



EMPLOYMENT TRIBUNALS

Claimant: Ms M Kagdadia

Respondent: Shilchem Ltd

Heard at: Leicester
On: 9, 10 and 11 May 2022
In Chambers: 12 May 2022

Before: Employment Judge M Butler
Members: Mrs J Barrowclough
Mr J Hill

Representation

Claimant: Mrs J Duane of Counsel
Respondent: Ms N Webber of Counsel

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is -

1. The Claimant was procedurally unfairly dismissed but her compensation and basic award are reduced by 100%.
2. The claim of unauthorised deductions from wages is not well-founded and is dismissed.
3. The claims of age discrimination and harassment are not well-founded and are dismissed.
4. The claim of failure to provide updated written particulars of employment succeeds and the Respondent is Ordered to pay the gross sum of £997.50 to the Claimant.

RESERVED REASONS

THE CLAIMS

1. The Claimant submitted her claim to the Tribunal on 27 July 2021 whilst a litigant in person. After instructing solicitors, amended Particulars of Claim were submitted to the Tribunal on 19 September 2021 to include claims of

direct age discrimination, harassment and unauthorised deductions from wages. The application to amend the claims to include the additional claims was granted by Employment Judge Ahmed at a Preliminary Hearing on 29 October 2021.

2. The Respondent is a pharmacy business. The Claimant was dismissed for gross misconduct in that she gave the password to the Respondent's NHS email account to the former owner of the Pharmacy at which she worked thereby allowing him access to sensitive and confidential information. She further claims that her dismissal was due to her age because the present owner wished to employ someone younger at a lower wage to undertake many of the duties the Claimant undertook. The claim for unauthorised deductions arises out of a reduction in her hours of work when the present owner decided that she would only undertake dispensing duties and the Claimant had not agreed to this reduction.
3. The Respondent defends the claims. They argue that the dismissal for gross misconduct was fair after a reasonable investigation and the dismissal fell within the range of responses of a reasonable employer. Discrimination on the grounds of age is denied as is harassment. The claim for unauthorised deductions from wages is contested on the ground that the Claimant agreed to the reduction in her hours of work.

THE ISSUES

4. The parties have helpfully agreed a list of issues, which are as follows:

Time limits

- 4.1 Was the Claimant's claim for discrimination presented within the time limits prescribed by Section 123(1) of the Equality Act 2010 (EqA)?
- 4.2 If it is not in time, would it be just and equitable to extend time under Section 123(1)(b) EqA?

Failure to provide updated contract of employment

- 4.3 Did the Respondent omit to provide the Claimant with an updated contract of employment as alleged, or at all?

Unlawful deduction of wages

- 4.4 Were the deductions identified in paragraph 3 of the amended Particulars of Claim authorised by a statute, or a provision in the Claimant's contract?
- 4.5 If not, did the Claimant give her prior written consent to the deduction?
- 4.6 If the deductions were not authorised, what sums does the Claimant allege were unlawfully deducted by the Respondent and on what

date(s)?

Unfair dismissal

- 4.7 Did the Respondent have a fair reason for dismissal, namely misconduct?
- 4.8 Did the Respondent have a genuine belief in the Claimant's misconduct at the time the Claimant was dismissed?
- 4.9 If so, was such belief based upon a reasonable investigation by the Respondent prior to dismissing the Claimant?
- 4.10 Was the Claimant informed, prior to the disciplinary meeting on 11 June 2021, that a possible consequence of this meeting could be her dismissal?
- 4.11 If so, did the Respondent, taking into account its size and resources, have reasonable grounds for treating the misconduct as a sufficient reason for dismissal, ie was it within the range of reasonable responses?

Age discrimination

- 4.12 Can the Claimant show that the following acts occurred, as set out at paragraph 8 of the amended Particulars of Claim:
- (a) The Claimant was informed that Mr Dipen Patel wanted "someone younger".
 - (b) The Claimant was removed from shifts on Saturdays in April 2021.
 - (c) The Claimant was removed from shifts on Thursday afternoons in May 2021.
 - (d) The Claimant was suspended and invited to a disciplinary hearing.
 - (e) The Claimant was dismissed on 11 June 2021.
- 4.13 Who is/are the Claimant's comparators?
- 4.14 If the Claimant is able to prove any or all of the alleged conduct referred to above, in each case did the Respondent treat the Claimant less favourably in doing so than it did or would have treated the relevant comparator(s)?
- 4.14 If so, in each case was such less favourable treatment because of the Claimant's age?

Harassment

- 4.15 Did the Respondent engage in unwanted conduct towards the Claimant which had the purpose or effect of creating a hostile, degrading, humiliating or offensive environment for the Claimant?
- 4.16 If so, was such conduct related to the Claimant's protected characteristic of age?

Remedy

- 4.17 Is the Claimant entitled to financial compensation? If so, at what level?
- 4.18 Is the Claimant entitled to injury to feelings? If so, at what level?
- 4.19 If the Claimant was unfairly dismissed, should any compensation awarded be reduced on the ground that:
 - (a) the Claimant has failed to properly mitigate any purported loss, and/or
 - (b) it would be just and equitable in all the circumstances, and/or
 - (c) if the sanction of dismissal if deemed to be unfair as outside the range of reasonable responses, should there be a reduction in compensation because of contributory conduct?
 - (d) if the Claimant was unfairly dismissed because the Respondent failed to follow a fair process, if such a process had been followed would the dismissal have been fair, with compensation being reduced accordingly (in accordance with ***Polkey v A E Dayton Services Ltd [1987] IRLR 593***)?
 - (e) should there be any alteration in the compensation awarded through a failure by the Claimant or the Respondent to follow the ACAS Code of Practice.

THE LAW

5. Section 123(1) EqA provides:

"123 Time limits

- (1) *Proceedings on a complaint within section 120 may not be brought after the end of—*
 - (a) *the period of 3 months starting with the date of the act to*

which the complaint relates, or

- (b) such other period as the employment tribunal thinks just and equitable.”*

6. Section 1 of the Employment Rights Act 1996 (ERA) provides:

“1 Statement of initial employment particulars.

- (1) Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.”*

7. Section 13 ERA provides:

“13 Right not to suffer unauthorised deductions.

- (1) An employer shall not make a deduction from wages of a worker employed by him unless—*
 - (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or*
 - (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.”*

8. Section 98 ERA provides:

“98 General.

- (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
 - (a) the reason (or, if more than one, the principal reason) for the dismissal, and*
 - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
- (2) A reason falls within this subsection if it—*
 - (a) ...*
 - (b) relates to the conduct of the employee,*
 - (c) ...*
 - (d) ...*

- (3) ...
- (4) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
 - (a) *depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
 - (b) *shall be determined in accordance with equity and the substantial merits of the case.”*

9. Section 4 EqA provides that age is a protected characteristic.

10. Section 13 EqA provides:

“13 Direct discrimination

- (1) *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
- (2) *If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.”*

11. Section 26 EqA provides:

“26 Harassment

- (1) *A person (A) harasses another (B) if—*
 - (a) *A engages in unwanted conduct related to a relevant protected characteristic, and*
 - (b) *the conduct has the purpose or effect of—*
 - (i) *violating B's dignity, or*
 - (ii) *creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
- (2) ...
- (3) ...
- (4) *In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into*

account—

- (a) *the perception of B;*
- (b) *the other circumstances of the case;*
- (c) *whether it is reasonable for the conduct to have that effect.”*

12. We were referred to and considered the following cases:

- ***British Home Stores v Burchell [1980] ICR 303***
- ***Ayodele v Citylink Ltd and Napier [2017] EWA Civ 1913***
- ***Sandwell and West Birmingham Hospitals NHS Hospital NHS Trust v Westwood UKEAT/0032/09***
- ***A v B [2003] IRLR 405***
- ***Neary v Dean of Westminster [199] IRLR 288***
- ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439***
- ***Sainbury's Supermarkets Ltd v Hitt [2003] IRLR 23***
- ***Vincent (ta Shield Security Service) v Hinder UKEAT/0174/13***
- ***Madden v Preferred Technical Group CHA Ltd [2005] IRLR 46***
- ***Hewage v Grampian Health Board [2012] UKSC 37***
- ***Nagarajan v London Regional Transport [1999] IRLR 572***
- ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285***
- ***Martin v Lancehawk Ltd (t/a European Telecom Solutions) UKEAT/0525/03***
- ***Igen Ltd and others v Wong [2005] IRLR 258***
- ***Simler J in Pnaiser v NHS England [2016] IRLR 170***
- ***Glasgow City Council v Zafar [1998] IRLR 36 HL***
- ***Owen and Briggs v James [1982] IRLR 502 (CA)***
- ***Perrin v Christophers and Sons Ltd and another ET/1401278/14***
- ***Hogg v Dover College [1990] ICR 39***
- ***Polkey v AE Dayton Services Ltd [1987] IRLR 503***
- ***Abrahall and others v Nottingham City Council and another [2018] ICR 1425 CA***
- ***Alidair Ltd v Taylor [1978] ICR 445 CA***
- ***Pemberton v Inwood [2018] EWCA Civ 564***

13. We were also referred to the ACAS Code of Practice on Disciplinary and Grievance Procedures

The evidence

14. There was an agreed bundle of documents extending to 149 pages and references to page numbers in this Judgment are to page numbers in the bundle.

15. We heard oral evidence from the Claimant and Mr R Shah, the previous owner of the Pharmacy, and, for the Respondent, from Mr D Patel and his wife Mrs R Patel, Directors of the Respondent. All of the witnesses provided written witness statements as their evidence-in-chief and were cross-

examined (with the exception of Mrs Patel who was not).

The oral evidence

16. In order to add context to the comments below, we first record that Mr and Mrs Patel acquired the business from Mr Shah on 8 March 2021 by way of share purchase. Consequently, the Claimant's employer remained the same until her dismissal. It is also noted that, for a time under the ownership of Mr Shah and up to the acquisition of the business by Mr and Mrs Patel, the Claimant was the Respondent's Data Protection Officer.
17. We did not find the evidence of the Claimant to be credible. She often seemed confused and her oral evidence was inconsistent with her witness statement. We give examples below.
18. In her oral evidence, the Claimant said that Mr Patel "*kept on*" making reference to employing younger counter assistants. Yet her witness statement at paragraph 9 only makes reference to one such incident. It says that in late April 2021, "*Mr Patel confirmed to me that he had made his decision and my Saturday shifts were going to be allocated to "someone younger" and essentially cheaper ...*"

In response to the Employment Judge's question, the Claimant changed her evidence saying that a former colleague had told her Mr Patel had said he wanted to employ someone younger. In cross-examination, the Claimant gave evidence that Mr Patel had said this to a customer and the Claimant overheard it.

19. In relation to her own personal password which was necessary to access the Respondent's NHS email account containing confidential and sensitive information about the prescriptions of customers of the Pharmacy, the Claimant said in oral evidence that she kept her password in a file by the Pharmacy computer. She then said she did not remember this and we wondered why when she had access to the system herself she did not look up user name and password on her initiative since if Mr Shah could obtain it by accessing the account the Claimant could have done so. When asked why she did not look for her password herself she said she could not remember and, further, she could not remember why she chose to contact Mr Shah for these details. She then said that she did not look in the file for her password as she was going home, and she had forgotten it was in the file and found it the following day.
20. At paragraph 32 of her witness statement, the Claimant said that when suspended, she asked a colleague to bring her coat to her but in her oral evidence she said she only asked the colleague to bring her smart card and did not know why that colleague brought her coat and other personal possessions, such as her tea mug. Also at paragraph 32, she said she told her family members to move their prescriptions away from the Pharmacy as they would now have to get them themselves but in oral evidence she said the family did not move the prescriptions until after her dismissal. When this conflict in her evidence was put to her, the Claimant replied, "*I'm confused*".

21. Further, in her oral evidence, the Claimant said that she did not know that the meeting with Mr and Mrs Patel on 11 June 2021 at which she was dismissed was a disciplinary hearing yet at paragraph 33 of her witness statement she says, “... *I was not expecting that the same person who undertook the investigation would also be deciding on the disciplinary outcome.*”
22. We also had concerns as to the credibility of Mr Shah’s evidence. His evidence surrounding his access to the Respondent’s NHS email account must be treated with some circumspection. It is clear that, having sold the business to Mr Patel, Mr Shah had absolutely no right to access its NHS account. He said in evidence he was initially blocked from accessing the account when asked to obtain the Claimant’s username and password. He does not explain why he then continued into the account using the “forgotten password” method. Nor was the Tribunal confident as to the reason why he changed the password so that on the following day Mr Patel could not gain access to it.
23. This bears out Mr Patel’s evidence that Mr Shah continued to interfere with the business, as is also shown by Mr Patel’s email to him of 27 July 2021 (page 84), after Mr Shah had called the National Pharmaceutical Association allegedly on behalf of the Respondent to reinstate a dispensing course for the Claimant’s niece.
24. In contrast, we found the evidence of Mr Patel to be given in a straightforward manner and, in our view, honestly. He did not seek to excuse or gloss over the fact that he had not strictly adhered to the ACAS Code and most of his evidence was supported by documents in the bundle.

Findings of fact

25. In relation to the issues before us, we find the following facts:
 - 25.1 The Claimant was born on 27 November 1953. She commenced employment with the Respondent on 1 May 1989 initially as a Counter Assistant. She became a qualified Pharmacy Technician in around 2001 and throughout the remainder of her employment undertook a range of duties including dispensing prescriptions, stock control and working as a counter assistant. She was appointed as the Respondent’s Data Protection Officer in around 2018 having signed the Respondent’s Standing Operating Procedures in relation to confidentiality on 9 June 2016 (page 119). As part of her dispensing duties she was given access to the NHS Electronic Prescription Service. At some point during her employment, Mr Shah issued her with written particulars of employment but these were not produced during the hearing and were not passed to Mr Patel when he took over the Pharmacy. During Mr Shah’s ownership of the business, the Claimant worked 9 am to 6 pm Monday to Friday and 9 am to 5.30 pm on Saturdays. The Claimant had a very good working relationship with Mr Shah and at the time he sold the business she earned £498.75 per week.

- 25.2 On 8 March 2021, Mr and Mrs Patel bought the shares in Shilchem Ltd from Mr Shah. On completion of the purchase, or very shortly thereafter, Mr Patel changed the password for access to the NHS portal. This meant that Mr Shah could no longer access it. Mr Patel made enquiries of the NHS Portal Service in order to have his name registered for email purposes but was told there was a 3 month wait for this to be completed due to pressure of work within that Service. He assumed the role of Data Protection Officer for the business (page 123).
- 25.3 Mr Patel and Mr Shah came into conflict after completion of the purchase and on 14 April 2021 he advised the Claimant that his relationship with Mr Shah had broken down and he stressed to her the importance of keeping pharmacy related matters confidential (page 67).
- 25.4 Prior to this, on 5 April 2021, Mr Patel spoke to the Claimant regarding her Saturday shifts. He explained that Saturdays were very quiet for dispensing prescriptions and it did not make financial sense to employ a dispenser on a higher wage than that paid to a counter assistant and he proposed that she would no longer work a Saturday shift. The Claimant asked Mr Patel to review the volume of dispensing over the next month before making a final decision, which he did. Mr Patel saw no significant volume of dispensing work during that month and confirmed to the Claimant that she would no longer work the Saturday shift. The Claimant raised no further objection to this course of action and, after Mrs Patel worked as a counter assistant on Saturdays for a short period of time, he employed a student to carry out this role paying her the national minimum wage. A note of the preliminary consultation is at page 66 and of the second consultation meeting at page 68. Mr Patel's justification for this course of action was predicated on the fact that doctors' surgeries were not open on Saturdays. This decision by Mr Patel was an economic business decision.
- 25.5 In around the middle of May 2021, Mr Patel again spoke to the Claimant to explain that he proposed reducing her hours of work on Thursdays since the doctors' surgeries they served were closed on Thursday afternoons. This change was due to take effect from 3 June 2021. Again, the Claimant raised no objection to this amendment to her working hours.
- 25.6 During the morning of Thursday 3 June, Mr Patel gave the Claimant the password to the NHS portal as he was anticipating taking a few days holiday and the Claimant would need access to the system to undertake dispensing prescriptions in his absence. He wrote the password down on a piece of paper. He asked the Claimant for her login details so he could keep a record of them but the Claimant said she did not have it to hand and would look for it and confirm it to him the following day as she was shortly leaving for the day. Whilst the

Claimant had the details in a file next to the computer, for reasons unknown she did not produce them at the time. That evening, she contacted Mr Shah by text message asking him for her details because he had set them up in the first place. Mr Shah could not remember them and could only find them if he accessed the NHS portal. We find that the Claimant gave the password for the business to Mr Shah who then accessed the Respondent's NHS portal.

- 25.7 Having accessed the account, Mr Shah changed the password. His evidence was that he was able to access the account because his name was still linked to the business. We do not accept that evidence or that he could change the password for the whole business without first gaining access with the current password. We conclude that Mr Shah had the password because, had he been required to log in through the "forgotten password" route, a code would have been sent to the telephone number registered to the account, which was Mr Patel's (page 48).
- 25.8 The following morning, Mr Patel attended the Pharmacy and attempted to log into the NHS account. He could not because the password had been changed. He asked the Claimant whether she had spoken to Mr Shah and she denied having done so, omitting the fact that she had exchanged text messages with him. We find this omission was a deliberate attempt to deceive Mr Patel.
- 25.9 Having attempted several times to access the system, Mr Patel asked the Claimant, who was at work, whether she had changed the password and she said she had not. He then telephoned Mr Shah who confirmed that he had changed the password. He asked the Claimant to meet with him upstairs in the premises and asked whether she had given Mr Shah the password. She denied having done so. Mr Patel then contacted Mr Shah again who confirmed he had been in contact with the Claimant the previous evening. He put this to the Claimant who then said she had texted Mr Shah for her details.
- 25.10 Mr Patel then made three calls to the NHS Mail Helpdesk and it was confirmed to him that the account had been accessed by way of password and not a temporary password.
- 25.11 Mr Shah telephoned the Pharmacy's landline and spoke to the Claimant to advise her what had happened. Shortly after that call ended, Mr Patel entered the Pharmacy and sometime later the Claimant admitted she had been speaking to Mr Shah.
- 25.12 At around midday that day, Mrs Patel arrived at the Pharmacy and she and Mr Patel asked the Claimant to go upstairs to the office in order to speak to her privately. Being dissatisfied with the Claimant's account of her dealings with Mr Shah, and in the light of the information gleaned from calls to the Helpdesk, a decision was made to suspend the Claimant (page 71).

- 25.13 At some time during the same morning, Mr Shah attended the Pharmacy having once more changed the password. There was a tense meeting with Mr Patel during which Mr Shah read out the new password to him but refused to actually show him his mobile 'phone. Mr Patel was able to access the system again later that day. He made further enquiries of the Helpdesk who confirmed that the password reset had been carried out by someone from within the system and not an external user. This was confirmed in writing in August 2021 (page 61).
- 25.14 On 9 June 2021, Mr Patel emailed the Claimant to invite her to a disciplinary meeting. He enclosed no information with the email and did not say a possible sanction was dismissal. He confirmed he had obtained an audit report from the Helpdesk which confirmed that the email account had not been accessed on 3 June via a temporary password but by the correct password which was how the password could then be changed. This information was made available to the Claimant at her disciplinary hearing. The email did not specifically refer to the meeting being a disciplinary hearing but said, "*We would like to invite you into the Pharmacy on Friday 11th June at 1.15pm to discuss this matter with you and to provide you with our decision following the outcome of your suspension.*" Prior to this, the Claimant had contacted a colleague and asked her to bring her belongings to the Claimant, which was to include all of her personal belongings at the Pharmacy.
- 25.15 The Claimant duly attended on 11 June. She had not been advised of her right to be accompanied but asked if her niece could attend with her, which was agreed by Mr and Mrs Patel. During the meeting, the Claimant continued to deny she had given the password to Mr Shah (pages 74 to 78). Having listened to what the Claimant had to say and not finding it credible, Mr Patel advised her that he was terminating her employment with immediate effect. The Claimant replied, "*That's fine, write it down*". By email dated 14 June 2021, Mr Patel confirmed to the Claimant that she had been dismissed for gross misconduct in breaching confidentiality and that she would be paid in full up until 1 pm on 11 June 2021, which was when she was notified of her dismissal. The letter did not advise the Claimant of her right to an appeal.
- 25.16 By email dated 12 July 2021, the Claimant indicated she wished to appeal against Mr Patel's decision and "*take further legal action.*" Mr Patel replied the following day making reference to the disciplinary procedure in the Respondent's Handbook (pages 105 to 109). Mr Patel in his reply said, "*We will allow 5 days for you to provide us with the relevant evidence, after which time if we do not receive anything, we will close the appeal.*" The Respondent heard nothing further from the Claimant in relation to her appeal.
- 25.17 We find that at a meeting of all staff shortly after acquiring the

business, Mr Patel advised them that there was a Company Handbook and where it was kept within the Pharmacy.

- 25.18 The Claimant at no time raised the issue of her age or any discrimination in relation to her age until she had instructed solicitors after submitting the Claim Form herself and raising for the first time a claim of age discrimination.

Submissions

26. Both Counsel provided written submissions and spoke to them directly to the Tribunal. We do not rehearse them further here but confirm that we considered them as part of our deliberations and took full account of them.

Discussion and conclusions

27. We first considered the claim for unauthorised deductions. The Claimant is claiming the money she would have earned had her shifts not been taken away on Saturdays and latterly on Thursday. The question, therefore, is whether Mr Patel unilaterally removed those shifts or did so by agreement with the Claimant. If this variation was by agreement and the Claimant consented, her claim must fail.
28. Mr Patel has produced notes of his two meetings with the Claimant on 5 and 26 April 2021 (pages 66 and 68). He argues this shows he consulted the Claimant about the variation. The Claimant's account is that this variation was imposed on her by the unilateral action of Mr Patel. This does not sit well with the note of the conversation on 5 April 2021 where it is recorded, "*Mina asked to allow another month as some Saturdays can be busy. I agreed to allow another month and that I will re-evaluate at the end of the month.*" Further, on 26 April 2021 (albeit only 3 weeks later) the note of Mr Patel's conversation with the Claimant says, "*Explained to Mina that I had allowed another month but did not feel Saturdays were busier enough to merit a pharmacist and dispenser whilst surgeries are closed and there are little to no prescriptions coming through. Informed Mina that from a business point of view it made sense to have a counter assistant work in the shop rather than a dispenser. I told Mina we would implement this from 1st May and asked that she was ok with this decision. I also informed her that should I be on annual leave then we may require her to work those Saturdays with a locum. Mina stated this was fine.*"
29. There is no record of a meeting with the Claimant regarding her working on Thursday afternoons. However, the Tribunal considered this gave authenticity to the other notes of meetings with the Claimant since there was no attempt to fabricate a note of the meeting weeks or months after the event.
30. We therefore conclude that the Claimant agreed to these changes. Even if she did not, however, we would conclude she accepted the changes by her conduct in working in accordance with them without protest. Whilst she argues in her witness statement that she accepted the changes under

duress, there is no evidence of this or that she ever raised the issue with Mr Patel again. In support of this conclusion, we refer the decision of the EAT in ***Simmonds v Dowty Seals Ltd [1978] IRLR 211 EAT*** where there was an oral agreement that the employee would change from working on day shifts to night shifts, a change which was never reflected in his written statement of particulars. The EAT considered that whether there has been a consensual variation of the terms of employment depends on the evidence in each particular case and such an agreement is not required to be in writing to have legal effect. This is the situation in the case before us. We conclude that the Claimant agreed to the variations, worked to them and did not protest in doing so. Her claim for unauthorised deductions cannot, therefore, succeed and is dismissed.

Unfair dismissal

31. In relation to the unfair dismissal claim, the Tribunal must consider two principal issues. The first is whether the requirements of Section 98 ERA and the test set out in ***Burchell v British Home Stores*** have been complied with and, secondly, whether the procedure followed by the Respondent in dismissing the Claimant satisfies the requirements of the ACAS Code.
32. In considering the ***Burchell*** principles, we have regard to the requirements the Respondent had a genuine belief on reasonable grounds in the misconduct alleged, sustained that belief after a reasonable examination and thereafter that the decision to dismiss fell within the range of responses of a reasonable employer.
33. We have no doubt that the Respondent had a genuine belief that the Claimant had given the password to its NHS email account to Mr Shah. At the relevant time, only two people held the password to that account, Mr Patel and the Claimant. Mr Patel asked the Claimant whether she had accessed the account and whether she had given the password to Mr Shah. She claims she told Mr Patel she had not spoken to Mr Patel which, given her subsequent admission that she had been in contact via text message, was really nothing more than an exercise in semantics designed to disguise the fact that she had given Mr Shah the password. In assessing whether Mr Patel sustained that belief after a reasonable investigation, we have regard to the decision in ***Sainsbury's Supermarkets Ltd v Hitt***. The investigation must only be reasonable in the circumstances. In this case, we struggle to understand what else Mr Patel could have done other than what he did actually do in contacting the NHS Mail Helpdesk to ascertain whether Mr Shah had accessed the account. His investigations revealed that he had in that he was advised that the account had been accessed from within. This means that whoever did access the account did so with the benefit of the password.
34. The Respondent's NHS email account contained very sensitive information, not only about prescriptions for the Respondent's customers, but also potentially sensitive and confidential financial matters relating to the Respondent's finances. Under normal circumstances, we would not hesitate to find that the decision to dismiss the Claimant for gross misconduct fell

within the range of responses of a reasonable employer.

35. However, we must also have regard to the ACAS Code. We do, of course, accept that the size and administrative resources of the Respondent's undertaking were limited (Section 98(4) ERA) and we must have regard to equity and the substantial merits of the case.
36. Upon learning that Mr Shah had accessed the Respondent's NHS email account, and having spoken to the Claimant, Mr and Mrs Patel held a meeting with the Claimant setting out what had happened and suspended her on full pay pending the outcome of the investigation being conducted by Mr Patel (pages 71 to 72). He wrote to the Claimant six days later inviting her to a meeting, "*to discuss this matter with you and to provide you with our decision following the outcome of your suspension*" (page 73).
37. The letter inviting the Claimant to the meeting on 11 June 2021 did set out the basis of the alleged misconduct but did not confirm the meeting was a disciplinary meeting nor did it advise the Claimant of her right to be accompanied. Whilst the Respondent's disciplinary policy sets out that an employee is entitled to be accompanied at a disciplinary meeting by either a colleague or a trade union representative (page 106), this was not set out in the invitation letter to the meeting. Whilst we acknowledge that the Respondent's staff were introduced to the Staff Handbook which contains the disciplinary policy by Mr Patel when he took over the business, our understanding is that they were not given a copy but were told where a copy was located within the Pharmacy. It would have been good practice to have sent a copy of this to the Claimant with the invitation letter. Further, the Claimant was not advised of her right to be accompanied, albeit she did attend the meeting with her niece who was permitted to accompany her by Mr Patel.
38. The ACAS Code sets out at paragraph 6 that, "*In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.*" We do bear in mind that this was a small business with less than a handful of employees and accept that, in these circumstances, it may not have been practicable for different people to carry out the investigation and also the disciplinary hearing. We further bear in mind that the Claimant's own evidence (paragraph 33 of her witness statement) acknowledges that at the meeting Mr Patel "*would also be deciding on the disciplinary outcome*". Consequently, although she was not told the meeting was a disciplinary hearing in so many words, that is what she understood it to be.
39. The minutes of the disciplinary hearing are at pages 74 to 78. They show that the Claimant was given an opportunity to state her case. Nevertheless, Mr Patel decided to summarily dismiss her, and he confirmed this in a letter emailed to her on 14 June 2021 (page 80). That letter does not advise the Claimant of her right of appeal in accordance with the ACAS Code. The Claimant did appeal on 12 July 2021 (page 82). Mr Patel replied the following day (page 83) advising that the Respondent's disciplinary procedure provided that an appeal was to be brought within 5 days of her

dismissal. The fact that the Claimant had had no access to this disciplinary procedure throughout the process followed by the Respondent is relevant to the fairness of the procedure as a whole. But Mr Patel applied a condition to the appeal saying in his letter, “*However, we have remained fair throughout the course of this issue and have no problem reopening the investigation if you can provide any new evidence that help prove your innocence*”. The Claimant took no further action.

40. Having considered all of the circumstances, we conclude that the procedure followed by the Respondent did not comply with the ACAS Code and the Claimant’s dismissal was, therefore, procedurally unfair. This means that we must consider the application of the principle in ***Polkey v AE Dayton Services Ltd*** and Section 123(1) ERA which provides:

“(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.”

41. The principle set out in ***Polkey*** is often referred to as the “no difference rule”. However, that is not the whole story. Whether, if a fair procedure had been followed, it would have made no difference to the outcome is only one of the factors we must take into account. We must first consider all of the circumstances surrounding the dismissal and then decide whether a reduction in compensation (and any basic award) should be made.
42. In this case, in assessing those circumstances, we note that the Claimant was well aware of the allegations against her and that she was to attend the disciplinary hearing. She was previously the Respondent’s Data Protection Officer so would have been well aware of the importance of maintaining confidentiality, particularly in relation to sensitive personal information held within the Respondent’s NHS email account concerning its customers. The Claimant breached that confidentiality, which is a very serious matter. We have no hesitation in concluding that it was an act of gross misconduct in providing the password to Mr Shah.
43. We also bear in mind the deficiencies in the Respondent’s procedure. The Claimant was not advised that dismissal was a potential sanction to be applied although in asking a colleague to take all of her personal possessions from the Pharmacy to her and advising her relatives to make alternative arrangements to have their prescriptions dispensed, the Claimant clearly knew the writing was on the wall. On the other side of the coin, she was not specifically advised she was to attend a disciplinary hearing, was not advised of her right to be accompanied and was not advised of her right of appeal.
44. We further note that the Respondent makes no mention in the minutes of the disciplinary hearing or the letter confirming the Claimant’s dismissal of the fact that she had 32 years’ service with the Respondent. In relation to this matter, Mr Patel’s evidence was that he was fully aware of the Claimant’s

long service and she was an important part of the business as the only other qualified dispenser in the Pharmacy. We consider the age discrimination below but note also that the Claimant did not raise her age as a factor in her dismissal. Indeed, she did not mention age discrimination at all until she had taken legal advice and her solicitors raised it in additional Particulars of Claim sent to the Tribunal.

45. Finally, we do consider whether the deficiencies in the Respondent's procedure would have made any difference to the outcome.
46. In this regard, we find that the Claimant was guilty of serious gross misconduct. The confidentiality of patient information is highly sensitive and she gave access to that information to Mr Shah who had no right to view it. Accordingly, we find that summary dismissal was an appropriate sanction.
47. Considering all of the circumstances and, in particular, the seriousness of the Claimant's misconduct, we do not find it just and equitable to award any compensation for her dismissal even though it was procedurally unfair. In reaching this conclusion, we bear in mind the decision in **King and others v Eaton Ltd (No. 2) [1998] IRLR 686**. The reference is to the Court of Session, Inner House where Lord Prosser said:
- "The matter will be one of impression and judgement, so that a tribunal will have to decide whether the unfair departure from what should have happened was of a kind which makes it possible to say, with more or less confidence, that the failure makes no difference, or whether the failure was such that one cannot sensibly reconstruct the world as it might have been"*
48. We are conscious of the fact that the reduction under Section 123 ERA applies only to a compensatory award. Accordingly, we must consider whether to apply a reduction to the basic award under Section 122(2) ERA which provides:
- "(2) Where the tribunal considers that any conduct of the complainant before the dismissal ... was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."*
49. In **Steen v ASP Packaging Ltd [2014] ICR 56 EAT**, the EAT set out the correct approach a Tribunal must take when considering to apply a reduction to the basic award under Section 122(2) ERA. This is:
- (i) firstly, to identify the conduct which is said to give rise to possible contributory fault;
 - (ii) then decide whether that conduct is culpable or blameworthy; and
 - (iii) then decide whether it is just and equitable to reduce the amount of the basic award to any extent.
50. We bear in mind the decision in **Western Leisure v Flynn and another EAT**

375/92 which confirms that the Tribunal may only make a reduction to the basic award under Section 122(2) if they have sufficient evidence before them of the misconduct in question. In the case before us, we find we do have such evidence. We have found that the Claimant, in breach of her responsibilities and obligations of confidentiality, gave a password to a third party allowing him access to highly sensitive and confidential information. As we have already commented, the Claimant was a former Data Protection Officer of the Respondent and had been given details of those responsibilities and obligations. Her defence to the allegations, which conflicted totally with the evidence before us, was that she did not give the password to Mr Shah. Further, she was not entirely truthful in denying she had spoken to Mr Shah on the evening of 3 June 2021 when she omitted to mention to Mr Patel that she had been in contact with him by text message.

51. Accordingly, although the Claimant's dismissal was procedurally unfair, we find that her conduct was entirely blameworthy and culpable. In these circumstances, we find it just and equitable to reduce the basic award by 100%.
52. We next considered the Claimant's allegation of age discrimination. The acts upon which she relies to support her allegation are set out in the agreed list of issues above. In relation to those issues, we have found that Mr Patel did not ever say he wanted to employ someone younger. We have also found that the Claimant's removal from her Saturday and Thursday afternoon shifts was done with appropriate consultation and to which she raised no objection. Her suspension was appropriate given the allegations against her, as was her invitation to a disciplinary hearing. These matters had nothing to do with her age. Further, we have found that the Claimant's dismissal was for gross misconduct and was not in any way connected to her age. Given, therefore, that we find there is no evidence that any act of the Respondent was carried out due to the Claimant's age, there is no evidence from which we could find that discrimination has taken place. Accordingly, the burden of proof does not pass to the Respondent to explain those acts and why they do not amount to discrimination. It follows that the Claimant cannot succeed in her claim of harassment on the ground of the protected characteristic of age.
53. In reaching this conclusion, we have also borne in mind that the Claimant did not once raise her age as an issue throughout the disciplinary process nor, when she first submitted her Claim Form to the Tribunal, did she indicate she wished to bring a claim of age discrimination. Of course, she was subsequently allowed to amend her claim to include age discrimination but her evidence in relation to the acts relied on to support her claim is not accepted by the Tribunal. Indeed, her evidence surrounding her claim that Mr Patel indicated he wished to employ someone younger was confused, conflicted with her witness statement and we found to be completely unreliable. Accordingly, the claim of age discrimination has no merit and is dismissed.
54. The final claim brought by the Claimant is that the Respondent "*failed to provide updated contracts of employment*" pursuant to Section 1 ERA. Section 1(1) ERA provides that where an employee begins employment with

an employer, the employer shall give to the employee a written statement of particulars of employment. We have heard evidence from Mr Shah that he thought he had given such written particulars to his employees at some point during his ownership of the Pharmacy. But there was no evidence as to whether these statements were still in existence although it was clear they were not handed to Mr Patel during or after his purchase of the shares in the business. Although we were not referred to it during the hearing, even if we accept that a written statement of particulars was given to the Claimant at some point, Section 4 ERA is relevant in that it provides:

“(1) If, after the material date, there is a change in any of the matters particulars of which are required by sections 1 ... to be included or referred to in a statement under section 1, the employer shall give to the worker a written statement containing particulars of the change.”

55. During her employment in the Pharmacy business under the ownership of Mr Patel, there were such changes to the Claimant's particulars of employment, namely by virtue of the reduction in her hours of work. Accordingly, these changes should have been notified to the Claimant in writing but there is no evidence that this happened. We therefore conclude that the Respondent is in breach of Sections 1 and 4 ERA.
56. A claim of failure to provide written particulars of employment cannot subsist as a standalone claim. The right to compensation is dependent upon a successful claim being brought by the employee under one of the jurisdictions listed in Schedule 5 ERA.
57. Since the Respondent was in breach of the obligation to give written particulars of employment at the time the Claimant submitted her claim and the Claimant was successful in her unfair dismissal claim, albeit in relation to procedural matters only, she was nonetheless successful in that claim and we must award a minimum amount of 2 weeks' pay and may, if we consider it just and equitable in the circumstances to do so, award 4 weeks' pay.
58. By virtue of Section 38 of the Employment Act 2002, if an Employment Tribunal finds in favour of a worker but makes no award to him in respect of the claim to which the proceedings relate, and when the proceedings were begun the employer was in breach of his duty to the worker under Section 1 or 4 ERA, we must make an award of at least 2 weeks' pay and may award 4 weeks' pay if it is just and equitable in all the circumstances to do so.
59. Considering these matters, we find the Respondent to be in breach of Sections 1 and 4 ERA and award the Claimant 2 weeks' pay. The Claimant earned £498.75 per week gross and so the total award is £997.50.
60. We do not consider the claim of harassment has any merit. We are not clear as to what acts are alleged to have constituted harassment under section 26 EqA. If the Claimant relies on the alleged comments of Mr Patel about employing a younger counter assistant, we find no such comments were made. If reliance is placed on her suspension and being disciplined, these actions by the Respondent were entirely merited. There is no credible

evidence of harassment before us and that claim must fail.

- 61. In relation to time limits, the issues were not raised at the hearing. However, for completeness, we find the claims were made in time. The alleged acts of discrimination continued until the Claimant's dismissal in relation to the reduction in her hours of work in order, allegedly, to employ a younger counter assistant.
- 62. We confirm this Judgment of the Tribunal is unanimous.

Employment Judge M Butler

Date: 17 June 2022

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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