EMPLOYMENT TRIBUNALS

Claimant: Ms J Locke

Respondent Nottinghamshire County Council

HELD AT: Nottingham **ON:** 7-11, 14-16 October 2019, 20, 23-27 November 2020 (and in chambers: 17, 18 December 2020, 23, 24 February 2021)

BEFORE: Employment Judge Batten
Ms F French

REPRESENTATION:

For the Claimant: Mr O Manley, Counsel
For the Respondent: Mr J Gidney, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. the claim of automatic unfair dismissal for making protected disclosures is well-founded;

2. the claim of ordinary unfair dismissal is well-founded;

3. the claimant suffered detriments for making protected disclosures;

4. the claimant was dismissed in breach of contract; and

5. the claimant's complaint about unpaid holiday pay due at the termination of her employment succeeds.

6. The claim shall proceed to a remedy hearing on a date to be fixed.

REASONS

Background

1. By a claim form submitted on 27 March 2018, the claimant presented claims of unfair dismissal, unfair dismissal and detriment for making protected disclosures, breach of contract in respect of notice pay and for holiday pay due at termination of employment. The respondent entered its response to the claim on 7 June 2018 and the claimant provided further particulars of claim on 27 February 2019.

2. The claim was originally listed for an 8-day hearing in November 2019 before a 3-person Tribunal. The hearing proceeded but the evidence was not completed in the time available and so the hearing was adjourned, part-heard, and was listed for a further 6 days in December 2019. In December 2019, the third member of the panel was taken ill and subsequently, in 2020, resigned their judicial position due to continuing ill-health. The parties agreed that the Tribunal hearing should be listed to proceed with the remaining 2 members of the panel. Unfortunately, in March 2020, the COVID-19 pandemic resulted in restrictions on Tribunal hearings such that the listed hearing of this claim had to be postponed and re-listed in November 2019, when the evidence was completed. As the oral evidence and submissions were completed only at the very end of the fourteenth hearing day, the Tribunal reserved its judgment. The Tribunal is grateful to the parties, and to Counsel representing them, for their patience and forbearance through the difficulties which have led to the hearing of the claim becoming protracted.

Evidence

3. An agreed bundle of documents comprising 2 lever-arch files was presented at the commencement of the hearing in accordance with the case management Orders. References to page numbers in these Reasons are references to the page numbers in the agreed bundle. In the course of the hearing, a number of further documents were added to the bundle including a copy of the claimant's work diary for the period from 18 April to 10 May 2017 and a copy of Ms Scott's personal notes of the disciplinary hearing.

4. The claimant gave evidence from a witness statement. In addition, she called 5 witnesses in support of her case: - Ms K Hallam, a former employee of the respondent; Mr J Donohue, former employee of the respondent and Senior Practitioner; Mr T Robinson, former team manager with the respondent; Mr P Teall, retired Group Manager of the respondent's Older Adult Services department; and Ms Y Raza, Transformation Partner with the respondent. Each of the claimant's witnesses gave evidence from a witness statement and was subject to cross-examination.

5. The respondent called 6 of its managers to give evidence on its behalf: - Ms N Peace, Group Manager at the respondent and former line manager of the claimant; Mr P McKay, former Service Deputy Director for Adult Services at the respondent; Ms S Houlton, team manager in R's Trading Standards Group; Ms D Scott, Group Manager for Older Adults at the respondent; Mr A Smith, Corporate Director at the respondent; and Ms S Jeffery, HR manager. Each of the respondent's witnesses gave evidence from a witness statement and was subject to cross-examination.

Issues to be determined

6. At the outset, and by agreement of the parties, it was confirmed that the issues to be determined by the Tribunal were:

Ordinary Unfair dismissal – section 98 Employment Rights Act 1996 ("ERA")

1. Was the respondent's principal reason for dismissing the claimant misconduct?

2. Was the misconduct that the claimant:

2.1 on 18 April and 8 May 2017 abused her position of trust and confidence by misusing the Mosaic system and contacts within the respondent (the Emergency Duty Team) to look up/discuss private records of a member of the public (the service user known as MGB) with whom she had no professional involvement with, or right to do so?; and

2.2 shared private information on the service user MGB with other parties?

3. Were the actions of the claimant in accessing the Mosaic records capable of amounting to gross misconduct or misconduct in accordance with the respondent's policies and codes of conduct in the light of the particular circumstances which faced her at the time?

4. Did the respondent act reasonably or unreasonably in treating the claimant's misconduct as a sufficient reason for dismissing the claimant?

5. Did the respondent genuinely believe that the claimant was guilty of misconduct?

6. Did the respondent have reasonable grounds for forming that belief?

7. Did the respondent carry out as much investigation as was reasonable?

8. Did the decision to summarily dismiss the claimant by Denise Scott fall within a reasonable range of options open to the respondent?

9. Did the claimant by her own conduct contribute to her dismissal? If so, to what extent is the claimant at fault? What deduction, if any, should be made for contributory fault?

10. If a procedural defect is identified, would the claimant still have been dismissed but for that procedural defect (Polkey)?

Public interest disclosures – s43B ERA

11. Did the claimant make one or more protected disclosures on the following occasions?

11.1 on 21 March 2017 to Paul McKay?

11.2 on 29 March 2017 to Paul McKay?

11.3 by way of written grievance dated 12 March 2018?

12. Did all or any of the disclosures qualify for protection? In other words, did they:

12.1 disclose information;

12.2 which in the reasonable belief of the claimant tends to show that the respondent has failed or is likely to fail to comply with a legal obligation;

12.3 what legal obligation is relied on? Is it (a) to ensure the health and safety of its staff, (b) prevent harassment or (c) prevent discrimination?

12.4 were they made in the public interest?

12.5 was the disclosure made in good faith (to be determined in advance of any remedy hearing)?

Dismissal for making a protected disclosure – s103A ERA

13. If the claimant's disclosures qualify for protection, was the reason for the claimant's dismissal by Denise Scott (or if more than one, the principal reason) that the claimant made a protected disclosure?

14. Did the reason for the dismissal (set out at 2 above) have nothing whatsoever to do with any protected disclosure?

Detriment for making a protected disclosure – s47B ERA

15. If the claimant's disclosures qualify for protection, did the claimant suffer the following acts of detriment?

15.1 being subjected to an unnecessary investigation/disciplinary process?

15.2 being unnecessarily suspended during the investigation/disciplinary process?

15.3 being subjected to biased, inaccurate and unfair criticism by Paul McKay in his management statement of case?

15.4 being subjected to biased, inaccurate and unfair criticism by Nicola Peace in her interview in the claimant's investigation?

16. In respect of the grievance dated 12 March 2018, which is relied on as a protected disclosure, did it predate all or any of the acts of detriment relied upon?

17. Were any of the acts relied on in 15 above acts of detriment?

18. If so, did they occur because the claimant had made a protected disclosure?

19. Did they occur because of the claimant's misconduct (set out at 2 above) and have nothing whatsoever to do with any protected disclosure?

Wrongful dismissal

20. The claimant was dismissed summarily. Was she entitled to notice of her dismissal? If so, how much?

Holiday pay

21. How many days holiday per year was the claimant entitled to?

22. From what dates did the respondent's holiday year run?

23. Had the claimant accrued holidays that she had not taken?

24. Did the claimant ask to carry over any untaken days into the next holiday year? Can the claimant do that?

25. Whilst suspended, do pre-booked holidays falling during suspension get treated as holiday taken?

26. In the circumstances is the claimant entitled to holiday pay? If so, how much?

Findings of fact

7. The Tribunal made the following findings of fact on the basis of the material before it, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities, taking into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts. The findings of fact relevant to the issues in the claim are as follows.

8. The claimant was employed by the respondent from 28 November 2002, as a senior social worker at the respondent's Gedling office, working 4 days per week. The claimant had been a social worker for over 34 years and was very experienced. She had an unblemished record and had received a number of awards and commendations during her career. The respondent's Adult Social Care Directorate was very busy, caseloads were high and personnel including the claimant were working under pressure.

9. From 7 November 2016, the claimant was appointed as a temporary team manager at the respondent's Gedling office, leading a team of 27 social workers. The claimant reported to Nicola Peace, the respondent's Group Manager for Older Adults, Gedling and Hospitals.

Relevant policies and procedures

10. The respondent's Code of Conduct, bundle page 188 onwards, includes:

Under "Underlying principles":

4. All officers of the Council must at all times observe this Code. Failure to comply with the Code and the standards of service expected could result in disciplinary action.

Under "Disclosure of information":

45. Officers must not disclose information given to them in confidence without consent, unless the circumstances are exceptional. In this situation, advice should be sought from their line manager;

47. Officers should not use confidential information obtained in the course of their employment with the Council for personal use, nor should they pass it on to others who might use it for unauthorised purposes.

11. The Disciplinary Procedure, bundle page 105 onwards, includes the following sections:

2.11 Each case will be dealt with on its merits. Consequently, certain offences which normally constitute gross misconduct may constitute misconduct only because of mitigating circumstances. Similarly certain issues normally viewed as misconduct will, if extremely serious, constitute gross misconduct;

3.5 In some circumstances minor breaches of conduct can be best dealt with by managers talking to the employees concerned as soon as possible, to give the employee the opportunity to explain … At this stage it may be appropriate for the manager to issue the employee with a caution recorded on their personal file … where a manager suspects there has been a serious breach of conduct, the manager should progress to the formal process;

Appendix B – standards of conduct include being honest and trustworthy, maintaining a high standard of integrity and conduct and not putting his/her private interests or those of relatives or friends before the duty to the respondent and not using his/her position to further such interests;

Appendix B – a list of acts of gross misconduct includes: serious bullying and harassment; serious negligence; and serious breach of confidence [subject to the Public Interest Disclosure Act 1998].

12. The respondent's Data Protection Policy, bundle page 161 onwards, includes a statement that 'personal data' on individuals must be *processed for limited purposes and in an appropriate way*.

13. The Whistle Blowing Policy, bundle page 167 onwards, includes, using the numbering in the policy:

1. A statement that *'Whistleblowing' means the reporting by employees of suspected misconduct, illegal acts or failure to act within the Council;* and

The aim of this Policy is to encourage employees and others who have serious concerns about any aspect of the Council's work to come forward and voice those concerns;

2.2 A direction that employees who have concerns about their own treatment as an employee should raise it under the grievance or harassment procedures;

2.4 A statement that concerns: … *might relate to: conduct which is an offence or breach of the law … racial, sexual, disability or other discrimination … health and safety of the public and/or other employees … neglect or abuse of clients …* [and] *other unethical conduct;*

3.3 A statement that throughout the process, an employee whistle-blower *… will be given the full support of senior management, … concerns will be taken seriously and … the County Council will do all it can to help [the whistle-blower] throughout the investigation;*

5. A statement that: *The Council will respond to concerns as quickly as possible.*

14. The Grievance Procedure, bundle page 175 onwards, includes, using the numbering in the policy:

2.2 Where the grievance is about the supervisor or line manager, it may be necessary, if the complainant feels unable to take it up with them directly, for the grievance to be discussed with the supervisor's or line manager's manager;

4.3 Records should be kept of all grievances raised, the employer's responses, any actions taken and the reasons for such actions. Such records shall be kept confidential and retained.

15. The Nottinghamshire Information Sharing Protocol, bundle page 194 onwards, includes, using the numbering in the document:

At the beginning of the document, a statement that "*This protocol does not overrule any safeguarding processes*", and a paragraph (bundle page 198) stating that: *Where there is concern that a vulnerable adult may be suffering or is at risk of suffering harm, the individual's safety and welfare must be the first consideration*;

1.3 Every individual who is involved in the provision of health and social case is responsible to ensure that their us of person-identifiable information is lawful, properly controlled and that an individual's autonomy is protected. Striking a balance between the need to share information to provide a quality service and at the same time protecting privacy and confidentiality is sometimes a difficult one to achieve;

1.4 For practitioners dealing with everyday questions about whether to share information, the picture is often confused. The absence of clear advice … typically results in one of two outcomes. People either make decisions based on what feels right to them as

professionals, albeit with concerns that their approach may not accord exactly with the law. Or … they defer decisions altogether, for fear of making a mistake;

1.5 *The principle underlying this protocol is that personal information must be shared within and between organisations so that people get the care and services they need …*;

5.7.2 *In general terms if a health or social care employee is handling and sharing personal information about a service user in accordance with the established functions of their organisation, their job description and the policies and procedures of the organisation, then it is most likely that will be lawful or intra vires, whereas anything beyond that scope is probably not*;

7.3 Under the section on purposes for sharing person-identifiable information: *Information sharing may also be necessary to assess risks to protect victims of domestic violence and to bring perpetrators to justice under the terms of the Multi Agency Risk Assessment Conference (MARAC)*;

8.4 In the section on key principles: *In some circumstances, where seeking consent is not a possible or feasible option, sharing information without consent should be considered on a case-by-case basis, and the decision to share justified. Advice should be sought where appropriate*;

8.6 *Legislation and rules around privacy and confidentiality … should not be applied so rigidly that they are impractical to follow and detrimental to the care of the individual or the safety of others*;

8.9 *Subject to the rules of confidentiality, staff should only have access to person-identifiable information on a justifiable and proportionate need to know basis, in order for them to perform their duties in connection with the care and service provision that they are contracted to deliver*;

8.16 *Where person-identifiable information is shared, with or without consent, the decision should be recorded and include details of who made the decision, when, with whom and for what purpose the information was shared*;

11.2 In the section on disclosure of information without consent: *The circumstances where disclosure without consent may be considered include: … Where there is a risk of serious harm to an individual or others, … In the interest of the protection of a vulnerable adult … from abuse or neglect;*

11.3 The decision to disclose information …. without consent must only be made by the Consultant, GP or Healthcare professional in charge of the individual's care, or a person of a similar authority within Social Care;

17.8 Each individual should be aware that any violation of the privacy laws or breach of confidentiality is unlawful and a serious matter that could lead to disciplinary measures being taken, which could result in dismissal and/or personal prosecution.

16. The respondent's social care departments hold records on the service users on a computerised system, originally called 'Framework'. This was updated in 2017 and renamed, 'Mosaic'. When a member of staff accesses the system, they are presented with a security reminder which says, "*Look only at records which are within your responsibilities and duties*". The conditions of use of 'Mosaic' include that, "*You should only look at records relevant to your role and responsibilities. Inappropriate use of the system such as looking at records of colleagues, family members or neighbours may lead to disciplinary action being taken*".

17. In March 2017, there was an incident at the Gedling office, when an employee, Yasmin Raza, was "hot-desking" in the office. Ms Peace came into the office and saw Ms Raza working there. Ms Peace challenged Ms Raza in front of staff, and asked what she was doing there and when she was leaving. Her tone was stern and abrupt, causing Ms Raza to become distressed. A number of employees witnessed the incident. The claimant considered this was the "last straw" as the claimant was aware of unrest and concerns amongst the team regarding the management style and conduct of Ms Peace.

<u>First protected disclosure</u>

18. On 21 March 2017, the claimant had an informal meeting with Mr McKay, the respondent's Service Director for Adult Social Care, in a café. Mr McKay arranged the meeting in order to meet the claimant, as a new manager. This was despite that the claimant had been in post for over 4 months. It was the first time the claimant had met Mr McKay. What the claimant told Mr McKay during their meeting constituted a protected disclosure for the purposes of whistle-blowing.

19. In the course of the meeting, the claimant raised a number of difficulties with Ms Peace in terms of her leadership and management style, and the claimant told Mr McKay of other staff complaints about Ms Peace of which the claimant was aware. The claimant described this as a "group whistle-blowing complaint". The claimant broke down during the meeting and cried.

20. Following the meeting, Mr McKay took advice from Ms Jeffery of HR on how to proceed. The advice she gave, which Mr McKay did not question, was to investigate the matters as a group grievance rather than as whistle-blowing.

Second protected disclosure

21. On 29 March 2017, the claimant was interviewed by Mr McKay and Ms Jeffery from HR. The claimant repeated her concerns about Ms Peace and relayed what she knew of other employees' concerns. The information that the claimant relayed in this meeting constituted her second protected disclosure.

22. Mr McKay invited other members of the Gedling team who wished to speak to him, to come forward that day and 13 employees did so, some in person whilst others put their concerns in writing including at least 3 anonymous complaints about Ms Peace's conduct. There were a number of very serious matters disclosed by the claimant and team members including examples of Ms Peace's unprofessional foul language, ageist remarks, throwing a box across the workplace, telling employees that she could get people sacked and threatening them with HR, and derogatory offensive remarks about service users including her describing one as "smelling of piss". It was also reported that Ms Peace was very difficult to contact during working hours and her delay in responding to the team had, in one case, led to an elderly service user having to wait for several weeks without heating during the winter months because Ms Peace had failed to authorise a boiler repair in a timely manner.

23. On 31 March 2017, the claimant emailed Mr McKay to thank him simply for having listened to her and the team. The claimant wrote that "In the whole of my career in social care, I have never dealt with the amount of 'fall-out' which has been created by one individual, notwithstanding personal comments aimed at myself".

24. On Monday 3 April 2017, Mr McKay wrote to Ms Peace to ask her to attend a meeting to discuss the matters raised. The letter stressed that this was not a formal investigation meeting. Ms Peace met with Mr McKay on 6 April 2017. Mr McKay had prepared a list of matters to discuss which did not include all of the allegations raised by the team. He made no notes of Ms Peace's responses so it remained unclear to the Tribunal whether all matters on the list were put to her and if so what her responses were. Mr McKay made no further enquiries once he had spoken informally to Ms Peace.

Incident on 18 April 2017

25. On 18 April 2017, at 7.30am, the claimant arrived at work to be told by her colleague, Mr Donohue, that there had been an incident on the previous

Friday, which was Good Friday, involving a female member of staff whose partner had apparently attacked her and tried to kill her. Mr Donohue had been called, on Easter Saturday evening, by the respondent's Emergency Duty Team ("EDT") about a safeguarding referral which had been raised against the staff member.

26. Attempts were made to contact the staff member without success. The claimant also tried to contact her own manager, Ms Peace, without success, and so she rang the EDT to establish whether a safeguarding issue had been raised and to highlight confidentiality issues if the matter were to be referred to the claimant's team, because the individuals involved resided in the team's area and the staff member's partner was a service-user.

27. At about 8.30am, the claimant accessed the respondent's electronic record system, by then called 'Mosaic', which contained information on the service user and his case notes, in an effort to determine his whereabouts and so to assess the risks to the service user and to the staff member.

28. At 8.45am, the member of staff arrived at work. A meeting was convened, with the staff member, the claimant, Mr Donohue and Mr Robinson, to review and discuss events. Mr Robinson considered that they had a duty of care to protect the safety of the staff member. In the course of the meeting, Mr Donohue told the member of staff about the safeguarding referral over the weekend. As a result of this meeting, the staff member agreed to go to the police.

29. Just after 9 am, the claimant sent a text message to her manager, Ms Peace, to notify her of a serious incident involving a member of staff and asked her to make contact.

30. Shortly afterwards, a telephone conversation took place between the claimant and Ms Peace in which the claimant updated her on the situation and said that she had checked the respondent's electronic records for information. After the conversation, Ms Peace replied to the claimant's text to thank her for letting her know of the incident and Ms Peace also suggested sources of help for the staff member.

31. On 20 April 2017, the claimant and Mr Robinson had a joint supervision meeting with Ms Peace at which the incident with the staff member over the Easter weekend was discussed and actions were reviewed. It was noted that the team managers had been supporting the staff member concerned. The respondent has disclosed a record of this meeting which was produced by Ms Peace but which had never been shown to the claimant or Mr Robinson even though the record template requires their signature. The record is incorrectly dated and sparse in its contents. The Tribunal did not find the record to be a reliable record of the meeting or of the discussion which took place.

32. On 26 April 2017, the staff member was interviewed by the police. The claimant went along to the interview to support her.

33. On 26 April 2017, Mr McKay wrote to Ms Peace to say that he believed that Ms Peace's "conduct and behaviour fell far below the standards expected of a Group Manager and was unacceptable". As a result, however, Ms Peace was only given an informal 'caution' and was put forward for management behaviour training. She apologised to one team member, Mr Robinson, for her language but made no apology to the claimant or to any other employees.

34. Two days later, on 28 April 2017, Mr McKay sent the claimant a letter to inform the claimant that "all of your concerns have been considered and appropriate action undertaken", bundle page 326. The letter goes on to say that Mr McKay expected the claimant to support any approach he took to rebuilding relationships and that he intended to speak to the claimant about the "unhealthy and damaged" relationship between the claimant and Ms Peace. The Tribunal accepted the claimant's submissions that this letter amounted to a direction to her to "toe the line".

35. Despite the letter's contents, Mr McKay took no further action to address matters with the claimant, except that, on 11 May 2017, the claimant was called to a meeting with Mr McKay and Ms Jeffery from HR, at which she was told she has led a 'witch hunt' against Ms Peace and that she would be expected to tell the team to support Mr McKay and Ms Peace in future. In response, the claimant said that she wanted to step down as temporary team manager.

36. On Monday 8 May 2017, Ms Peace completed a coaching referral form for management training as part of the outcome of the informal investigation into her conduct.

Incident on 8 May 2017

37. At lunchtime on 8 May 2017, the staff member involved in the incident on Good Friday told the claimant that she intended to go to her ex-partner's home, to collect her personal belongings. The claimant was concerned about this and so texted Ms Peace asking to discuss matters but she was unable to get a response from Ms Peace.

38. In an effort to check the service user's whereabouts, just before 5pm that day the claimant accessed the service user's records, but there was nothing to indicate where he was and so the claimant told the staff member that she would need to make further enquiries. Ms Peace came into the office at the end of the day. The claimant reported the position with the staff member to Ms Peace and mentioned that she had accessed the records in an effort to discover where the service used might be.

39. The next day, 9 May 2017, Ms Peace instructed the claimant to send an email to her team about accessing records for work purposes only.

Suspension

40. On 10 May 2017, Ms Peace sought advice from HR as to appropriate action to be taken against the claimant for having accessed the respondent's service user records. She had a number of discussions with HR that day and also with the claimant. HR advised Ms Peace to issue either a strongly worded email or a caution. However, first thing on 12 May 2017, Ms Peace telephoned the claimant and told her not to come to work because she was suspending her for a data breach. The claimant's suspension by Ms Peace was not undertaken on HR advice or in accordance with the respondent's procedures. Ms Peace later rang the claimant on the claimant's non-working day and told her that she was not suspended but on "special leave". Ms Peace then wrote to the claimant, on 15 May 2017, using a template letter, to invite the claimant to what Ms Peace described as a meeting with the potential outcome of suspension. In fact, Ms Peace had already decided to suspend the claimant and was now going through the correct procedures, after the event.

41. On 19 May 2017, Ms Peace met the claimant, together with her trade union representative. After the claimant had explained her rationale for accessing the records, Ms Peace proceeded to formally suspend the claimant.

42. On 20 May 2017, the claimant emailed her trade union representative to record her concerns. The claimant was concerned that, having admitted a potential data breach to Ms Peace, there would not be a fair investigation because of Ms Peace's potential to conduct that investigation and/or act as a witness, the claimant's involvement in the complaint about Ms Peace and how that had been dealt with by the Service Director, Mr McKay, and what the claimant considered to be the apparent bias of HR towards Ms Peace and against the claimant. The claimant also cited the numerous historic grievances against Ms Peace across the respondent's organisation.

43. On 22 May 2017, the claimant received a suspension letter which stated that the allegation against her was that she had committed a data breach.

44. On 23 May 2017, Mr McKay convened a meeting of the claimant's team. He attended with Ms Peace, who sat by his side at the head of the table, whilst Mr McKay spoke to the team. HR were not present and no minutes were taken. After Mr McKay had spoken, the team felt frustrated and disappointed that their complaints had not been addressed. They felt unable to say anything and eventually they asked Mr McKay and Ms Peace to leave whilst they had a private discussion.

45. Following the meeting, Mr McKay wrote to the team to summarise the meeting. The letter includes a statement that "Nicola [Peace] has my full support". The letter suggests that some of the team had felt that Ms Peace was supportive, when that is not reflected in the numerous written testimonies and the concerns which had been raised with Mr McKay. The letter also informed the team that Mr McKay would be addressing the bullying allegations with the individuals who had raised them. Nevertheless, Mr McKay did not follow up on any of the allegations or concerns thereafter.

Investigation

46. Ms Peace obtained a report on access to the service user's records. These showed the claimant's access which she had admitted and also that Mr Donohue had accessed the same records on 18 April 2017. On 25 May 2017, Mr Donohue received a letter from Ms Peace about a possible suspension. He was interviewed by Ms Peace on 9 June 2017, about a "serious data breach" and then suspended.

47. On 6 June 2017, the claimant was formally notified by Ms Peace that the respondent was to commence an investigation.

48. On 20 June 2017, Ms Sayer, an HR Business Partner at the respondent, informed Ms Peace that she would be a witness to the investigation and so she "will need to stand back in order to keep your evidence clean". Despite such advice, Ms Peace continued to involve herself in the process. It was Ms Peace who effectively appointed Ms Houlton to be the investigating officer for both the claimant and Mr Donohue, Ms Peace drew up the investigation brief and proceeded to send Ms Houlton, the investigating officer, a number of carefully selected items of evidence against the claimant.

49. The allegations which the claimant faced were formulated and developed by Ms Peace. They started with a single allegation in the claimant's suspension letter, bundle page 472:

"That you committed a serious data breach as you have used the Mosaic system to look up the private records of a member of the public"

50. This allegation was expanded in the investigation brief to 2 allegations, bundle page 345:

a) *"That [the claimant] committed a serious data breach as she used the Mosaic system to look up the private records of a member of the public which she had no professional involvement with, or right to do so.*

b) She shared information on [the member of the public] with other parties e.g. [the staff member] and possibly others"

51. When it came to the investigation report, bundle page 408, the allegations were that the claimant:

i) Used the Mosaic system to look up the private records of a member of the public (service user/SU) which she had no professional involvement with or right to do so;

ii) Shared this information on the SU with other parties; and

iii) As a result of allegation i) and ii), [the claimant] breached professional standards and the NCC Code of Conduct.

52. On 21 June 2017, Ms Sayer of HR who had been appointed to the investigations, emailed Ms Houlton to confirm that she would soon be getting the investigation brief from Ms Peace. This was despite that only the day before, Ms Sayer had advised Ms Peace to "stand back" from the process.

53. It is the claimant's case that Ms Peace was involved in establishing the investigation and was guiding/influencing the investigation despite the conflict of interest which arose, and which had been pointed out to her because she was a witness and despite that she had been warned to stand back from matters. The Tribunal agreed with this analysis wholeheartedly. The email of 22 June 2017, in the bundle at page 351, sent from Ms Peace to Mr McKay, is very telling. Ms Peace writes:

"Given that I am a witness in the JL case can you please do the presenting, I have commissioned Sarah and will compile the reports etc. but I cannot actually present in Sarah's view due to being a witness to her statements to me and then subsequent information, which highlights discrepancies in her story."

54. Despite this position, Ms Sayer allowed Ms Peace to continue to write the investigation brief, and to discuss the process and who will be presenting with Mr McKay. The Tribunal noted that Ms Peace is copied into a number of HR emails about the investigation. In addition, Ms Peace is allowed to feed Mr McKay with selective information on the claimant. The Tribunal rejected the contention made in Ms Peace's witness statement, paragraph 26, that: *"it was promptly decided that I would stand back … My role was therefore just as a witness"*. This was a highly misleading suggestion and is contradicted by contemporaneous documents and emails showing the communications that took place.

55. On 27 June 2017, a meeting took place between Ms Houlton, the investigating officer, and Ms Sayer from HR. Ms Peace attended the

meeting, for the first part of the meeting, which considered the investigation remit. The notes of the meeting appear in the bundle at pages 352.3 and 352.4. These show that Ms Peace represented certain matters as being a fact when they were disputed and needed to be investigated; for example, the date(s) on which the claimant told Ms Peace about accessing the records. It was Ms Peace who determined who would be interviewed for the purposes of the investigation and the order in which those witnesses were interviewed, including dates and times, with Ms Peace to be interviewed first and the claimant to be interviewed last. In addition, Ms Peace directed the investigation to speak to Ms Tina Ramage, Principal Social Worker, about the Health and Care Professions Council ("HCPC") code of conduct and professional expectations. After the meeting, Ms Peace emailed Ms Houlton and Ms Sayer to provide Ms Ramage's contact details. It is clear from that email that Ms Peace had, by then, spoken to Ms Ramage and had prepared Ms Ramage to expect to advise the investigation including on what matters she would be expected to give advice. The action points from the meeting are all actions for Ms Sayer and Ms Houlton to carry out, and they include matters about which they are to "Ask Nicola".

56. The meeting notes refer to a discussion of Mr Robinson who knew of the data breach and the "potential for [him] to be implicated" but this is never followed up and no action point is noted. Despite being present at the material time of the first breach and having knowledge of it, Mr Robinson was not subject to any action formal or otherwise, in contrast to the claimant and Mr Donohue. The respondent has been unable to explain this difference in treatment.

57. Following the meeting on 27 June 2017, Ms Peace commenced supplying Ms Houlton with a number of emails of 'evidence' for the investigation. These include: Ms Peace's notes of what is headed an "HR meeting" with the claimant on 19 May 2017 but which in fact was the suspension and initial investigation meeting conducted by Ms Peace - the notes are not signed off or corroborated in any way; the claimant's training record; certain emails between Ms Peace and HR; Ms Peace's notes of the joint supervision meeting with the claimant and Mr Robinson on 20 April 2017; and the Mosaic access reports.

58. The emails sent contain Ms Peace's leading opinion about what the evidence shows and/or her interpretation of the contents and attachments and statements about how such evidence would be useful to the investigation. The emails are selective and partial and, taken together, the Tribunal considered them to show Ms Peace selecting and orchestrating the evidence so as to lead to the outcome of dismissal - she was guiding the investigating officer to what would, if the investigation looked no further, likely be a conclusion of dismissal.

59. On 28 June 2017, Ms Peace sent Ms Sayer an email with her supervision notes attached. This email is in the bundle at page 364 – 365 and includes Ms Peace describing her notes as 'the record' and, *"It clearly shows that we discussed [the staff member] and [the claimant] did NOT mention she had been on Mosaic despite having the opportunity to mention it at this point … Yet I was unaware that she had accessed the records until it came up in a general conversation on the 10th of May …"*. The Tribunal considered that statement to be taken out of context and is an example of Ms Peace presenting a matter as undisputed when, in fact, the timing of the claimant's disclosure of her access of the respondent's records was a central point of dispute between the claimant and the respondent.

60. Immediately after sending her supervision notes, Ms Peace sent Ms Houlton a further email, bundle page 358, headed "Notes for investigation report" saying that these were notes she *"made in discussion with [Mr McKay]"*. There was no evidence of any such discussion nor that Mr McKay was aware of or had approved the contents. The Tribunal considered that the notes demonstrated Ms Peace again leading the investigation in a particular direction and giving weight to the attached notes. The notes include a list of questions to ask witnesses, which were written by Ms Peace, and which are directed at specific aspects of the first alleged data breach and the timing of its disclosure, starting with the proposition that the claimant had not told Ms Peace on 20 April 2017.

61. On 29 June 2017, Ms Peace sent Ms Houlton and Ms Sayer copies of the audit reports of access to the service user's records, bundle page 367. Ms Peace's email set out that *"It shows clearly …"* and Ms Peace then listed a number of points. The email concluded with a reminder to contact Ms Ramage about certain matters and the rationale for doing so. Ms Peace stated that she had advised Ms Ramage that Ms Houlton would be in touch with her, thereby obliging Ms Houlton to do so.

62. On 29 June 2017, Ms Houlton advised the claimant that she has been appointed to investigate the allegation of a data breach.

63. On 30 June 2017, the investigation brief was signed off by Mr McKay. There was no evidence to suggest that Mr McKay had done anything more than sign the document. That day, Ms Peace was interviewed by Ms Houlton who then followed the list and timings of interviews set out by Ms Peace on 27 June 2017. The interviews conducted by Ms Houlton included that, on 5 July 2017, Ms Houlton interviewed the staff member who had been the subject of the incident on Good Friday

64. On 11 July 2017, the claimant received a letter inviting her to an investigatory interview and informing her that the allegations had been expanded to the 3 allegations set out in paragraph 51 above. On 13 July 2017, a Ms L Ford and then Mr Robinson were interviewed by Ms Houlton and, on 19 July 2017, Mr Donohue was interviewed.

65. On 21 July 2017, the claimant was interviewed by Ms Houlton. The claimant did not deny what she had done and explained the context in which she accessed the service user's records. She confirmed that she knew it was a "no, no" but said that she understood there were exceptions and she provided her justification for her actions. Following her interview, the claimant provided an additional statement on 31 July 2017.

66. On 31 August 2017, Ms Houlton wrote to the claimant to inform her that, as a result of new information discovered by the investigation, she was recommending that an additional allegation be added to the file concerning the fact that the claimant had contacted the EDT on 18 April 2017. Ms Houlton's letter included 5 questions which the claimant was asked to Answer about her dealings with the EDT. The claimant answered the questions on 14 September 2017, including a statement that Ms Peace had been aware of the claimant's calls to both the EDT and HR on 18 April 2017.

Investigation report

67. On 29 September 2017, the respondent produced its investigation report which appears in the bundle from pages 406 -436. At this time, the report was not sent to the claimant. The report analyses the evidence against 3 allegations. Ms Houlton's witness statement suggested that the first allegation was proven and had not been not disputed by the claimant. This was not the case. Whilst the claimant admitted to accessing the records, her explanation was that she believed she had a professional involvement as a manager, and a right to access given the circumstances with which she was confronted on 18 April and on 8 May 2017. In respect of the second allegation, Ms Houlton again concluded that this was proven because the claimant had told Ms Peace of the access and also "possibly" told Mr Donohue information on the service user. This was even though documents confirmed that Mr Donohue had learned such information independently, over the Easter weekend, and before he spoke to the claimant. The Tribunal considered the analysis of this second allegation to be vague and inconclusive, despite that Ms Houlton's evidence to the Tribunal was that it was proven. The section of the report analysing this allegation in relation to the events of 8 May 2017 accepts that the claimant did not share information on that occasion but goes on to state that *"It could however be argued that telling somebody there is nothing relevant on a system is disclosing information from that system to them."* In respect of the third allegation, Ms Houlton concluded that the matter between the member of staff and the service user amounted to problems in the staff member's private life and that taking action in that respect was a breach of the respondent's code of conduct. No account was taken of the claimant's concerns for the service user at the time nor her concern to ensure that a safeguarding referral about a member of staff should not come to her team. Ms Houlton also concluded that the claimant's failure to intervene

or challenge Mr Donohue when he shared information about the safeguarding indicated a breach of the respondent's code of conduct. This conclusion ignored the fact that another manager, Mr Robinson, was present at the time and he did not intervene either but he was not disciplined for such. The report concluded by recommending that the disciplinary panel consider dismissal and take into account the mitigating circumstances outlined. The mitigating circumstances referred to are set out very briefly and comprise half a page of 4 brief points. There is no mention of the claimant's long service, her clean record and awards and commendations. No alternatives to dismissal are mentioned and some of the mitigation is played down: for example, *"this mitigating factor is significantly reduced by [the claimant]'s failure to disclose fully and in a timely manner to [Ms Peace]."* In fact, the claimant was never asked about that aspect or whether she told Ms Peace of her access on 18 April 2017.

68. On 9 October 2017, the claimant was signed off, sick, with reactive depression, initially with a sick note for 2 weeks but further sick notes were tendered and, in fact, the claimant never returned to work.

69. At the beginning of November 2017, the claimant received a request from the respondent for an occupational health referral. On the form was a comment that the claimant's case was to proceed to a disciplinary hearing. This was the first the claimant had heard of such a decision. When she queried the matter with HR, they did not apologise but suggested that they had told the claimant's trade union representative. However, the union representative was himself off sick and so the claimant had not even been told second hand of such an important development, nor had she been sent a copy of the investigation report.

70. On 15 November 2017, prompted by Ms Sayer, Ms Peace sent a letter to the claimant to say that the investigation report was finalised and had been passed to Mr McKay who had decided to arrange for a disciplinary hearing. The letter wrongly stated that the claimant was aware of this from previous correspondence, when she clearly was not, as no such correspondence had been sent out. That same day, Ms Sayer of HR emailed Mr McKay and Ms Peace to inform them of the names of the disciplinary panel and she said that if there were any problems, to let her know.

71. On 28 November 2017, occupational health reported that claimant was not fit to attend a disciplinary hearing and that she was very ill.

72. On 5 December 2017, Ms Peace wrote to the claimant to say that she was to be referred to the HCPC due to the disciplinary action against her. The Tribunal was concerned that the respondent's witnesses were unable to explain why such a letter was sent to the claimant at this time, given the respondent's knowledge of the claimant's continuing ill-health and why a referral to the HCPC had not been made much earlier in the process.

73. Also, on 5 December 2017, Ms Peace emailed Mr McKay and Jo Kirkby, the respondent's complaints and information team manager, to request a referral of the claimant's data breaches to the Information Commissioner ("ICO"). When Mr McKay asked Ms Kirby how she thought the ICO would respond, Ms Peace interjected with an example of a social worker who had been prosecuted and of consequences for local authorities failing to report. Ms Kirkby responded, pointing out that the respondent's Information Management Group had not so far agreed on a corporate view as to whether such instances should in fact be referred to the ICO, and Ms Kirkby pointed to the fact that disciplinary action was already being taken against the claimant and Mr Donohue. No report to the ICO was therefore made, a fact of which Ms Peace was aware.

74. On or about 13 December 2017, Ms Peace filled out the HCPC referral form, in which she stated that the claimant had *"inadvertently and incompletely admitted to her line manager that she had accessed the personal files of a service user inappropriately – without authorisation or professional involvement … in order to obtain information for another employee"* – bundle page 613. The Tribunal found this to be an inaccurate statement tending to suggest dishonesty on the claimant's part. Mr Donohue was told that he too was being referred to the HCPC at that time.

75. On 18 December 2017, the respondent conducted a welfare visit at the claimant's home. Following the meeting, Ms Sayer emailed Mr McKay and Ms Jeffery to report that the claimant had sought to raise concerns about Ms Peace and was very emotional when talking about matters. Ms Sayer reported that she had moved the meeting on, saying that the claimant had been advised to such discuss matters with her union representative. Ms Sayer was dismissive of the claimant's concerns and did not listen to her. Ms Sayer also stated that the claimant's new manager, Adrian Shaw, was present and Ms Sayer commented that, "*I didn't [want] him to hear all that about Nicola [Peace]"*.

76. On 17 January 2018, Mr Donohue attended his disciplinary hearing. He was dismissed for gross misconduct at the end of the hearing, after a short adjournment. Mr Donohue appealed unsuccessfully.

77. At the end of January 2018, the respondent received a further occupational health report on the claimant which recommended that the claimant should undergo at least 3 sessions of CBT therapy before she would be fit to attend a disciplinary hearing. What then followed, despite the claimant's continuing ill-health, was what the claimant rightly described as a "barrage of emails" from HR to the claimant, seeking to arrange a disciplinary hearing. Eventually, after canvassing a number of individuals' availability, the parties arrived at 6 April 2018 as a date for the claimant's disciplinary hearing.

Third protected disclosure

78. On 12 March 2018, the claimant submitted a grievance to the respondent. The letter is headed 'Grievance/concerns in respect of Nicola Peace - Group manager and Paul McKay – Service Director' and extends to 29 pages of tightly typed concerns, with sub-headings. In the grievance, the claimant set out numerous instances of conduct by Ms Peace which the claimant contended amounted to bullying and harassment of herself and other employees. The claimant's grievance constituted her third protected disclosure.

79. On 19 March 2019, HR wrote to the claimant to acknowledge her grievance and to inform her that the respondent's employee resolution procedure has changed. The letter from HR attached a copy of the new procedure and asked the claimant to *"review your submission in light of the revised procedure to enable me to progress the matter within this procedure."* The letter goes on to state certain principles including that a grievance "will" always be dealt with informally as a first step and should be raised no later than within 3 months. The letter ends with *"Once we have received your revised submission HR will discuss this with David Pearson."* The implication of the letter, which was confirmed by the evidence of the respondent's witnesses, was that the claimant had not first attempted to address her issues with Ms Peace informally. This position was maintained even though it is apparent from the contents of the grievance that it would be wholly unrealistic to expect the claimant to pursue the concerns raised through an informal approach to Ms Peace, notwithstanding the fact that the grievance was also about Ms Peace's line manager, Mr McKay. In addition, the respondent's evidence was that the grievance was out of time due to the 3 months suggested in the new policy, although this is not an absolute timescale. The Tribunal therefore concluded, from the evidence, that R had no intention of progressing the claimant's GL at this stage and was pushing back on it.

Disciplinary hearing

80. The claimant remained off work, sick, at the time and, on 26 March 2018, the claimant went onto half pay.

81. On 29 March 2018, the claimant wrote to the respondent to say that she was unwell but still wanted the disciplinary hearing to go ahead on 6 April 2018. Despite the claimant's ill-health, the respondent gave no thought to either postponing the hearing, giving the claimant more time to deal with matters or canvassing alternative ways for the claimant to engage in or contribute to the disciplinary process.

82. Prior to the disciplinary hearing, the disciplinary panel had a pre-meeting with HR. Questions were compiled to be put to the witnesses, with HR

guidance and assistance in formulating the questions. The notes of this meeting were not disclosed by the respondent.

83. The claimant's disciplinary hearing went ahead on 6 April 2018. The minutes appear in the bundle at pages 867-893. The disciplinary hearing was chaired by Denise Scott, a group manager on the same level as Ms Peace, but based in another geographical area of the respondent local authority. It was only the second time Ms Scott had chaired a disciplinary panel and she was assisted by an HR manager, Ms Waldron.

84. The respondent's management case was presented by Mr McKay, a Service Director, who was senior in authority to Ms Scott. Mr McKay had provided a written 'Management statement of case' which is highly partial and directive as to the conclusions which the disciplinary panel should come to. The management statement of case was written by HR for Mr McKay and Ms Peace had some input in to the document. It appears in the bundle at pages 821 - 826. For example, the document opens with "*This disciplinary hearing has been convened in response to allegations raised which are considered to constitute gross misconduct on the part of [the claimant] … In so far as she abused her position of trust and confidence by committing a serious data breach… sharing that information with other parties and as a consequence harming others in the process"* and later says *"The investigation concluded that the allegations were proven and constitute gross misconduct, for which [the claimant] should be summarily dismissed from [the respondent]."*

85. Under the heading 'Main issues', the first issue is presented in terms of a conclusion: *"A very serious data breach has been committed which resulted in actual emotional harm being caused to a colleague…"* when there was no evidence to substantiate the contention as to emotional harm. Th statement concludes by declaring that *"it is felt by management that [the claimant]'s actions constitute gross misconduct"*, and *"It is recommended that the severity of her actions is considered … with regards to the complete and irrevocable breakdown of trust and confidence in her …"* and further, *"That the public would have no trust or confidence in her as a professional"*, and *"it is recommended [she] should be dismissed … without notice"*. There is no reference to any mitigating circumstances in the management statement of case. Mitigating circumstances appear only very briefly at the end of the investigation report and there is no mention of the claimant's long service, her unblemished record or the previous commendations and awards that she had received whilst working for the respondent.

86. The claimant did not attend the disciplinary hearing due to her ill health but she was represented by her trade union workplace representative, Mr Hodgkinson. The claimant prepared a statement in response to the management statement of case which she sent to HR prior to the hearing. In this document, on the first page the claimant mentions her grievance

against Ms Peace and Mr McKay, and also her whistleblowing. The claimant stated that she had never denied accessing the records but explained the situation she faced at the time and contended that she believed she was acting under a duty of care to a staff member. The claimant also raised the issue of her belief that the disciplinary allegations were brought as a consequence of her raising previous concerns about individuals involved in the case and as "an opportunity to take me down". At the end of the document, the claimant complains about the limited time afforded to her to submit her defence in writing after receiving the respondent's case only 7 days prior to the disciplinary hearing.

87. During the hearing, Mr McKay addressed the fact of the claimant's grievance, by saying that any issues that the claimant 'may have had' with Ms Peace would be addressed personally by him outside of the hearing. He did not mention the fact that he was one of the subjects of the claimant's grievance even though this is stated on the first page of the claimant's written response to the management statement of case. The Tribunal considered it to be inconceivable that Mr McKay would not have read such an important document from the claimant, and the Tribunal rejected the suggestions, made in evidence by both Mr McKay and Ms Peace, that they had no idea that the claimant had raised a grievance about them until some months after the claimant's dismissal.

88. Mr Hodgkinson was asked a number of questions, in the claimant's absence. He attempted to address the respondent's questions, but was unable to answer many of the questions and often had to say, "I cannot comment".

89. During the disciplinary hearing, Ms Peace gave evidence about referring the matter of the data breaches to the ICO and to the claimant's regulatory body, the HCPC. Ms Peace said that she had filled in a data breach form which had been sent to the respondent's complaints and information team manager and gave the impression that the matter had been reported to the ICO when, in fact, it had not and Ms Peace was well aware of that position. Her answers to questions lacked clarity, so much so that Ms Scott was shocked to discover, only when giving evidence to the Tribunal, that no ICO referral had ever been made. Ms Scott was of the view that Ms Peace had given her the wrong impression about that matter. Likewise, when asked about the HCPC referral, Ms Peace said that she had contacted HR immediately for advice and filled in a data breach form which subsequently went to the HCPC. She was asked about the referral to the HCPC in December 2017 and Ms Peace said that she believed it was referred to the HCPC before then and that she could not comment on the date. What she did not tell the disciplinary hearing was that she was the manager who had made the referral to HCPC in December 2017 and that no referral had been made prior to December 2017.

90. In summing up the management case, Mr McKay sought to suggest that the claimant's long service and experience should be held against the claimant, rather than going to her credit, and that the respondent would not be able to control, monitor or trust the claimant in future. He recommended that the claimant be dismissed without notice "based on the precedent set by recent and similar cases", without going into what those cases were.

91. The disciplinary hearing adjourned for the panel to deliberate on its decision. The notes of this meeting were not disclosed. Ms Scott candidly gave evidence that her view at the time had been to give the claimant a written warning. However, she was told by the HR manager, Ms Waldron, that because the claimant had committed gross misconduct, the only sanction available was summary dismissal and so Ms Scott felt compelled to change her decision.

92. When the disciplinary hearing reconvened, the chair told the hearing that the panel had decided that all 3 allegations should be upheld against the claimant. In respect of mitigation, the panel said that it had *"considered all the mitigating factors but feel that these do not have any impact on the outcome"*. As a result, the claimant was summarily dismissed on 6 April 2018, in her absence.

Dismissal and appeal

93. On 16 April 2018, the respondent sent the claimant a letter to confirm the outcome of the disciplinary hearing, namely that she was dismissed for gross misconduct based on all 3 allegations.

94. On 16 April 2018, the claimant submitted an appeal against her dismissal, producing a statement that is 17 pages long and includes copies of text messages to show that she had communicated with Ms Peace on both 18 April 2017 and 8 May 2017, about the incidents for which she was dismissed.

95. Also, on 16 April 2018, the claimant wrote to the respondent to resubmit her grievance, stating that she felt it was unreasonable to have to resubmit the grievance and asking that it be accepted, given her health issues. The claimant also reported that she had spoken to ACAS about resubmitting her original grievance.

96. On 19 April 2018, Ms Peace told the HCPC that the claimant had been dismissed for gross misconduct. In her letter, Ms Peace also tells the HCPC that the respondent will be writing to the family to notify them of the claimant's data breach. Despite this suggestion, there was no evidence that the family concerned were ever told about the data breach and the respondent's witnesses were unable to explain why it had taken 12 months to realise such action needed to be taken in any event.

97. On 26 April 2018, Ms Jeffery from HR wrote to the claimant to inform her that her grievance was in effect rejected by the respondent once again, this time because the issues had previously been raised in meetings with Mr McKay and it was suggested that the claimant should have raised her concerns long ago if she was unsatisfied with the outcome of that process. The letter, in the bundle at page 931, ends *"However you have raised a number of issues and it is my intention to refer these to the department to consider and take any appropriate action required."* There was no evidence that any such referral or action resulted and, indeed, in Ms Jeffery's undated report on the claimant's grievance of 12 March 2018, to David Pearson, Corporate Director at the respondent, Ms Jeffery opines that there are "lessons to be learned" but then recommends that no further action is required.

98. On 7 May 2018, the claimant wrote to the respondent to complain about how her grievance had not been addressed. The claimant wrote that the behaviour of Ms Peace *"warrants further investigation by Senior Leaders (senior to Paul McKay) because (as raised in the grievance), I believe that he has found in NP's favour on previous occasions, even with significant evidence against her. NCC have a history of finding grievance/harassment and bullying cases as 'no case to answer' or 'dealt with informally' and I believe my case falls within one of many against NP, which was heard by Paul McKay without proper consideration of all the evidence and the Code of Conduct … Shortly after raising this issue as a whistleblowing, NP was notified of my actions by Paul McKay … and I was then suspended by NP …"*

99. In response, Ms Jeffery emailed the claimant on 21 May 2018 about her final payslip and collection of her belongings and took the opportunity to say, *"In regard to the other points you raise I would reiterate that whilst you remain dissatisfied with my response I have nothing further to add."* In short, the claimant had raised very serious allegations about a senior member of the respondent's management and the respondent's handling of bullying and harassment allegations. However, the respondent's Senior HR manager was not prepared to refer those allegations to anybody for consideration.

100. On 6 June 2018, Ms Scott produced a 'management statement of case' for the claimant's appeal. The statement was written by HR, and stated that the claimant *"chose not to attend the hearing"*. In fact, as the respondent knew, the claimant was too ill to attend and she had supplied regular medical evidence to them regarding her incapacity. In addition, the statement refers to *"overwhelming evidence and admissions made by [the claimant]"* without specifying to what this related and contends that summary dismissal was an entirely reasonable decision to make. The impression given is that the claimant had admitted to everything, when she

had not, and no account is taken of the evidence produced by the claimant or her mitigation.

101. On 11 June 2018, the claimant produced a statement of case for her appeal in response to the management statement of case. In her statement, the claimant pointed out that the text messages between her and Ms Peace had not been recorded by the original investigating officer despite her being shown them, that none of the witnesses had given evidence that she had ever shared any information and that it was only Ms Peace who said so, and that the report from the respondent's EDT had confirmed that they told the claimant of the information in question. Further, the claimant says that she had "submitted a whistleblowing against [Ms Peace]" a few weeks before and she also raised her recent grievance which HR had informed her would not be heard.

Appeal hearing

102. The appeal hearing took place on 29 June 2018 and was chaired by Adrian Smith, the respondent's Corporate Director for Place, assisted by an HR manager. The claimant attended with the support of her daughter.

103. The management case at the appeal was presented by Ms Scott, the respondent's dismissing officer. Having heard from Ms Scott, Mr Smith accepted that the claimant had not, in fact, shared the information from Mosaic with Ms Hallam herself and that it was Mr Donohue who had done so. However, in the letter he wrote, turning down the appeal, Mr Smith concluded that because the claimant was in the room when the information was shared and because she did not challenge the sharing of that information, the claimant was therefore a party to it. The Tribunal considered that this was not the substance of allegation 2 and it amounted to an attempt by Mr Smith to make the evidence fit allegation 2 when he knew that the evidence did not show that the claimant had shared private information herself; alternatively, he was somehow seeking to blame the claimant for failing to prevent the sharing of private information even though that was not the allegation she faced.

104. The appeal considered the text messages that the claimant had produced to show her communications with Ms Peace on 18 April 2017, and which were appended to the claimant's first letter of appeal. Ms Scott said that the panel had assumed there would have been a conversation between the claimant and Ms Peace but also said "there was no recollection of that" when in fact the evidence of the claimant had been that she recalled the conversation. It was only Ms Peace who had said she did not recollect it, such being her stock response to many matters that were put to her in evidence. Ms Scott said that the panel did not know the nature of the conversation and had no evidence of such, when in fact the evidence of the claimant had been that she told Ms Peace what she had done to check the records on 18 April 2017.

105. The claimant's daughter sought to introduce the fact of the claimant's whistle-blowing to the appeal, by way of background, and to explain why her mother had been dismissed. She pointed out that, on 18 April 2017, Ms Peace was not aware of the whistleblowing but that, by 26 April 2017 she was. The claimant's daughter contended that on 8 May 2017, when the second incident took place, Ms Peace's approach to the claimant was tainted by her knowledge that the claimant had 'blown the whistle' about Ms Peace's conduct. Mr Smith's response was to ask if that was a comment or a question. He did not alert himself to the possibility of a whistle-blower being victimised, nor did he make any enquires about the claimant's relationship with Ms Peace.

106. The claimant returned several times to her concerns about Ms Peace's and Mr McKay's involvement in the disciplinary process. She pointed out that Ms Peace was a material witness (in fact the only witness to give evidence at the disciplinary hearing for the respondent apart from its investigating officer) and that Mr McKay had presented the management case.

107. In addition, at the appeal hearing the claimant presented the results of a Freedom of Information Act request she had made to the respondent, to the effect that, between 2012 and 2015, the respondent had dealt with 53 complaints of harassment and bullying all of which had been dealt with informally. The claimant contended that this showed a pattern of behaviour within the respondent whereby such matters are not dealt with properly.

108. Ms Scott told the appeal that "*the whistle-blowing incident is separate to this issue … whilst the statement of case on the day mentioned the relationship with Nicola, that was not a bearing on the outcome of her conduct."* Ms Scott's evidence to the Tribunal was that she did not know the detail of the whistleblowing, or of the claimant's grievance about Ms Peace and Mr McKay, and that she had been told by HR that it was a separate matter and so she did not take it into account. When asked in cross-examination whether it would have made a difference, had she known, Ms Scott was at first unable to say but did concede that she would have taken it into account and that it could have made a difference. The Tribunal noted that Ms Scott had not been shown the grievance or any of the complaints by the claimant's team against Ms Peace at the time of the disciplinary hearing.

109. On 4 July 2017, the respondent sent the claimant an outcome letter, turning down her appeal. Mr Smith upheld the dismissal on all 3 allegations despite that, in relation to the second allegation, he had agreed that it was Mr Donohue who had in fact shared the information with the staff member, and not the claimant. He also accepted that the text messages were evidence of a conversation on 18 April 2017 between the claimant and Ms Peace. After extensive questioning, Mr Smith accepted

that the claimant and Ms Peace had in fact had a conversation on 18 April 2017 in which the claimant had told Ms Peace that she had accessed the Mosaic records. However, Mr Smith sought to justify his view, held at the time of the appeal, that there had not been a conversation because the claimant had not told Ms Peace specifically about a "data breach" and had not followed the respondent's procedures for reporting such. That view had led Mr Smith to refer, in the appeal outcome letter, to the fact that management had taken no action, on 18 April 2017, about any data breach, as some sort of justification for discounting the claimant's evidence about the conversation and the text messages which supported her. This was even though Mr Smith told the Tribunal that he believed the claimant had been honest in her account of events at the appeal hearing.

110. Mr Smith wrote that the claimant had *"admitted to accessing the Mosaic records of a service user you had no professional involvement with nor authority to do so."* That statement reads as if the claimant had admitted to all matters contained within the first allegation when in fact the claimant had admitted to accessing Mosaic in relation to a service user who was not part of her personal caseload but she did not admit or accept that she had no authority to do so. The claimant explained on a number of occasions in the disciplinary process that she considered that she had authority to access the records, by virtue of her position as a manager faced with the exceptional circumstances of a member of her team. The Tribunal also noted that Mr Smith sought legal advice on the claimant's contentions as to her authority to access the records. If he had believed that the claimant had admitted that she had no authority to do so, such an enquiry would not have been necessary.

The applicable law

111. A concise statement of the applicable law is as follows.

Whistle-blowing claims

112. Section 47B ERA provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer on the ground that the worker has made a protected disclosure.

113. Section 47(1A) to (1E) ERA provides that an employer can be vicariously liable for the detrimental acts of its workers unless the employer has taken all reasonable steps to prevent the detriment. It is immaterial whether the act of detriment or deliberate failure to act was done with the knowledge or approval of the employer.

114. Section 103A ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

115. A “protected disclosure” means a disclosure of information, but not mere allegations, to the employer or to a prescribed person which, in the reasonable belief of the worker is in the public interest and tends to show one or more matters including a failure to comply with a legal obligation, that the health or safety of any individual has been endangered, or that a criminal act has been committed.

116. The Tribunal has jurisdiction to consider complaints of public interest disclosure detriments by section 48(1A) ERA. Section 48(2) stipulates that on such a complaint it is for the employer to show the ground on which any act, or any deliberate failure to act, was done.

117. A ‘detriment’ arises in the context of employment where, by reason of the act(s) complained of a reasonable worker would or might take the view that he or she has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: see for example, Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL.

118. In Fecitt v NHS Manchester [2012] IRLR 64 the Court of Appeal held that for the purposes of a detriment claim, a claimant is entitled to succeed if the Tribunal finds that the protected disclosure materially influenced the employer’s action. The test is the same as that in discrimination law and separates detriment claims from complaints of unfair dismissal under section 103A ERA, where the question is whether the making of the protected disclosure is the reason, or at least the principal reason, for dismissal. The claimant must establish a causal link between the protected disclosure and her dismissal and must establish, on a balance of probabilities, that the protected disclosure was the reason or principal reason for her dismissal.

Unfair dismissal

119. Section 98 ERA sets out a two-stage test to determine whether an employee has been unfairly dismissed. First, the employer must show the reason for dismissal or the principal reason and that reason must be a potentially fair reason for dismissal. The respondent contends that the reason for dismissal was the claimant’s conduct. Conduct is a potentially fair reason for dismissal under section 98 (2) (b) ERA.

120. In Jhuti v Royal Mail [2019] UKSC 55, where a manager decided to engineer the dismissal of an employee, and faked an admissible reason which fooled the dismissing officer, the ‘principal reason’ for dismissal was held to be the hidden reason operating in the mind of the manager, instead of the admissible reason operating in the mind of the decision-maker.

121. If the employer shows a potentially fair reason in law, the Tribunal must then consider the test under section 98 (4) ERA, namely whether, in all the circumstances, including the size and administrative resources of the respondent's undertaking, the respondent acted reasonably or unreasonably in treating that reason, i.e. conduct, as a sufficient reason for dismissing the claimant and that the question of whether the dismissal is fair or unfair shall be determined in accordance with equity and the substantial merits of the case. In Jhuti, it was held that "*the question of whether the knowledge...of a person other than the person who actually decided to dismiss, could be relevant to the fairness of a dismissal, could arise both in relation to the Tribunal's consideration of the reason for dismissal under section 98(1) and/or its consideration of the section 98(4) question...[In] a case where someone responsible for the conduct of a pre-investigation did not share a material fact with the decision-maker, that could be regarded as relevant to the Tribunal's adjudication of the section 98(4) question.*"

122. In considering the reasonableness of a dismissal for misconduct, the Tribunal must have regard to the test laid out in the case of British Home Stores -v- Burchell [1978] IRLR 379 and consider whether the respondent has established a reasonable suspicion amounting to a genuine belief in the claimant's guilt and reasonable grounds to sustain that belief and the Tribunal must also consider whether the respondent carried out as much investigation as was reasonable in the circumstances.

123. The issue of the reasonableness of the dismissal must be looked at in terms of the set of facts known to the employer at the time of the claimant's dismissal, although the dismissal itself can include the appeal; so, matters which come to light during the appeal process can also be taken into account: West Midlands Co-operative Society Ltd -v- Tipton [1986] IRLR 112.

124. The Tribunal must also consider whether the decision to dismiss fell within the band of reasonable responses open to a reasonable employer in the circumstances of the case: Iceland frozen Foods Ltd -v- Jones [1982] IRLR 439. The range of reasonable responses' test applies both to the decision to dismiss and to the procedure by which that decision is reached: Sainsbury's Supermarkets Ltd –v- Hitt [2003] IRLR 23.

125. The ACAS Code of Practice on Disciplinary and Grievance Procedures contains guidance on the procedures to be undertaken in relation to a dismissal for conduct. Although compliance with the ACAS Code is not a statutory requirement, a failure to follow the Code should be taken into account by a Tribunal when determining the reasonableness of a dismissal.

Wrongful dismissal – Notice pay

126. Section 86 ERA provides that an employer is required to give minimum notice to an employee to terminate her contract of employment. The statutory minimum period of notice which an employer is required to give to an employee is one week's notice for each completed year of service up to a maximum of 12 weeks' notice. Notice requirements under a contract of employment may be greater. However, an employer is entitled to terminate the contract of an employee without notice in circumstances of gross misconduct.

Holiday pay

127. Regulations 14(1) and (2) of the Working Time Regulations 1998 provide that a worker is entitled to payment in lieu of accrued unused holiday entitlement where her employment is terminated during the leave year - where, on the termination date, the proportion of statutory annual leave she has taken under regulations 13 and 13A of the Working Time Regulations 1998 is less than the proportion of the leave year that has expired.

128. In the course of submissions, the Tribunal was referred to the following case law authorities, of which the Tribunal took note but not in substitution for the relevant statutory provisions: -

Singh v London Country Bus Services Ltd [1976] IRLR 176
W Devis & Sons v Atkins [1977] IRLR 314 HL
Polkey v AE Dayton Services Ltd [1987] UKHL 8
Whitbread & Co plc v Mills [1988] ICR 776
Clark v Civil Aviation Authority [1991] IRLR 412
Stoker v Lancashire County Council [1992] IRLR 75
Byrne v BOC Ltd [1992] IRLR 505
Clarke v Trimoco Group Ltd [1993] ICR 237
Chief Constable of Lincolnshire Police v Stubbs [1999] IRLR 81
Wilson v Ethicon Ltd [2000] IRLR 4
Lister v Lesley Hall Ltd [2001] UKHL 22
Fincham v HM Prison Service UKEAT 3.12.2001
A v B [2003] IRLR 405
Strouthos v London Underground Ltd [2004] IRLR636
Aslef v Brady [2006] IRLR 576
Taylor v OCS Group Ltd [2006] IRLR 613
Boulding v Land Securities Trillium (Media Service) Ltd UKEAT 3.5.2006
Lakshmi v Mid Cheshire Hospitals NHS Trust [2008] IRLR 956
Roldan v Salford NHS Trust [2010] ICR 1457
Goode v Marks & Spencer plc UKEAT 14.4.2010
NHS Leeds v Larner [2012] EWCA Civ 1034
Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4
Cavendish Munro Professional Risks Management v Geduld [2012] IRLR 38

West London Mental Health NHS Trust v Chhabra [2013] UKSC 80
Blackbay Ventures Ltd v Gahir [2014] IRLR 416
Panayiotou v Chief Constable of Hampshire Constabulary [2014] IRLR 500
Edwards and others v SS for Justice UKEAT/0123/14/DM
Chesterton Global Ltd v Nurmohamed UKEAT/0335/14
Ramphal v Department of Transport [2015] ICR 23
Kilraine v London Borough of Wandsworth UKEAT/0260/15
Stewart v NHS Business Services Authority [2018] EWHS 2285 Ch
Uddin v London Borough of Ealing UKEAT/0165/19 (unreported)
Arjomand-Sissan v East Sussex Healthcare NHS Trust UKEAT 17.4.2019

Submissions

129. Counsel for the respondent made a number of detailed submissions which the Tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:- the claimant's disclosures did not qualify as protected disclosures because they were opinions, made as part of a witch-hunt by the claimant against Ms Peace and were not made in the public interest; the claimant had been fairly dismissed for gross misconduct, to which she had admitted; that allegation 1 was not in dispute and was the reason for the claimant's dismissal and not a bogus or invented reason; that the investigation process, suspension, management statement of case and Ms Peace's interview with the investigating officer all flowed from the claimant's misconduct and had nothing to do with any protected disclosures; that the dismissing officer had separated the claimant's grievance from the allegations she was tasked to consider and so had a genuine belief in the claimant's guilt; that Ms Houlton undertook a thorough investigation; that summary dismissal fell within the range of reasonable responses in the circumstances of the case; that the claimant would have been dismissed in any event given the seriousness of the misconduct and the loss of trust in the claimant; and that the claimant did not seek to carry over any outstanding holiday entitlement and so had been paid for accrued holiday entitlement owing at termination.

130. Counsel for the claimant also made a number of detailed submissions which the Tribunal has considered with care but do not rehearse in full here. In essence it was asserted that:- the dismissal was not only substantively unfair but also that the principle reason for dismissal was the claimant'' protected disclosures about Ms Peace who then set out to ensure the claimant's dismissal; that the respondent did not have a genuine belief in the claimant's guilt; that Ms Peace sent selective information overlaid with her own views, to the investigation and ensured that Ms Ramage's advice was provided so as to steer the investigation in a particular way; that the respondent was blind to the possibility that, in the extreme circumstances faced by the claimant, she might have a right or

justification for accessing Mosaic within her responsibilities and duties as a manager; that the respondent had no reasonable belief that the claimant had shared information within the meaning of allegation 2; that the investigation was wholly unreasonable and flawed due to the actions of Ms Peace; that dismissal was not within the band of reasonable responses; that there should be no reductions – whether for Polkey or on a just and equitable basis - because the Tribunal cannot safely conclude that the outcome would have been dismissal in any event; and that the claimant's assertions as to her holiday pay had gone unchallenged by the respondent.

Conclusions (including where appropriate any additional findings of fact)

131. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

Unfair dismissal

132. The Tribunal first considered what was the respondent's principal reason for dismissing the claimant. Ms Scott's reason for dismissing the claimant was misconduct. The Tribunal accepted that, at the material time, that was Ms Scott's view based on the case presented to her but the Tribunal considered that misconduct was not the true reason for the claimant's dismissal. On the basis of the Tribunal's findings of fact as to the manner and conduct of the investigation, see paragraphs 46 - 66 above and the resulting investigation report, the Tribunal found that Ms Scott was the "deceived decision maker" in the Jhuti sense, because she was presented with what has been shown by the evidence in this case to be limited and selective materials gathered through a flawed investigation, wholly influenced and steered by the claimant's manager, Ms Peace, with key matters of importance, in terms of context, having been withheld from Ms Scott, who was also misled at the disciplinary hearing on a number of key matters. The Tribunal noted Ms Scott's evidence to the Tribunal, on the issue of ICO and HCPC referrals, to the effect that she considered that Ms Peace had given her the wrong impression about such matters, and in relation to the claimant's grievance, to the effect that she had been led to believe by Mr McKay that the claimant's grievance was a personal matter between the claimant and Ms Peace and unrelated to the disciplinary process – see paragraphs 87 and 89 above. Ms Scott accepted in evidence that the context of the grievance could have had a material effect on her decision-making.

133. The Tribunal considered the nature of the misconduct for which the claimant had been dismissed: firstly allegation 1, that on 18 April and 8 May 2017 the claimant was alleged to have abused her position of trust and confidence by misusing the Mosaic system and contacts within the respondent (the Emergency Duty Team) to look up/discuss private records of a member of the public (the service user known as MGB) with whom

she was said to have had no professional involvement with, or right to do so. Having examined the events of 18 April 2017, at paragraphs 25 - 30 above, and the events of 8 May 2017, at paragraphs 37 - 38, the Tribunal concluded that what the claimant did, on each occasion, did not amount to misconduct under the respondent's policies. In deciding this issue, the Tribunal accepted the submissions of Counsel for the claimant, that the warning on Mosaic, see paragraph 16 above, is not clear and unambiguous and could be said to be misleading. It merely suggests that looking at records outside of responsibilities and duties *may* result in disciplinary action whereas the respondent's approach to the disciplinary was to adopt the view that such constituted gross misconduct for which dismissal was the primary sanction. In the respondent's disciplinary policy, the list of gross misconduct identifies 11 items none of which can be said to clearly and unambiguously apply to the claimant's case, applying Singh v London Country Bus Services Ltd.

134. In any event, the Tribunal did not find that the claimant had misused the Mosaic system as described in allegation 1, because the Tribunal found that the claimant had legitimate reasons for accessing the records, as a manager faced with exceptional circumstances that had posed a risk to the life of a member of her team. The respondent's policy documents, including the disciplinary policy, the information sharing protocol and the claimant's job description as a team manager support this conclusion. The Tribunal accepted the claimant's evidence, that she reasonably believed that she was acting within the respondent's policies and in accordance with her duties and responsibilities at the time. Her belief was supported by the evidence of Mr Teal and Mr Robinson, both of whom were long-standing and experienced managers who agreed that it would have been inconceivable for a manager not to have accessed the records in the circumstances faced by the claimant and that there was a legitimate reason to do so in the aftermath of the incident and threats to a team member's life. Mr Teal told the Tribunal that the first thing a manager would do in such circumstances would be to access the records to check the situation, and that it would be extraordinary if a manager did not so access the records.

135. The Tribunal next considered allegation 2, that the claimant was alleged to have shared private information on the service user with other parties. There was no evidence that the claimant had in fact done so. In cross-examination, Mr Smith agreed that the claimant had not done so, which led to his attempt to justify, and so uphold allegation 2 by saying that the claimant was present at the time that information was shared and had done nothing to challenge the sharing of private information by another employee. Mr Smith sought to suggest that this amounted to "being a party to the sharing" of data. That was not the allegation the claimant faced and the Tribunal was concerned that a senior manager of the respondent would go to such lengths to uphold the dismissal, on appeal, when he could see that the claimant was not guilty of allegation 2.

136. In the list of issues, number 3, the Tribunal has been asked to consider whether the actions of the claimant in accessing the Mosaic records were capable of amounting to gross misconduct or misconduct in accordance with the respondent's policies and codes of conduct in the light of the particular circumstances which faced her at the time. In respect of gross misconduct, the Tribunal has found that the respondent's disciplinary policy, list of gross misconduct, lists 11 items none of which can be said to clearly and unambiguously apply to the claimant's case. In addition, the warning on Mosaic merely suggests that looking at records *outside of* responsibilities and duties *may* result in disciplinary action. This raises an issue, which the respondent's witnesses were unable to explain with clarity, as to the extent of a manager's responsibilities and duties or what constitutes exceptional circumstances. The Tribunal considered that the respondent's Data Protection Policy, the Nottinghamshire Information Sharing Protocol and the respondent's Code of Conduct are all relevant to such considerations. However, the Tribunal noted that many of these relevant policy documents were not put before the disciplinary hearing or the appeal. There was no apparent consideration of the question of whether the claimant had committed any misconduct and no account taken of whether the claimant was acting in what she believed to be the best interests of the employee concerned, as a manager and for no personal gain. The claimant's explanations were ignored by the respondent and her mitigation was played down. Mitigation constituted a very minor part of the disciplinary investigation report, included at the end of the document, almost as an afterthought. Having considered the documents and the respondent's policies, the Tribunal accepted the submissions of Counsel for the claimant that there was no reasonable basis to find that the claimant was guilty of misconduct, let alone gross misconduct.

137. It follows from the above conclusions, that the Tribunal concluded that the respondent acted unreasonably in treating the claimant's misconduct as a sufficient reason for dismissing the claimant. At the time of her decision, Ms Scott had honestly believed that the claimant was guilty of misconduct. The Tribunal considered that Ms Scott's belief at that time had been based on the evidence presented to her at the disciplinary hearing. In the course of her evidence to the Tribunal, Ms Scott was shocked to discover that she had not been told about the history or context of relations between the claimant and Ms Peace and misled about the ICL and HCPC reporting. The Tribunal has found that Ms Scott was a deceived decision-maker. The Tribunal was here mindful of the decision in Devis v Atkins: that an employer cannot be said to have acted reasonably in dismissing if there were matters which it ought reasonably to have known which would have shown that the reason was insufficient.

Jhuti

138. The Tribunal considered this case to be analogous to Jhuti v Royal Mail because there was clear evidence that the claimant's protected disclosures about her line manager, Ms Peace, were the principal reason for the claimant's dismissal which was engineered by Ms Peace. The Tribunal considered that Ms Peace had determined that, because of the protected disclosures about her conduct, the claimant should be dismissed but that reason should be hidden behind an invented reason (gross misconduct). The reason for the claimant's dismissal, which was given by Ms Scott in good faith, has turned out to be bogus. The Tribunal took account of the fact that Ms Peace was told by the claimant about accessing Mosaic on 18 April 2017 but Ms Peace took no action for several weeks, until 10 May 2017 and shortly after her final discussion with Mr McKay, when she knew the outcome of the informal process conducted by Mr McKay arising from the claimant's protected disclosures about her conduct. The claimant had also told Ms Peace again, on 8 May 2017, of her access to Mosaic. However, Ms Peace took no action on either breach nor consulted HR until 10 May 2017.

139. Thereafter, Ms Peace sought to suspend the claimant, assumed responsibility for the conduct of the investigation including drafting the brief, influencing and steering the investigation, the disciplinary panel and the final outcome for the claimant and she did not share material facts with the decision-maker. The Tribunal noted that Ms Peace had initially been told by HR that the claimant's actions merited at most a strongly worded email or a caution. Ms Peace did not follow that advice. Instead, on 12 May 2017, she suspended the claimant without regard to the respondent's procedure for suspension, and only resorted to following the respondent's procedure for suspension in the next week, later telling the claimant that she had been placed on 'special leave' in the interim. Ms Peace had a number of email exchanges with HR in this period from which the Tribunal agreed with the submissions of Counsel for the claimant that these show Ms Peace was not satisfied with HR's response and advice and so she went away to build a case against the claimant. Despite HR giving clear advice to Ms Peace to "stand back" from the disciplinary process because of her role as a witness, Ms Peace completely ignored that advice and continued to involve herself in every aspect of the disciplinary process, appointing the investigating officer, compiling the investigation brief, packing it with evidence selected by herself and advice from a colleague, Ms Ramage, whom she had pre-briefed on what aspects should be covered, together with selecting witnesses who should be interviewed and then drafting the questions to be put to them. Later, Ms Peace engaged in emails with Ms Kirby, the respondent's complaints and information team manager, seeking to refer the claimant to the ICO and pushing an example of a social worker who had been prosecuted and a report of consequences for local authorities failing to report – see paragraph 73 above. Despite Ms Peace's efforts, she was aware that no report to the ICO was made, but nevertheless proceeded to mislead the disciplinary panel about that and other matters. The Tribunal considered that, if Ms

Peace had genuinely believed the claimant was guilty of misconduct, she could have stepped back, as HR advised, and allowed the investigation to take its course. However, she was intrinsically involved in setting it up and being an important material witness.

140. In Jhuti, the Supreme Court held that if a person in the hierarchy of responsibility above the employee determines that she should be dismissed for a reason but hides that reason behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason. The Tribunal considered that the knowledge and conduct of Ms Peace, as set out above, is therefore relevant to the fairness of the claimant's dismissal in addition to the reason for dismissal. In all the circumstances, the Tribunal considered that Ms. Peace's actions had the effect of manipulating the investigation and ensuring that the outcome would be the Claimant's dismissal and that on a balance of probabilities her motivation was the claimant's protected disclosures.

141. As explained in paragraphs 133 – 136 above, the Tribunal considered that the respondent did not have reasonable grounds to form a belief that the claimant had committed misconduct. The evidence of Ms Scott was important to this aspect. First, she confirmed under cross-examination that, had she known that the alleged data breaches had not in fact been reported to the ICO, this would have made a significant difference and she said it would have been "very useful" to know. In response to the suggestion that Ms. Peace had misled her about whether a data breach had been reported to the ICO or not, Ms Scott conceded that this information could have led to a different outcome and that she would have raised this with HR and her line manager. Secondly, having accepted that the evidence appeared only to show that the Claimant had shared information with Ms. Peace and then told the member of staff concerned that there was nothing to share, Ms Scott's view was that this would most likely have meant there would not even have been a disciplinary investigation. Ms. Scott gave clear evidence that, in her mind, a simple access of confidential data with no right to do so would lead at most to a caution, because it is what an employee does with the data which is the important factor. Ms. Scott explained that she had considered it very serious because she had been led to believe that the Claimant had shared the fact of a safeguarding with Mr Donohue who in turn passed that information on to the member of staff concerned. Absent this, Ms Scott's evidence was that she doubted there would even have been an investigation of the Claimant. Third, Ms Scott accepted that, had she known of the detail of the claimant's whistleblowing, this would have had an impact on her decision. Further, Ms Scott candidly admitted that, in light of the above matters, she thought that the disciplinary hearing would not have gone ahead.

142. When questioned about the choice of dismissal as a sanction, Ms. Scott said that, once she had found gross misconduct, she felt that she had no option but to dismiss, because that was the direction that she had received on the day from Ms Waldron of the respondent's HR team. The Tribunal considered that this was important because Ms Scott's evidence was that she had never considered whether the Claimant had any right to access the records; the position put to her in the investigation brief and at the hearing was that the claimant had no such right and that, once there was proof from the Mosaic audits that the claimant had accessed the records on the dates in question, Ms Scott had understood that dismissal was the only option available due to the matter being one of gross misconduct. However, in the case of Wilson v Ethicon where alleged misconduct had occurred over a limited timespan against a background of an impeccable and long-standing work record, employers ought to consider whether an alternative sanction to dismissal should be imposed. In this case, the Tribunal considered that the claimant's record had no impact on the disciplinary outcome and was not considered, when it could and should have been.

The investigation

143. The Tribunal considered the investigation that was carried out by Ms Houlton. In doing so, the Tribunal took account of the gravity of the allegations against the claimant and that, if proven, they were likely to lead to the permanent end of the claimant's professional career. The claimant disputed the allegations throughout the disciplinary process and appeal. In those circumstances, the allegations should have been the subject of the most careful and conscientious investigation, per A v B. The facts of the alleged data breaches were in dispute between the parties but the claimant was not at any stage given the benefit of any doubt nor, was it apparent that the investigating officer had considered the conflicts in the evidence or tested the evidence. This was Ms. Houlton's first disciplinary investigation although she had a background of 30 years' experience conducting trading standards investigations and she approached the investigation as a prosecutor might, coming to firm conclusions that all the allegations were proven and that it was gross misconduct which meant dismissal should be considered. However, the Tribunal was concerned that there was no evidence that Ms Houlton took advice from or interviewed Ms Kirby, the respondent's data protection officer, nor that she interviewed members of the EDT team to discover who had spoken to the claimant, nor investigated what the Claimant had told HR on 18 April 2017, and Ms Houlton did not seek legal advice nor consider any of the relevant policy documents including for example the data sharing protocol or the claimant's job description.

144. The Tribunal considered that, at each stage of the process, the respondent was reluctant to accept or even check out what the claimant said, most notable being her assertion that she had informed Ms. Peace of

her access of the records on each occasion. Even when faced with text messages proving the fact of a conversation having taken place on 18 April 2017 between the claimant and Ms Peace, the respondent was not prepared to accept the claimant's statement of events unless the text message had actually included the exact content of the conversation. In effect therefore, the respondent was requiring the claimant to prove her own innocence or mitigating facts beyond all reasonable doubt.

145. It was also apparent from Ms. Houlton's evidence that 2 of the conclusions she came to regarding the case, as set out in the investigation report, namely that there had been a failure by the claimant to disclose her access to Ms. Peace on 18 April 2017 which could be regarded as dishonest, and the conclusion that there could be no justification for the claimant looking at the records regardless of the extreme circumstances, were both issues which had been pressed by Ms. Peace at the outset of the investigation. These matters were set out in Ms Peace's initial emails to HR which she ensured Ms. Houlton had, in the draft of the investigation brief, in the questions discussed with Mr. McKay, and at the meeting with Ms Houlton on 27 June 2017 and also in subsequent emails send by Ms Peace to Ms Houlton on 28 June 2017. In respect of the sharing of data (and in particular the safeguarding to the staff member, which Ms Scott had told the Tribunal was the most critical issue for her) Ms Houlton's conclusion on this important point did not stand up to scrutiny as it was based on pure speculation – "*Could that have been how John Donohue obtained some of the information about the safeguarding…?",* bundle page 426. Having recognised this speculation in her report, Ms Houlton told the disciplinary hearing that Mr Donohue *"… would not have had that information from anywhere else"*, bundle page 876. This statement was made despite the fact that Ms Houlton knew that the Mosaic records showed that Mr Donohue had been told of the safeguarding by the EDT on the Easter weekend, bundle page 537. This was a plainly inexcusable failing of the investigation because it led Ms. Scott to conclude that the claimant had indeed shared the most sensitive data with Mr Donohue, who in turn shared it with the staff member.

146. In light of the above, the Tribunal considered that the respondent's investigation was flawed, due to the actions and involvement of Ms Peace which led to numerous failings and limited enquiries, couple with attempts to discount the mitigating factors presented by the claimant or give any weight to them, and without consideration of why the claimant might not consider her actions to amount to a breach and/or why the claimant felt her actions were justified.

147. It follows from the above conclusions that the Tribunal found that the decision to summarily dismiss the claimant did not fall within the range of reasonable responses open to the respondent in the circumstances of the case and was unfair. The claimant's claim of ordinary dismissal therefore succeeds, regardless of any issues around her protected disclosures and

the Tribunal had no hesitation in deciding that the claimant could in no sense be said to have contributed to her dismissal by her conduct. Further, the Tribunal has identified a number of procedural defects and also takes account of the evidence of Ms Scott as to the effect of such on her decision to dismiss the claimant. In those circumstances, the Tribunal considered that it could not safely be said that the claimant would still have been dismissed but for any procedural defect, or in any event. No reductions shall therefore be made for any contributory fault, none being found, nor in relation to Polkey or on a just and equitable basis.

Public interest disclosures

148. The claimant has contended that she made 3 protected disclosures on: (1) 21 March 2017 to Paul McKay; (2) on 29 March 2017 to Paul McKay; and (3) by her written grievance dated 12 March 2018. The Tribunal considered that each of these disclosures qualify for protection because they each comprise the disclosure of factual information about the conduct of managers of the respondent, Ms Peace and later Mr McKay. The factual content of the disclosures made in March 2017 is substantiated by the testimony of 13 team members as to the conduct of Ms Peace, bundle pages 270 – 290.b, in contrast to a single individual who suggested it was a 'witch-hunt', when that individual admitted that Ms Peace had 'no filter' and also that she had been treated differently by Ms Peace. The Tribunal considered that the claimant had a reasonable belief that the disclosures were in the public interest in that they tended to show that the respondent, a large local authority, had failed to comply with its legal obligations to ensure the health and safety of its staff, to prevent bullying and harassment and to prevent discrimination. Further, the Tribunal concluded that the disclosures were made in good faith by the claimant and not for personal gain. She was concerned that the respondent should address the conduct of Ms Peace which she considered was having a negative effect on the Gedling team. The claimant made her first 2 disclosures on behalf of her team and was supported by the team's testimonies. The disclosure of facts pointing to a potential culture of bullying and harassment and of neglect of the needs of service users by the respondent's management is a serious matter, in the public interest. That seriousness was appreciated by Mr McKay who sought advice from HR. In that context, the Tribunal was concerned to find that HR approached the matter by advising that it should be treated as a private dispute about the claimant's contract, when all the evidence showed that it clearly was not.

Dismissal for making a protected disclosure

149. Applying Jhuti, the Tribunal considered that the claimant's dismissal by Denise Scott was effectively because the claimant made a protected disclosure – see also paragraph 140 above. The Tribunal considered that the reason operating in the mind of the manager who had engineered the

dismissal, Ms Peace, can in this case be imputed to the respondent, even though the decision-maker, Ms Scott, was unaware of it.

Detriment for making a protected disclosure

150. The claimant has pleaded that she suffered 4 acts of detriment in consequence of her protected disclosures – see the list of issues, numbers 15.1 – 15.4. The Tribunal found that each act of detriment was proven on the following bases.

151. First, the claimant was subject to what the Tribunal considered to be an unnecessary investigation and disciplinary process. The Tribunal accepted that, under the respondent's disciplinary policy, an investigation was necessary because misconduct had been alleged. However, the advice from HR, at the outset was that the data breaches, if any, merited a strongly worded email or, at most, a caution. A caution is a sanction under the respondent's initial and informal process. In addition, as confirmed by the evidence of Mr Smith, there could be no reasonable belief that the claimant had shared information within the meaning of allegation 2. Further, the evidence of Ms Scott, having been made aware of the context of the events of 18 April and 10 May 2017, was that she doubted there would even have been an investigation of the Claimant and she thought that the disciplinary hearing would not have gone ahead. So, the investigation, whilst flawed as found above, was also unnecessary and detrimental to the claimant.

152. Second, the Tribunal considered that the claimant was unnecessarily suspended during the investigation and disciplinary process. Ordinarily, suspension is a neutral act, and arguably appropriate whilst an investigation is conducted. However, the claimant was suspended by Ms Peace, initially without regard to the respondent's procedures by telephone on 12 May 2017, and this was not a neutral act. It was instead the first stage in a process to remove the claimant from the workplace – see the Tribunal's findings in paragraph 40, and conclusions in paragraphs 138 and 139.

153. Third, the Tribunal considered that the claimant had been subjected to biased, inaccurate and unfair criticism by Paul McKay in his management statement of case dated 16 March 2018 and sent to the claimant on 22 March 2018. The Tribunal found it difficult to comprehend why Mr McKay had felt the need to become involved in the disciplinary action against the claimant and not to recuse himself, given his prior knowledge and involvement with the claimant and Ms Peace. The respondent is a large organisation with plenty of other managers at Mr McKay's level who could have presented the management case, notwithstanding the fact that Ms Scott, a manager on a level below Mr McKay, was seen by him and HR as appropriate to head the disciplinary panel. Such does not accord with the principles of the ACAS Code of Practice.

154. Mr McKay's evidence on a number of matters was contradictory and lacking in credibility. The Tribunal found him to be an unreliable witness. For example, Mr McKay was asked to explain why he chose an informal approach to Ms Peace's behaviour in light of the serious and numerous disclosures made by the Gedling team, which he had described in his letter to Ms Peace of 26 April 201, as conduct which "*fell far below the standards expected of a Group Manager and was unacceptable*". Despite this finding, Mr McKay suggested that he had adopted an informal approach because he thought the claimant had instigated a 'witch-hunt' even though only 1 out of 27 team members had made that comment. Although Mr McKay was aware of the details of the claimant's whistle-blowing, he told the disciplinary panel that such was not relevant to the claimant's case and should be dealt with separately. His management statement of case to the disciplinary hearing was partial and made no mention of the claimant's mitigation. It included an assertion that the respondent's investigation had concluded that the claimant 'should' be dismissed. This mispresented the fact that Ms. Houlton's report had stated that the panel should 'consider' dismissal. In addition, Mr. McKay informed the panel, incorrectly, that no controls existed to monitor the claimant's access to Mosaic in the future, despite the fact that there was a documented ability for the Respondent to audit such access and despite that the respondent had the ability to block the claimant's access to Mosaic if it chose to do so.

155. Fourth, the Tribunal considered that the claimant was the subject of inaccurate and unfair criticism by Ms Peace when Ms Peace was interviewed for the investigation on 30 June 2017. Ms Peace's interview was the first conducted by the investigating officer, and the Tribunal considered that it set the tone for the future interviews, with the claimant placed as the last of the interviewees, interviewed over 3 weeks later. The running order of the interviews had been recommended by Ms Peace and never questioned. The transcript of that interview shows that Ms Peace was selective in the information she supplied verbally. She did not tell the investigation of her conversation with the claimant on 18 April 2017, although items such as the suggestion of a MARAC report and referral to women's aid, which she had mentioned in text messages to the claimant on 18 April 2017, were reported by Ms Peace to have been recommended on 10 May 2017. The access of records was presented as something that was plain wrong, without qualification and Ms Peace said that the claimant had admitted to such, and had told her that she knew that what she had done was wrong, and that the claimant "*was prepared to accept any consequences for it*". Ms Peace went further, in suggesting that the claimant had told her some information about the service user which Ms Peace had no right to know, when there was no evidence to support this. Ms Peace did not confine herself to factual matters but also provided her opinion on issues which were for the disciplinary panel to determine. At the end of the interview, Ms Peace asserted that she would not expect any

single member of staff to ever breach data when they had no professional involvement with them, saying "*It's common knowledge that you're not supposed to do that*" and that the claimant's "*awareness of safeguarding issues and data protection is much higher than expected from less senior and less experienced members of staff*" thereby in effect inviting the investigation to hold the claimant's seniority and long service against her.

156. The Tribunal considered that the claimant had suffered these detriments as a result of Ms Peace's involvement in the disciplinary process. The Tribunal has found that Ms Peace involved herself in the claimant's disciplinary as a direct consequence of the protected disclosures. The claimant's first 2 protected disclosures pre-dated the first, second and fourth detriments complained of. The claimant's grievance is dated 12 March 2018 and is date stamped as received by the respondent on 14 March 2018. The management statement of case, compiled by Mr McKay is dated 16 March 2018 and was completed and sent out on 22 March 2018, within a week of the claimant's grievance. The Tribunal has rejected Mr McKay's suggestion, in evidence, that he was not aware of the claimant's grievance until the end of April 2018. The claimant had mentioned it, including by reference to the behaviour of Mr McKay and of Ms Peace, in the first paragraph of her response to Mr McKay's management statement of case. This is a document which the Tribunal considered Mr McKay must have read when preparing for the disciplinary hearing. In the course of the hearing itself, Mr McKay addressed the fact of the claimant's grievance, saying that any issues that the claimant 'may have had' with Ms Peace would be addressed personally by him outside of the hearing, thereby demonstrating an awareness of the claimant's grievance at that time. The evidence in the bundle showed that the claimant had sent 3 copies of her lengthy grievance to the respondent, including one sent to the Chief Executive and one to Mr Pearson, the respondent's Corporate Director. The Tribunal considered that such senior officers would not have done nothing upon receipt of such a document, containing as it did serious allegations about a senior manager and that, at least out of courtesy, the manager(s) would have been notified of the fact of receipt of the claimant's grievance and likely provided with a copy for comment. This would accord with the respondent's procedure for such which envisages holding a meeting with the parties within 10 working days. Under cross-examination, Mr McKay conceded that there were issues between the claimant and Ms Peace because of the bullying allegations but he continued to maintain that these were separate matters. The Tribunal noted that, in his submissions to the disciplinary hearing, Mr McKay failed to mention the fact that he was one of the subjects of the claimant's grievance and he would not accept in evidence that this created a potential conflict of interest. The Tribunal considered that it would have been feasible, even at a late stage, for Mr McKay to have handed the management case to another manager to present.

157. In addition, HR were aware of the history between the claimant and Ms Peace, and of the claimant's grievance. HR had previously advised Ms Peace that she should 'stand back' but did not give any such advice to Mr McKay. For reasons which were never explained, the Tribunal found that Mr McKay was determined to present the management case against the claimant and he pressed on with it despite his knowledge of the grievance against himself.

158. In light of the Tribunal's conclusions on the issues above, the Tribunal had no hesitation in finding that the claimant was unfairly dismissed and dismissed for whistle-blowing, for which she also suffered detriments prior to her dismissal. As explained above, the Tribunal considered this case to be analogous to Jhuti v Royal Mail. The Tribunal found that the disciplinary process leading to the dismissal of the claimant was open to manipulation by Ms Peace who acted without apparent oversight of or checks on her actions, whilst the respondent's managers accepted guidance from HR without question, did not appear to consult the respondent's policy or procedural documents independently and seemed unable or unwilling to confront the most serious misconduct allegations against fellow managers in anything other than an informal manner.

Wrongful dismissal

159. The claimant was dismissed summarily and wrongfully because, as the Tribunal has found, the claimant was not guilty of any misconduct, see paragraph 136 above. She is therefore entitled to compensation for her wrongful dismissal being the equivalent of a payment in lieu of contractual/statutory notice of 12 weeks' pay.

Holiday pay

160. The Tribunal was told that the claimant was entitled to 26 days' holiday per year and that the respondent's leave year ran from 1 April to 31 March. The claimant was off sick from 9 October 2017 until her employment was terminated, effective 16 April 2018. Whilst off sick, the claimant continued to accrue holiday entitlement which she had no opportunity to take because she was off sick. Per NHS Leeds v Larner, the claimant is entitled to carry over all and any holiday entitlement that was outstanding when she went off sick and also such further holiday entitlement as accrued during her long-term sick leave, into the next leave year, because she had not had a proper opportunity to take that leave whilst off sick. The respondent did not challenge the claimant's assertion that she had been prevented from cancelling her holiday which fell during her sickness absence.

161. The respondent made a payment of an amount of holiday pay at the termination of the claimant's employment. The Tribunal has been unable in the course of its deliberations to establish with precision, what

outstanding accrued holiday entitlement the claimant had due at the termination of her employment. In the circumstances, the calculation of how much further holiday pay the claimant was entitled to at the termination of her employment shall be dealt with at the forthcoming remedy hearing.

Remedy

162. As the claimant has succeeded in each of her complaints, the claim shall proceed to a remedy hearing on a date to be fixed.

_____
Employment Judge Batten
Date: 29 April 2021

JUDGMENT SENT TO THE PARTIES ON:

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FOR THE TRIBUNAL OFFICE