciplinary hearing, Ms Holbert expressed her concern at the Claimant's alleged arrangement being in breach of the Respondent's policies. She did not provide the Claimant with a copy of the alleged policy nor did she specify or reference the specific rules she said he had breached.

33. There were others who worked at the Hospital who saw their own private clients. In evidence to the Tribunal Ms Holbert said that there were Consultant's Practicing Privileges and that as a Senior Manager the Claimant should have known that any agreement should have been in accordance with that policy. The Claimant gave evidence, that is accepted by the Tribunal, that in addition to consultants he knew of another person who worked partially self-employed and partially as an employee and that this person saw his own private patients.

34. On 18 October 2018 Ms Thorp was interviewed on the telephone by Mr Davey, Human Resources. She confirmed that the Claimant saw some of his private clients at the Hospital but that there were not many. She understood this arrangement was agreed with Ms Dineen as it would enable the Claimant to refer his own patients back into the hospital for other services and treatments. In a follow up telephone conversation on 30 October 2018 Ms Thorpe said that she was aware of the agreement as he had shown her a letter saying that he could see his private clients at the Hospital as she needed to be aware for administrative purposes.

35. The Claimant and the HR adviser Mr Davey emailed each other and the Claimant again raised his concerns that his personnel file was incomplete.

36. On 31 October 2018 a further disciplinary hearing was resumed. Some of the Claimant's requested documents had not been provided as they were

not on the personnel file. The Claimant requested that Ms Holbert take into account that his personnel file was incomplete. In evidence to the Tribunal Ms Mack said, and the Tribunal finds as a fact:

a. it was her responsibility to keep HR files up to date.
b. She recalled that the Claimant's personnel file was very thick, it had consisted of two thick files because he had been an employee for a long time.
c. There had been a move towards electronic filing where an external provider scanned the documents. When the files were returned to the Respondent there were a lot of documents missing from his personnel file.

37. In evidence to the Tribunal Ms Holbert said "*As part of the internal allegation, [the Respondent] considered the entirety of [the Claimant's] personnel file and did not find anything that was relevant to the central issue of whether or not there was an agreement…".*

38. Later that day the Claimant received a letter dismissing him for committing an act of gross misconduct as he had "taken direct payments from patients for services rendered under the guise of" the Respondent, Ms Dineen denied having entered into such an agreement with him and that "all efforts to locate a copy of [the] agreement have been unsuccessful". No mention was made of why Ms Thorp's account of having seen the agreement had been rejected.

39. After the Claimant was dismissed Ms Thorp had three job offers and chose to leave the Respondent to go and work for the Claimant.

40. The Claimant appealed his dismissal on 12 November 2018. Dan Rees Jones, operations director, was appointed to hear the appeal and held an appeal hearing meeting on 12 December 2018.

41. In cross examination Mr Rees Jones did not know if he had seen the Claimant's version of the disputed investigation minutes, but his conclusions were based on the Claimant saying that he should not have taken money from PM so the Tribunal finds as a fact that either Mr Rees Jones was not provided with the Claimant's version of the investigation minutes, or he had disregarded them.

42. Mr Rees Jones re-interviewed Ms Thorp and he interviewed Rob Tritton, Ms Dineen, Gill Coomber, Ms Senneck and Robert Austin. He conducted a further email search where he "personally reviewed 557 emails". In Ms Thorp's interview on 18 December 2018 she was asked "Was [the agreement] shown to anyone else?", she responded that "I don't know if it was shown, but I know that loads of people knew about it, other admin ladies Lyn and Lyle, other physios – Helen Vamplieu…"

43. On 19 December 2018 Ms Dineen was interviewed. She denied that she had entered into an agreement with the Claimant that he could bring his own patients into the Hospital and she said she would be happy to come to the Employment Tribunal and swear on the bible and say that. She said that there was an agreement that the Claimant would be paid overtime and a

half to run the Saturday Sports Clinic, she was 100% sure there was a letter and she knew the letter was on his file. Ms Dineen did not give evidence to the Tribunal. There was no such letter on the Claimant's personnel file.

44. The appeal outcome letter dated 23 January 2019 upheld the decision to dismiss the Claimant.

45. As a result of the Claimant's dismissal he is being investigated by the Chartered Society of Physiotherapists to consider whether he brought the role of physiotherapist into disrepute.

Legal principles relevant to the claims

Unfair dismissal

46. Section 94 ERA confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that he was dismissed by the Respondent under section 95, but the Respondent must show the reason for dismissing the Claimant (within section 95(1)(a) ERA). S.98 ERA deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within s.98(2).

> *s.98 (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this subsection if it—*
>
> *(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
>
> *(b) relates to the conduct of the employee,*
>
> *(c) is that the employee was redundant, or*
>
> *(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*

47. The second part of the test is that, if the Respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason:

> *s.98 (4) Where the employer 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 equity and the substantial merits of the case.*

48. In the case of *British Home Stores v Burchell* [1978] IRLR 379 EAT, the court said that a dismissal for misconduct will only be fair if, at the time of dismissal:
    (1) the employer believed the employee to be guilty of misconduct;
    (2) the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and
    (3) at the time it held that belief, it had carried out as much investigation as was reasonable.

49. In the case of *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 EAT, guidance was given that the function of the Employment Tribunal was to decide whether in the particular circumstances the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair.

50. In the case of *Sainsburys Supermarket Ltd v Hitt* [2003] IRLR 23 CA, guidance was given that the band of reasonable responses applies to both the procedures adopted by the employer as well as the dismissal.

51. *Brito-Babapulle v Ealing Hospital NHS Trust* [2013] IRLR 854 per Langstaff (P) at [40]:

> *"… It is the tribunal's task to assess whether the employer's behaviour is reasonable or unreasonable having regard to the reason for dismissal. It is the whole of the circumstances that it must consider with regard to equity and the substantial merits of the case. But this general assessment necessarily includes a consideration of those matters that might mitigate. For that reason, we think that there was here an error of direction to itself by the tribunal."*

52. The Court of Appeal in *Shrestha v Genesis Housing Association Limited* [2015] EWCA Civ 94:

> *"To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole. Moreover, in a case such as the present it is misleading to talk in terms of distinct lines of defence. The issue here was whether the appellant had over-claimed mileage expenses. His explanations as to why the mileage claims were as high as they were had to be assessed as an integral part of the determination of that issue. What mattered was the reasonableness of the overall investigation into the issue."*

53. In *A v B* [2003] IRLR 405 Elias J at paragraphs 59 – 61 provides clear

guidance on the standard of reasonableness in cases where serious allegations are being made against an individual:

> *"59. Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.*
>
> *60. This is particularly the case where, as is frequently the situation and was indeed the position here, the employee himself is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field, as in this case. In such circumstances anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances.*
>
> *61. The Tribunal appear to have considered that the fact that there was a real possibility that the Appellant would never work again in his chosen field was irrelevant to the standard of the investigation. In our view the Tribunal was strictly in error in saying that it has no significance. However, it seems to us that it is only one of the very many circumstances which go to the question of reasonableness."*

54. The Court of Appeal in London Ambulance *NHS Trust v Small* [2009] IRLR 563 warned that when determining the issue of liability, a Tribunal should confine its consideration of the facts to those found by the employer at the time of dismissal. It should be careful not to substitute its own view for that of the employer regarding the reasonableness of the dismissal for misconduct. In *Foley v Post Office; Midland Bank plc v Madden* [2000] IRLR 82 the court said it is irrelevant whether or not the Tribunal would have dismissed the employee, or investigated things differently, if it had been in the employer's shoes: the Tribunal must not "substitute its view" for that of the employer.

55. The Employment Appeal Tribunal in *Clark v. Civil Aviation Authority* [1991] IRLR 412 laid out some general guidelines as to what a fair procedure requires. But even if such procedures are not strictly complied with a dismissal may nevertheless be fair – where, for example, the procedural defect is not intrinsically unfair and the procedures overall are fair: *Fuller v. Lloyd's Bank plc* [1991] IRLR 336. An employment tribunal must take a broad view as to whether procedural failings have impacted upon the fairness of an investigation and process, rather than limiting its consideration to the impact of the failings on the particular allegation of misconduct, see *Tykocki v. Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust* UKEAT/0081/16.

Compensation

56. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 onwards of the ERA. Where re-employment is not sought compensation is awarded by means of a basic and compensatory award.

57. The basic award is a mathematical formula determined by s.119 ERA.

Under section 122(2) it can be reduced because of the employee's conduct:

"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly".

58. The basic award can also be reduced if the employee receives a redundancy payment under s.122(4). However, for the basic award to be reduced to take into account a redundancy payment, the employee must have been dismissed by reason of redundancy (*Boorman v Allmakes Ltd* 1995 ICR 842).

59. A reduction to the compensatory award is primarily governed by section 123(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…"*

60. The leading authority on deductions for contributory fault under section 123(6) remains the decision of the Court of Appeal in *Nelson v British Broadcasting Corporation (No. 2)* [1980] ICR 111. It said that the Tribunal must be satisfied that the relevant action by the Claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award.

61. The compensatory award can be reduced if the Tribunal considers that a fair procedure might have led to the same result, even if that would have taken longer (*Polkey v A E Dayton Services Limited)* [1988] ICR 142.

Breach of contract

62. The Tribunal must be satisfied, on the balance of probabilities, that there was an actual repudiation of the contract by the employee. It is not enough for an employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct. This is a different standard from that required of employers resisting a claim of unfair dismissal, where reasonable belief may suffice.

Conclusions

Unfair dismissal

63. The Claimant having conceded, properly and fairly in the Tribunal's view, that the Respondent had a potentially fair reason for dismissal, namely misconduct, the focus of the dispute was whether the Respondent acted reasonably in all the circumstances in dismissing the Claimant for that reason. In particular, did the Respondent have reasonable grounds for the belief in the Claimant's guilt and was that belief formed after a reasonable

investigation?

64. The initial investigation was deficient. Kelly Moody, Lyle Smith and Linda Phillips were interviewed about the SAP process but were not asked crucial questions about whether or not the Claimant saw private clients and whether they knew that an agreement existed that he was entitled to do so. Yet the investigator reached the conclusion that there was a case to answer. The decision to proceed to a disciplinary hearing despite the Claimant raising additional documents and witnesses to be investigated was unreasonable.

65. New allegations were added to the disciplinary letter, none of which had been adequately investigated. Time was spent both in the disciplinary hearing and the appeal hearing interviewing witnesses to ask them questions around overtime and the inputting of patient data onto the system. All of the additional allegations were ultimately withdrawn.

66. Ms Holbert attempted to remedy the deficiency of the investigation by interviewing three of the Claimant's witnesses. However, those interviews were short and not probing in nature. Why, when Ms Mack and Ms Broughton knew about the agreement were further questions not asked to elicit as much information as possible? Ms Thorp gave clear evidence that she knew about and had seen the agreement but Ms Holbert rejected her evidence. Ms Holbert preferred Ms Dineen's evidence because of her previous experience of working with Ms Dineen and her reputation. In cross examination it was evident that Ms Holbert, unreasonably, did not consider the Claimant's long history working for the Respondent and his unblemished disciplinary record yet did consider Ms Dineen's.

67. Ms Holbert knew of four witnesses (including the Claimant) who knew about the Claimant's alleged agreement. It was unreasonable not to investigate further by asking these witnesses more questions and speaking to others in the department who would have been aware of what was happening in practice. The Tribunal draws the conclusion that Ms Holbert had a closed mind. She believed the allegation against the Claimant and was looking for evidence to support it, rather than evidence that could shed light on whether the allegation was true or untrue.

68. This can be seen throughout her approach to the disciplinary proceedings. She did not believe the Claimant's version of the notes because she believed the allegation against him was true. Neither Ms Holbert nor Mr Rees Jones worked in the Hospital where the Claimant was employed. Ms Holbert gave evidence that the Claimant taking on various other departments as head was the norm for those seeking to gain experience. Mr Rees Jones gave evidence that this practice was "unusual". There were different working practices at different hospitals. She did not believe that Ms Dineen would have entered into that arrangement without taking into account that Ms Holbert herself worked at a different hospital and so could not be certain that this was the case.

69. It was unreasonable for Ms Holbert to withhold the Consultant's Practicing Privileges policy from the Claimant when judging him to have been in breach

because as Senior Management Team member he should have known about the policy. She did not explore with him whether, as he was not a consultant, it would have been applicable to him in any event. She did not take into account that he was not a member of the Senior Management Team when he entered into the alleged agreement. Not only was the Consultant's Practicing Privileges Policy not provided to the Claimant it was also not provided to the Tribunal.

70. There were others who saw private clients in the Hospital, this was not an unusual arrangement. Given that context and the fact that others they interviewed knew that he saw private clients it was unreasonable for Ms Holbert not to investigate further this line of enquiry to ask specific questions about what they knew about how and when the Claimant started seeing private patients and whether they knew anything about when and how an agreement was formed. If she had done this Ms Holbert could have been able to fairly make findings, on the balance of probabilities, about what the agreement was between Ms Dineen and the Claimant.

71. The Claimant was repeatedly complaining that his personnel file was incomplete. Having a closed mindset, Ms Holbert did not make enquiries as to whether that was correct. The absence of an agreement in his personnel file was of "central" importance to the Claimant's disciplinary case. In the circumstances it was unreasonable of her to not ask Ms Mack who had already been interviewed and was responsible for ensuring the personnel files were up to date. Had she done so she would have found out that the Claimant's personnel file had documents missing and no conclusion should be drawn by the fact that the Claimant's alleged agreement was not on there, especially as the fault for the missing documentation was with the Respondent/the external scanning company.

72. In cross examination Ms Holbert said that the document requests in the letter from the Claimant should have been looked into by HR and that it was HR who was responsible for providing the Claimant with documents. This was not a reasonable approach. A great deal of emphasis was placed on the agreement not being present in the Claimant's personnel file, yet clear evidence and complaints that the personnel file was deficient were ignored as being the responsibility of someone else instead of an acknowledgment that it was her responsibility to ensure that the Claimant was afforded a fair opportunity to dispute the allegations against him. Ms Holbert did not ensure that the Claimant was treated fairly. He was not permitted to talk to any of his colleagues about the events under question and he did not have access to the intranet or his files as he was suspended.

73. Mr Rees Jones as the appeal officer undertook further investigation. Either he was not given the Claimant's version of the investigation minutes or he disregarded them and so he assumed that the Respondent's version were correct and that the Claimant had accepted he should not have accepted payment. This, unreasonably, formed the basis upon which he conducted his further investigations for the appeal.

74. Mr Rees Jones did undertake extensive enquiries but did not rectify the deficiencies of the disciplinary procedure. Both Ms Dineen and the Claimant

were adamant that there was an agreement on his personnel file. Ms Dineen said that the agreement said that he could be paid time and half on a Saturday when there was a sports clinic. The Claimant said there was an agreement that he be allowed to see private patients on the condition that there were not many and that he would refer them back into the Hospital for treatment. Yet neither agreement was on the Claimant's personnel file.

75. Mr Rees Jones also knew that when Ms Thorp was interviewed she said that lots of other people knew about the Claimant's alleged agreement and she gave a list of names. It was unreasonable of him not to interview those people to find out what they knew of the agreement and what the Claimant's working practices were in practice. With that information he could have properly, on the balance of probabilities reached a conclusion about what the agreement was that had been reached between Ms Dineen and the Claimant. Similarly to Ms Holbert he did not consider the importance of the incomplete personnel file. He, like Ms Holbert, focused on the absence of the written agreement in the Claimant's personnel file as proof that the Claimant had no agreement to see private clients.

76. The Tribunal reminds itself that employers are not expected to carry out perfect investigations. In accordance with *Shrestha v Genesis Housing Association Limited* the investigation as a whole must be fair. However, the Respondent knew that this investigation could affect his ability to work in his profession and therefore affect his livelihood. When making decisions that ultimately could impact his ability to practice in his profession, the standard of investigation must be higher.

77. The Tribunal concludes that, looking at the investigation as a whole, the Respondent had not carried out as much investigation into the matter as was reasonable in the circumstances of the case. Because of Ms Holbert's closed mindset the disciplinary was predetermined and failed to investigate the central issue of importance that the Claimant said he had agreement to see private clients at the Hospital. Mr Rees Jones' appeal did not rectify the deficiencies. As such there were no reasonable grounds for that belief that the Claimant took direct payments from patients under the guise of the Respondent.

78. For all the above reasons, the Tribunal concludes that the Claimant has been unfairly dismissed.

Wrongful dismissal – breach of contract

79. The Claimant was dismissed without notice and brings a breach of contract claim in respect of his entitlement to notice.

80. The Respondent says that it was entitled to dismiss him without notice for his gross misconduct. The Tribunal must decide if the Claimant committed an act of gross misconduct entitling the Respondent to dismiss without notice. In distinction to the Claimant's claim of unfair dismissal, where the focus was on the reasonableness of the Respondent's actions, and it is immaterial what decision the Tribunal would have made about the Claimant's conduct, the Tribunal must decide for itself whether the Claimant

was guilty of conduct serious enough to entitle the Respondent to terminate his employment without notice.

81. The Tribunal concludes that he was not guilty of conduct serious enough to entitle the Respondent to terminate his employment without notice. The Tribunal found the Claimant to be a compelling witness, he was consistent in his witness statement and his evidence to the Tribunal. He had a long unblemished service record and had been well regarded by the Respondent. Ms Dineen did not give evidence to the Tribunal. Ms Thorp was also a compelling witness. She had not yet handed in her notice when she told the Respondent that she had seen the agreement and she worked closely with the Claimant and so knew what was happening in the department. Others knew that the Claimant treated private clients. There were others who saw private clients at the Hospital. The Tribunal concludes that it is more likely than not that the Claimant had agreement to see occasional private clients at the Hospital and so was not guilty of gross misconduct.

Remedy

82. It is difficult for a Tribunal to enter into the realms of what might have happened had a fair disciplinary process been followed. Nevertheless it is necessary in order to decide on whether a *Polkey* deduction is warranted. Had the investigation been approached in an open and fair manner, irrelevant issues would have been ignored and appropriate witnesses would have been interviewed and re-interviewed in depth to shed light on the working practices and what the agreement with Ms Dineen was. The Tribunal concludes that the Respondent would have come to the conclusion that either there was an agreement for the Claimant to see private clients, or that it was impossible to determine one way or the other but, taking into account the Claimant's long unblemished employment at the Respondent, dismissal was not the appropriate sanction. No *Polkey* deduction is therefore appropriate.

83. In relation to contributory conduct, the Respondent did not pursue this argument and said that "it had no real role to play". The Tribunal agrees that there was no culpable or blameworthy conduct from the Claimant, such that it caused or contributed to his dismissal so that it would be just and equitable to reduce the award.

84. It was agreed between the parties that had the Claimant not been dismissed he would have been made redundant with effect from 31 July 2018.

85. The Claimant is awarded a basic award of **£11,424.00** based on the following:

    a. Net weekly basic pay: £690.74
    b. Notice period: 12 weeks
    c. Period of service: 04.04.04 – 31.10.18
    d. Complete years of continuous service: 14 years
    e. Age at effective date of termination (EDT): 49 years
    f. Gross weekly pay: £810.41

g. Statutory cap of a week's pay at the EDT: £508.00

86. The Tribunal concludes that it is just and equitable for the Claimant to be awarded a compensatory award of **£43,896.48** comprising:

a. notice pay of £12,769.15

b. Loss of statutory rights £500

c. Loss of enhanced redundancy payment £40,435.65

d. LESS wages earned 1 August 2018 – 31 October 2018 of (£9,808.32)

87. The Recoupment Regulations do not apply to this award.

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Employment Judge **L Burge**
Date: 25 September 2021