EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103215/2022

Held in the Glasgow Tribunal on 30 September and 3-4 October 2022

Employment Judge Murphy

Ms B Buchan	**Claimant Represented by Mr R Clarke - Solicitor**
United Cleaning Solutions Ltd	**Respondent Represented by Ms S Harkins - Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that

(i) the claimant was unfairly dismissed. The respondent shall pay to the claimant compensation in the sum of FOUR THOUSAND FOUR HUNDRED AND ELEVEN POUNDS STERLING AND FIFTY EIGHT PENCE **(£4,411.58);** and

(ii) the claimant's claim for breach of contract in respect of her notice pay does not succeed and is dismissed.

REASONS

Introduction

1. This final hearing took place in the Glasgow Employment Tribunal.

2. The claimant began employment with a predecessor employer on 15 February 2015 and TUPE transferred to the respondent, a contract cleaning company, on 13 February 2017. She was summarily dismissed on 7 February 2022 and complains of unfair dismissal and a breach of contract in respect of

the respondent's failure to serve the contractually required notice period of six weeks.

3. The claimant gave evidence on her own behalf. The respondent led evidence from Kathleen Macdonald, the dismissing officer, and Julie Barnett, the appeal manager. Witness names and those of other individuals referred to in the judgment are abbreviated as follows.

Kathleen Macdonald, Dismissing Officer and site supervisor employed by R (Tribunal witness)	KM
Julie Barnett, Appeal Manager employed by Holly Blue, HR Consultants (Tribunal witness)	JB
Chris Pearman, owner and director of R	CP
Diana McFadden, cleaner employed by R at Spingburn Campus whose statement was used in the disciplinary process	DM
Steven McFadden, son of DM and cleaner employed by R at Springburn Campus whose statement was used in the disciplinary process	SM
Nadine Taylor, Operational Manager employed by R and Disciplinary Investigator whose statement was used in the disciplinary process	NT
Donna Glass, Operational Manager employed by R	DG
Aishah McDevitt, HR Consultant employed by Holly Blue and investigator of the claimant's grievance	AM
Jeanette Rollo, Manager employed by R and notetaker at C's disciplinary hearing	JR

Martin Clark, the claimant's TU rep at her disciplinary and appeal hearings	MC
Margaret Lennon, cleaner employed by R at the Springburn Campus who accompanied C at her grievance meeting with AM;	ML
Anne Leslie, cleaner employed by R at the Springburn campus whose statement was used in the disciplinary process	AL
Sandra Copland, Catering manager employed by R at Sprinburn campus whose statement was used in the disciplinary process	SC
Lyndsay Tran, cleaner employed by R at the Springburn campus spoken to by JB after appeal hearing	LT
Hassain Diab, cleaner employed by R at the Springburn campus spoken to by JB after appeal hearing	HD

4. Evidence was taken orally from the witnesses. Ms Barnett's evidence was taken via videoconferencing as she was located in the United States. A joint set of productions was lodged running to 163 pages.

Issues to be determined

5 5. During the preliminary discussion on 30 September 2022, the parties agreed the issues to be determined as follows:

1) What was the principal reason for the dismissal?

2) If the reason was misconduct, did the respondent act reasonably in treating that as a sufficient reason to dismiss the claimant?

io The Tribunal will decide in particular whether:

i. at the time the belief was formed the respondent had carried out a reasonable investigation;

ii. the respondent otherwise acted in a procedurally fair manner;

iii. there were reasonable grounds for that belief;

iv. dismissal was in the range of reasonable responses.

3) If the claimant was unfairly dismissed, the claimant seeks compensation only. The Tribunal would require to determine the following issues.

4) If there is a compensatory award, how much should it be? The Tribunal will decide:

i. What financial losses has the dismissal caused the claimant?

1. **Period from dismissal to 21 Mar 22:** The parties agree that the claimant's net loss of earnings in the period to 21 March 2022, when the claimant obtained new employment were £1,443.36 plus a loss of employer pension contributions in the sum of £87.36. The respondent accepts the claimant mitigated her loss during the period to 21 March 2022;

2. **Period from 21 Mar 2022 to 30 Sep 22 (hearing):** The claimant seeks a continuing net loss in this period of £38.18 per week x 27.57 weeks = £1,052. The respondent does not accept this loss was mitigated;

3. **Future loss from and after 30 Sep 22:** The claimant seeks 6 months of future losses in the sum of 6 x 4.333 x 38.18 = £992.60. The respondent does not accept this loss is recoverable.

ii. Has the claimant taken reasonable steps to mitigate her loss in the period from and after 21 March 2022?

iii. If not, what period of loss should the claimant be compensated?

iv. Is there a chance the claimant would have been fairly dismissed anyway if a fair procedure had been followed? The respondent says that if any procedural flaws had been corrected, the claimant would have been fairly dismissed in any event.

v. If so, should the claimant's compensation be reduced? By how much?

vi. The parties accept that the ACAS Code of Practice on Disciplinary and Grievance procedures applied. Did the respondent unreasonably fail to comply with it? (The respondent does not assert any failure to comply by the claimant).

vii. If the respondent unreasonably failed to comply with the COP, is it just and equitable to increase the award paid to the claimant? By what percentage, up to 25%?

viii. If the claimant was unfairly dismissed, did she cause or contribute to her dismissal by blameworthy conduct? The respondent maintains she did so.

ix. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

5) The parties agree that the basic award calculated before any reduction is £2,380.86.

6) Would it be just and equitable to reduce the basic award because of any conduct by the claimant before the dismissal? If so to what extent?

7) The parties agree the claimant was not paid for her six week notice period. Was the claimant guilty of gross misconduct such that that the respondent was entitled to dismiss her without notice?

Findings in Fact

6. The following facts were found to be proved on the balance of probabilities.

Background

7. The respondent is a company which provides cleaning services to diverse sectors including the education sector. It is contracted to clean the Glasgow Kelvin College campuses, including their Springburn campus. The respondent is owned by brothers Chris and Andy Pearman who are directors of the business. It employs approximately 220 employees. The company has no internal HR expertise or resource and obtains advice on such matters from an external consultancy called Holly Blue. This Consultancy replaced the respondent's former HR advisors in around September 2021.

8. The claimant was employed at all material times as a site supervisor at the Glasgow Kelvin College Springburn campus. Her duties included supervising seventeen other members of the respondent's cleaning staff at the campus during the morning and back shifts as well as undertaking cleaning duties herself and performing administrative duties including maintaining payroll and sickness absence records. She transferred under TLIPE from a predecessor employer to the respondent on 13 February 2017 and for statutory purposes had recognised continuous service dating back to her start date with that previous employer on 15 February 2015.

9. The claimant worked 30 hours per week for the respondent and her gross weekly pay was £264.54. Her net weekly pay was £240.56. The respondent paid a weekly employer's pension contribution in respect of the claimant of £14.56.

10. The claimant had no disciplinary record prior to being dismissed by the respondent. Prior to the events beginning in September 2021, she had a cordial relationship with the respondent's Chris Pearman (CP). She used to

bring him samples of her home cooking and discussed with him on many occasions challenges she was experiencing with her team.

11. The claimant's team included Diana McFadden (DM) and her son Steven McFadden (SM). The claimant's view was that SM performed his role poorly and had done so for a number of years. She had discussed this with CP. She found SM difficult to manage. She did not consider that DM performed her duties poorly but found DM protective of SM and felt DM reacted negatively when the claimant made any criticism of SM's work. Jeanette Rollo (JR) had previously worked alongside the claimant as a manager at the Springburn campus. JR had a friendly relationship with DM and SM. Because of tensions over how this affected the claimant's oversight of SM, the respondent decided to move JR to be responsible for the three other Kelvin College Campuses the respondent cleaned. JR was moved from the Springburn site. The claimant was left responsible for that campus, where she continued to line manage SM and DM.

12. The respondent's work environment was one in which foul language was commonplace among not only the cleaning staff but some supervisory and management staff.

Disciplinary of DM in September 2021

13. On 7 September 2021, both DM and SM were off sick.

14. On 8 September 2021, DM returned to work. She entered the canteen and shouted and swore at the claimant. DM was unhappy because she felt that SM's duties had been inadequately covered during his absence the previous day. She was concerned, in particular, that the toilets which he was allocated to clean had not been cleaned. It was true that the toilets had not yet been cleaned. The claimant had allocated SM's work to others and though certain duties had been undertaken, the toilets were not cleaned. The claimant asked DM to lower her voice a number of times during the exchange.

15. The claimant reported the incident to CP who suspended DM. The respondent carried out a disciplinary process in relation to the incident. DM was issued

with a written warning. During the period of her suspension, SM continued to work at Springburn under the claimant's supervision. SM was unhappy about his mother's suspension and his attitude towards the claimant was poor during this period. He growled at the claimant in response to instructions or interactions. The claimant discussed this with both CP and Nadine Taylor (NT). The proposed solution was that the claimant distance herself from SM and NT would take responsibility for managing him.

16. In October 2021, CP telephoned the claimant. He informed her of the disciplinary outcome for DM and told her that DM would return to work on Monday 18 October. He suggested that DM would provide the claimant with a letter of apology, but the claimant replied that she didn't want one. The claimant was concerned that, having worked with DM for some time, the apology would not be sincere and would not change DM's way of behaving.

17. On or about 12 October 2021, CP had a further conversation with the claimant regarding the matter. He said he would be dealing with a new HR company to see if he could go further with the process in light of the claimant's concerns. He also told the claimant that he had emailed the company's existing HR consultants to see whether he could change the decision he had made to impose a higher sanction on DM. CP invited the claimant to raise a grievance because she was unhappy about the sanction given to DM. CP and the claimant also discussed whether it might be possible to alter DM's shift pattern so that the claimant was not on shift at the same time as DM.

18. Following this discussion, the claimant sent an email to CP, intimating a grievance about DM's conduct on 8 September 2021, as he had suggested. She indicated she felt it merited more than just a written warning. In her email, she complained about the incident on 8 September 2021 as well as about other occasions when she alleged DM had shouted and sworn at her and at other members of staff, including her son, SM.

Incident on 18 October 2021

19. On 18 October 2021, DM was due to return to work at the Springburn Campus following her suspension. The claimant was due to attend a grievance

meeting which was to be conducted by Aishah McDevitt, external HR Consultant employed by Holly Blue, the respondent's new HR consultancy.

20. The claimant had done a 12-hour shift the previous day and had received her flu and Covid booster shots after her shift ended. The claimant didn't feel well following the injections and slept poorly. She attended work at 7 am in the morning of 18th October. NT and another Operational Manager, Donna Glass (DG), were both present at the Springburn campus because it was anticipated that it may be a difficult day for staff relations, given DM's return and the claimant's outstanding grievance about DM's sanction.

21. DG and NT tried to provide the claimant with a handwritten letter of apology from DM but the claimant refused to accept it. Shortly after, the claimant said to DG and NT words to the effect: *"You better have a word with Steven McFadden as I'm going to lose my job before him 'cause I'm going to punch him in the fucking face if he keeps growling at me. You better get him told".*

22. Following this comment, the claimant, DG and NT went on to discuss operational matters. There was a flood on the first floor which they were seeking to deal with and the claimant was trying to organize a carpet shampooer. DG and NT then told her they were going to go and speak to DM. Neither DG nor NT reprimanded the claimant for her comment about SM. She continued about her duties and finished her shift.

23. When the claimant went home after her first shift of the day, she rested briefly then telephoned NT to apologise for her outburst that morning about SM. She also told NT she was still feeling unwell and would not return to work later that evening for her next shift. She told NT that she knew what she had said was wrong but that she had been upset and not very well. NT told the claimant not to worry about it but to take care and get better.

The claimant's grievance process

24. That day, the claimant had attended a grievance meeting with AM. Margaret Lennon (ML) was also in attendance as the claimant's companion. During the meeting, AM told the claimant that the respondent was entitled to make the

decision it did in relation to DM's disciplinary process regarding the incident on 8 Sep 2021. The claimant asked whether it was possible for DM to change her hours so she would not require to work with her, as had previously been discussed with CP.

25. The claimant had referred AM to examples of poor conduct by DM prior to the 8th September 2021 as well as the incident on that date. AM asked the claimant who she would like her to speak to for her investigation and the claimant asked her to speak to ML, Lyndsey Tran (LT), Helen and Pamela. AM asked ML, who was present at the meeting, if she would like to say anything now. ML said *"DM shouts and balls and always argues with her son."*

26. AM invited the claimant to consider mediation with DM and the claimant declined. AM undertook to go and speak to everyone and to come back to the claimant in writing.

27. On 24 October 2021, AM sent the claimant her grievance outcome letter. In her letter she said she had spoken with all the individuals the claimant had asked her to speak with. No witness statements were provided at this time. With regard to DM's written warning, she advised *"it would be both inappropriate and legally unfair to now seek to change this process when the decision making has been concluded."* The letter continued: *"Furthermore, I consider it entirely inappropriate that you are attempting to dictate what level of sanction is appropriate for another employee…".*

28. With regard to the claimant's complaints about previous incidents with DM before the incident in the canteen on 8 September 2021, AM said that DM reported at the material times to NT. She noted that the claimant's allegations of the earlier incidents had not been brought to NT's attention at the time the claimant alleged they took place. AM determined that the incidents were too historic to be considered in these circumstances.

29. With regard to the incident on 8 September 2021, AM concluded that the claimant had failed to provide cover for DM and her son's cleaning areas on 7 September 2021, and that this failure was a potential abuse of the claimant's

supervisory position and a potential form of bullying. AM concluded her letter as follows:

"The findings of my investigation lead me to the conclusion that swearing is common practice for all workers and that you yourself have been dishonest with me when you said that you and the rest of the team do not swear, one example is evident in the assertions that you swore when discussing Steven McFadden to the Nadine Taylor and Donna Glass. It is also relevant to note that upon speaking with Diana McFadden that it appears highly likely that you have formed an inner circle with your colleagues and that that you have actively encouraged your colleagues to willfully isolate Diana McFadden. It has also evident that that [sic] during your own periods of absence the working environment changing from one of hostility to one that is welcoming and inclusive to all.

Following full consideration, I confirm that I do not find in your favour and therefore do not uphold your grievance.

You have the right to appeal against this decision and should you wish to do so you should write to Jeanette Rollo within seven days of the date of this letter.

Based on my findings, some of which are outlined here and, it is my recommendation to the company that it would be appropriate and there is merit in invoking disciplinary procedures against you for allegations that I consider amount to gross misconduct. Whilst I may be required to give a statement in relation to my investigations into your grievance, the allegations of misconduct must be dealt with independently to this grievance and therefore it is my expectation that this will be raised with you separately.

Please contact me if you have any queries regarding your grievance outcome."

The Disciplinary Process (pre-hearing)

30. Following receipt of the letter, the claimant felt unwell and unable to cope. She consulted her doctor and was certified unfit for work due to work-related

stress. She was initially signed off until 4 November 2021, though the sick line was subsequently extended. The claimant remained off sick until her employment ended.

31. On 3 November 2021, NT wrote to the claimant in the following terms:

"I am writing to remind you that following the outcome of your grievance hearing a recommendation was made at an independent investigation be carried out following allegations of misconduct against you that arose following the investigation into the grievance raised by you.

I am conscious that at this time you are unaware of the allegations that have been formed and consider it appropriate to bring these to your attention, specifically it is alleged:

- *bullying and intimidation including but not limited to failing to fairly arrange appropriate relief cover of work for absent team members.*
- *Contributing to, and inciting a hostile work environment.*
- *Giving threats of actual physical violence towards Steven McFadden.*
- *Stating that if Diana McFadden continues to work with the company then you would leave as you were not prepared to continue to work with her.*
- *Displaying an overall pure attitude and demeanour towards line management.*
- *Passing inappropriate and sexualised comments about the director/owner.*

As you're aware you have currently signed off sick with work related stress and therefore the investigation process has been put on hold, please note however that due to the seriousness of the allegations it is very much the company's intention to resume this process following your return to work.

I appreciate however that this process may add to the stress you are currently experiencing therefore I wish to take this opportunity to confirm that the

company would be willing to depart from our normal procedure and allow you to proceed through written submissions. Our preference is that you attend an in-person hearing following your return to work on the 4th of November and this offer is made for no other reason than to assist and support you at this time.

Please confirm your preference in dealing with this matter and I will make the necessary administrative arrangements."

32. The claimant did not agree to proceed by way of written submissions. Her sick line was extended to 5 January 2022. She understood the matter to be on hold until she returned to work.

33. On 27 December 2021, NT emailed the claimant. She referred to the disciplinary investigation and informed her that an investigation meeting would take place on 5 January 2022. The email informed the claimant that she was not entitled to have any representative present during the meeting which was to be merely a fact-finding exercise. The claimant emailed NT back the same day to enquire when the meeting would take place and to ask who would be chairing the meeting. NT informed her that she, NT, would chair the meeting which would take place at 7 am on 6 January 2022. The claimant initially confirmed that she would attend. However, on understanding that she would not be permitted to have a companion at the meeting, she consulted her GP about her symptoms and was signed off again. Her sick line ultimately extended to the end of February 2022.

34. NT decided to convene a disciplinary hearing. The matter was passed to Kathleen Macdonald (KM) to chair the hearing. On 27 January 2022, KM wrote to the claimant in the following terms:

Dear Bernie

Disciplinary Hearing Invite

As you're aware you have been invited to three separate investigation meetings regarding allegations of gross misconduct as made against you and

you have failed to attend on each occasion providing a medical certificate declaring you are unfit to work on account of work-related stress.

Despite initially confirming your attendance at your rescheduled investigation hearing, you have now informed the company that you will now not attend an investigation hearing without representation and that our refusal to grant you such permission has caused further stress and this has caused your further period of absence.

As already advised, you hold no legal or contractual entitlement to representation during the investigation process because its purpose is fact-finding only and there is no possibility of formal action being taken against you. We *do not consider that there are any special circumstances to merit a modification to this process and your normal demeanour is not suggestive of fear or an inability to appropriately articulate yourself particularly in instances whereby you feel aggrieved, accordingly the company considers your refusal to attend as unreasonable and a deliberate attempt to unnecessarily protract the process.*

As you have refused to attend all investigation meetings, I know right [sic] *to inform you that you are required to attend a formal disciplinary hearing on Tuesday, the 1st of February at 1 pm at the Glasgow Kelvin College….*

The purpose of the hearing is to consider the same allegations of gross misconduct against you, namely:

[lists bulleted allegations as set out in NT's correspondence of 3 November 2021]

As this hearing will take place without the benefit of an investigation hearing on your part, you will be given an opportunity to provide an explanation for the allegations against you at the disciplinary hearing. Please find enclosed to this letter statements that have been gathered and will be relied upon.

In view of you having submitted a further medical certificate for a period of at least one month due to work-related stress, the passage of time that has

already passed and the seriousness of the allegations against you it is not our intention to delay matters any further.

It is also relevant to know that you have been witnessed recently visiting the college to go for breakfast meetings with current employees of the Company. Therefore, I consider it reasonable to assume that you are fit enough to attend a meeting.

…

If you are unwilling to attend in person or online the company is prepared to modify the procedure and allow you to offer your response to the allegations via written submissions.

Should you decline all options offered to you we will seek to write to your GP to request their opinion on your ability to attend a disciplinary hearing whilst being signed off work.

The hearing will be held in accordance with the Disciplinary Procedure which is set out in the Staff Handbook.

If you are found guilty of gross misconduct you may be dismissed without notice or pay in lieu of notice.

As advised and as this meeting may result in formal action being taken against you, you are entitled to bring a fellow employee or trade union representative to the meeting in accordance with her disciplinary procedure.

If you wish to bring a companion, please let me know their name as soon as possible."

35. The claimant had not been invited to attended three separate investigation meetings, as asserted by KM. The claimant had not had breakfast meetings at the Springburn campus, as KM asserted. She had visited her colleague and friend, ML, who lived close to the campus, during her sickness absence. KM's letter enclosed certain documents. These were described as statements in the disciplinary invite letter, and, for ease, they are referred to as statements in this judgment, though it is not clear in all cases how the documents came

to be prepared or by whom. They were all unsigned. They were mostly undated and did not provide dates or approximate dates of the allegations they contained.

36. The claimant received statements of the following witnesses: Nadine Taylor, Lynne Stewart, Anne Leslie, Steven McFadden, Diana McFadden, and Sandra Copland (SC). Only NT's and SC's were dated. NT's was dated (erroneously) 18 October 2020 but narrated events on 18 October 2021. SC's was dated August 2021.

37. NT's statement concerned allegations against the claimant on 18 October 2021 when the claimant had declined to accept a letter of apology from DM and when the claimant had told NT and DG that she was going to punch SM in the fucking face if he kept growling at her. Although a statement about the same incident was also provided to the respondent's NT by DG, that statement was not enclosed with the disciplinary invite letter and the claimant did not receive a copy.

38. The claimant also found enclosed what purported to be notes of a meeting between AM and two unnamed members of reception staff with the respective initials M and A. The notes indicated the meeting took place among AM and the two reception colleagues on 22 October 2021. In the notes, all contributions attributed to M&A are attributed jointly to the pair as though these two individuals spoke in unison with one voice at the meeting. The notes enclosed with the letter were unsigned.

39. The respondent's Staff Handbook contains a Disciplinary Procedure running to 4 pages. It includes a section on gross misconduct as follows:

"Occurrences of gross misconduct are very rare because the penalty is dismissal without notice and without any previous warning being issued. It is not possible to provide an exhaustive list of examples of gross misconduct. However, any behaviour or negligence resulting in a fundamental breach of contractual terms that irrevocably destroys the trust and confidence necessary to continue the employment relationship will constitute gross

misconduct. Examples of offences that will normally be deemed as gross misconduct include serious instances of: -

A. Theft or fraud;

B. Physical violence or bullying;

C. *Deliberate damage to property;*

D. Deliberate acts of unlawful discrimination or harassment;

E. Possession, or being under the influence, of drugs at work; …

F. Breach of health and safety rules that endanger the lives of, or may cause serious injury to, employees or any other person.

40. It also contained a section headed ***DISCIPLINARY AUTHORITY'*** as follows:

The operation of the disciplinary procedure contained, in the previous section, is based on the following authority for the various levels of disciplinary action. However, the list does not prevent a higher or lower level of seniority, in the event of the appropriate level not being available, or suitable, progressing any action up with every stage of the disciplinary process.

Formal verbal warning	*Managing Director*
Written warning	*Managing Director*
Final written warning	*Managing Director*
Dismissal	*Managing Director*

Disciplinary Hearing and outcome

41. The disciplinary hearing was rescheduled to accommodate the claimant's trade union representative's availability and took place on 4 February 2022. The claimant was accompanied by Martin Clark (MC). Jeanette Rollo (JR) was in attendance as notetaker. KM, a site supervisor employed by the respondent, chaired the hearing. The hearing was audio recorded. A transcript was prepared for use at the Tribunal hearing. (It was not available

to the claimant prior to the completion of the dismissal appeal hearing). KM did not know the claimant. She did not work at the respondent's Springburn campus but at another site.

42. During the hearing, KM questioned the claimant about thirteen separate factual allegations. These are summarized in the table below which also summarizes the claimant's responses during the hearing and the source of the evidence for the allegation from the statements sent to the claimant. No dates were specified of the allegations either in the statements or during the disciplinary hearing save where specifically indicated in the table.

	Allegation	**Source of Evidence**	**C's response**
1.	the claimant had failed to arrange cover for SM on 7 September 2021 when he and DM were off sick	SM and AL make generalized allegation that SM's and DM's areas don't get covered (not specific to 7 Sep)	Denied. C alleged Hassain covered DM's areas and that she, ML, and LT covered SM's areas
2.	the claimant would often walk around the College with cleaners she regarded as friends, doing no work while others cleaned. ML and Pamela named as examples of such friends	LS alleges 'on numerous occasions'. She doesn't name ML or Pamela (or anyone else) AL alleges ML, Helen and Pamela in C's clique who walk about SC alleges that C sits with ML, Helen and Pamela for 1 hour each day in canteen while others work.	Denied. C says any time ML in canteen with her, ML has finished her shift. After 9 am the College is up and running so everyone (inc DM) looking for things to do / sit in the canteen from 9-10

3.	allegation regarding allocation of cleaners' breaks	No evidence in statements provided	C says the cleaners are not entitled to breaks on their shift patterns
4.	that on Fridays the claimant would bring in a takeaway curry for the cleaners during shift, but only certain cleaners could sit in the canteen and join	No evidence in statements provided	C admits occasionally buying in food on a Friday and asserts everyone on backshift was involved
5.	that when SM returned to work after two weeks off, the claimant said to him "No cunt likes you here"	SM statement	Denied. Noted no complaint raised previously by SM with NT or CP. Not specified where or when.
6.	that the claimant openly discussed the personal home circumstances of SM and DM with other cleaners	LS statement	Denied. C says she doesn't know who LS is or the personal info of DM's which she's alleged to have shared
7.	that, during DM's suspension, some time between 9 Sep and 18 Oct 2021, the claimant told team members that if DM were to return she would leave her employment with the respondent	DM statement (DM doesn't specify to whom the claimant reportedly said this; it was not to DM) M& A (reception staff) notes allege that C said	Admits she made a comment to CP that she wished to leave if DM remained

		she wanted to leave on DM's return	
8.	that the claimant told Anne Leslie and Corrie Calder that SM and DM were rubbish and that the claimant wanted rid of them	AL statement	Denied.
9.	that on 18 October 21, the claimant refused to accept DM's written apology	NT's statement	Refused to answer on TU rep advice, as considered part of previous grievance process
10.	that on 18 October 21, the claimant told NT and DG that she would punch SM in the fucking face if he continued to growl at her	NT's statement	Admitted. C says she was frustrated, she had been growled at for a month; she was never going to punch SM; she called NT later and apologised
11.	that the claimant took a pass from AL so as to prevent SM getting access to the kitchen office, while regularly allowing other team members to sit in the kitchen	AL's statement	Admitted taking pass from AL but says it was because she was instructed to ensure no staff other than C had access to the kitchen
12.	that the claimant instructed AL not to allow SC to help in the kitchen	AL's statement	Denied. C noted that SC was the catering manager and queried why she would not

			allow the catering manager to work in the kitchen when she, the C has nothing to do with the kitchen
13.	that the claimant said to SC in relation to CP: *"I'm going to shag him by the end of the year."* The date of the allegation is unspecified but 'Aug 21' is typed at the top of the page.	SC's statement	Denied. C said she and CP were friends; that she cooked him dinner regularly; that she had never made any sexual comments about him.

43. During the hearing, MC raised concerns about procedural matters. He noted no investigation report had been prepared saying how the investigation was carried out, with signed statements. KM asserted the claimant had failed to attend an investigation meeting three times. MC denied that this was correct and indicated the claimant had only been invited once to an investigation meeting which had been scheduled for 6 January '21.

44. MC noted the investigation invite letter had come from NT and sought KM's clarification that NT was indeed the investigator. KM said she couldn't answer that. When MC asked if she meant she didn't know, she replied *"No, I'm saying I'm not answering it."* In fact, KM did not know who had prepared the statements she had been sent and did not enquire of the respondent who did so at any stage of her involvement. KM was similarly unaware of when the statements came to be taken (other than the couple which mentioned a date) or for what purpose.

45. MC asked who made the decision to progress the matter to a disciplinary hearing and KM advised it was Aishah McDevitt. MC disputed the appropriateness of this given AM's involvement in the grievance. KM later confirmed in her dismissal letter and her evidence to the Tribunal that when she said AM, she had meant to say NT. I find on balance that AM decided

that a disciplinary investigation should be initiated against the claimant, but it was NT who decided to progress matters to a disciplinary hearing and who asked KM to chair the hearing.

46. MC queried aspects of the evidence. He noted there was no evidence in the statements about the claimant ordering curries and excluding team members. He pointed out that the claimant was unaware of who LS was and sought clarification. KM noted that LS works in the College and MC queried how LS was aware that an investigation had been taking place. KM did not answer and told MC that he ought not to be asking her questions.

47. MC observed that the statement from the reception staff appeared to have been taken by AM in connection with the grievance which he said ought to have been independent of the disciplinary investigation. He referred to AM's grievance outcome letter in which she herself suggested that an independent investigation would be conducted. KM suggested this could be discussed a the end of the hearing. MC pointed out that he and the claimant had seen no statement from Donna Glass so queried why KM referred to Nadine and Donna having both provided a statement.

48. At the conclusion of the meeting, MC asked if a copy of the minutes would be circulated. No response was recorded by KM. No transcript of the recording was circulated and nor were JR's notes of the hearing.

Events following the Disciplinary Hearing

49. Immediately following the conclusion of the disciplinary hearing, after the claimant and MC had left, KM had conversations with JR and DG regarding the matter of the claimant's disciplinary process. The respondent inadvertently recorded these discussions and sent the recording to the claimant via WhatsApp on or about 3 March 2022.

50. Approximately two minutes into the post hearing discussion, JR, the notetaker told KM (referring to the claimant) *"I can absolutely see her as 100% doing all of this"* KM replied, *"Oh absolutely, without a doubt."*

51. Shortly thereafter, DG entered the room and is captured speaking on the recording. She asked what happened, and KM replied "do *you want me to be brutally honest? The questions were a bit of a fuck up."* With regard to the allegation regarding sexual comments about CP, KM told JR and DG, *"I know, you know, and you know, it's looking like hearsay."* It was mentioned that KM had given DG, a witness to one of the allegations, access to the statements relied upon for the disciplinary. DG further commented "now *we all know we can't prove it,"* though the allegation to which she was referring is unclear. KM responded *"it was not done properly; it was shambolic."*

52. During the discussion, DG said *"Aishah said to Chris that we have enough on her,* referring to the claimant.

53. KM told JR and DG a story about a disciplinary she had conducted at a previous employer. She explained a cleaner had been asked to clean a toilet after a black person had seemingly used the toilet. On CCTV footage, the cleaner was captured mouthing the words *"Fucking black bastard."* KM laughed and said the cleaner in question had lost her job. She explained to JR and DG that she had said to the cleaner *"fuck's sake, how many times do you clean fucking shitty toilets? Sorry, they are all fucking black bastards when it comes to cleaning like that."*

54. Because the conversation was recorded, it came to the attention of CP. CP did not instigate any disciplinary investigation process against KM in relation to her comments.

55. Following the disciplinary hearing, KM requested a copy of the grievance outcome letter written by AM.She was given both the outcome and the notes of the grievance meeting. She relied upon the information in those documents within her deliberations. She did not inform the claimant of her intention to do so.

56. Following the disciplinary hearing, KM also obtained evidence through discussions with NT. The contents of these discussions were not recorded in writing or otherwise. KM spoke to NT regarding DM and SM. She asked NT what SM and DM's version of events were leading up to the disciplinary

hearing. NT told her there had been occasions when DM and SM had not had work covered and occasions of the claimant inciting a hostile work environment, not including them within the workplace. KM did not speak to DM or SM directly (though she represented in her disciplinary outcome letter that she had done so). KM did not, following the disciplinary hearing, seek to speak to the witnesses the claimant had mentioned in the hearing, namely ML, LT and Hassain Diab (HD).

Dismissal of the claimant

57. KM telephoned AM and discussed the claimant's case. She told AM she intended to dismiss the claimant and advised her reasons for doing so. On 7 February 2022, KM telephoned the claimant and told her that she was dismissing her with immediate effect for gross misconduct and that a letter would be sent out.

58. AM prepared a draft letter of dismissal based upon her telephone discussion with KM, which KM approved and sent on 11 February 2022 to the claimant.

59. The letter confirmed the claimant's summary dismissal with effect from 7 February 2022. It narrated KM's findings. For ease of comparison, I have used the numbering of the allegations which is adopted in the table above. (This numbering was not used by the respondent.)

i. KM found Allegation 1 regarding the alleged failure to arrange cover for SM on 7 September 2021 to be established. In doing so, she relied on evidence she had obtained from NT that the C had telephoned NT and told her that "*she would not be cleaning their areas* and that if she had no option then she would only do the basics. This evidence was not put to the claimant for comment;

ii. KM found Allegation 2 established (namely that the claimant would walk around with colleagues who were friends doing no work, while others cleaned). She gave weight to the fact such behaviour was mentioned by three individuals (AL, LS and SC). Additionally, she considered it relevant that the claimant ought to have reallocated

unfinished work to herself and others between 9 and 10 am and should have informed higher management that there was insufficient work for the team in this hour.

iii. KM found allegation 4 to be established regarding the ordering of curries on a Friday. She relied upon evidence taken after the disciplinary hearing from NT about DM and SM's position on the matter. This evidence was not recorded or put to the claimant for comment. KM asserted SM and DM said they were not allowed to join the group or take part. KM also relied on information taken from the grievance hearing notes.

iv. KM found allegation 5 to be established (that the claimant told SM "no cunt likes you"). She based this on SM's statement and also the claimant's admitted conduct on 18 October 2021 when she told DG and NT that she would punch SM *"in the fucking face"* if he continued growling at her.

v. KM found allegation 7 to be established (namely that the C had said she would leave the respondent if DM returned to work). She relied upon the notes of the meeting between AM and the two members of reception staff in making this finding.

vi. KM found allegation 10 to be established (namely the comment to NT and DG about punching SM). She obtained further evidence from NT after the hearing to the effect that the conversation was not held in a private place. The evidence was not put to the claimant for comment. She also obtained a further statement from DG about the incident following the omission noted by MC during the hearing. This was not put to the claimant for comment.

vii. KM found allegation 13 to be established (inappropriate sexual comments about CP). KM subsequently obtained further evidence from CP in this regard which was not put to the claimant for comment. She said he agreed the working relationship was friendly

and he accepted the claimant's home cooked meals but denied there was a close friendship.

60. She indicated a belief that the claimant was guilty of bullying DM and SM based on the allegations she had found to be substantiated.

61. At the time of his dismissal, the claimant had six complete years of continuous service recognised by the respondent. She was 56 years old.

Appeal and Issues arising post-dismissal

62. The claimant sent an email on 16 February 2022 intimating an appeal. The appeal grounds included substantially the concerns MC had raised at the disciplinary hearings. In summary, the appeal raised the following issues:

a. The refusal to allow the claimant to be accompanied at an investigation meeting;

b. The conflict of interest involved in NT being appointed investigator;

c. The inappropriateness of NT taking the decision to progress to a hearing;

d. The lack of a separate disciplinary investigation independent of the earlier grievance investigation;

e. The claimant's allegation that she was 'coerced' into raising a grievance.;

f. Concerns over the confidentiality of the investigation and how LS, for example, came to be giving a statement;

g. The failure to prepare terms of reference for the investigation;

h. the new alleged evidence raised during the disciplinary hearing about ordering curries on a Friday;

i. KM ignoring MC at points during the hearing;

j. The claimant not being informed of her right to call witnesses or submit witness statements at the hearing; and

k. The fact that the disciplinary procedure provides that authority to dismiss lies with the Managing Director (which KM is not)

63. Before the appeal hearing, the claimant and her Til rep asked if they could call LT and ML as witnesses to the allegation that the claimant had failed to arrange cover for SM on 7 September 2021. This request was declined by the appeal chair.

64. Julie Barnett (JB), owner of Holly Blue HR Consultancy chaired the appeal. JB was not involved with advising the respondent on day to day employment issues. AM was their dedicated advisor. JB was not familiar with the detail of the grievance investigation and outcome, undertaken by AM. She had not previously reviewed the grievance documents in the context of supervising AM. She did, however, have knowledge of certain aspects of the case because of discussions she had had with AM who worked in JB's home during the period when AM was working on the grievance.

65. JB had heard AM criticizing advice the respondent's former HR consultants had given to them with regard to the disclosure of DM's disciplinary outcome to the claimant. AM had also asked her after the disciplinary hearing if she had done something wrong in interviewing the two reception staff together (a point which had been raised by MC at the hearing). JB also discussed with AM the notes of the meeting with the reception staff which JB had received before the appeal hearing and AM did not recognise the document which had not seemingly been produced in full to JB.

66. Prior to the hearing, JB was provided with the statements used at the disciplinary hearing, the dismissal letter, the claimant's grievance email and grievance outcome letter. She was provided with a separate statement for DG which was also sent to the claimant after the disciplinary

hearing. It had not been prepared or seen by KM prior to the decision to dismiss.

67. The appeal hearing took place on 4 March 2022. The claimant was accompanied by MC. There was no notetaker but the hearing was recorded and a transcript was later prepared.

68. During the hearing, MC raised concerns about the recording of the disciplinary hearing and the subsequent conversation caught on the recording between KM and JR and DG. The claimant had received this recording shortly before the appeal hearing and after the grounds of appeal letter had been prepared.

69. JB indicated she would decide after the hearing whether it would be a rehearing or a review of the original decision. There was discussion regarding the various grounds of appeal.

70. After the appeal hearing, JB approached CP. CP agreed he had discussed with the claimant the possibility of DM changing shift pattern but that DM had not agreed. CP admitted to having told the claimant during DM's suspension that the College was running smoothly without DM.

71. At some point between 4 and 16 March 2022, JB had a conversation or conversations with NT. NT provided further evidence to JB regarding the allegations. No written record or audio recording of this evidence was prepared. NT gave evidence to JB about the allegation that the claimant omitted to cover SM's work on 7 September 2021. She informed JB that DM's primary area was music rooms, locker rooms corridor sections, the games hall, changing room and toilets. NT told her that none of these areas were attempted to be cleaned by any member of staff. She also said to JB that SM's areas were five sets of toilets and a busy corridor, The information given to JB by NT was information NT said she had in turn received from SM and DM.

72. NT told JB in relation to the allegation that the claimant had said she would punch SM, that SM had come to hear about the comment. NT did not explain to JB how he had come to hear about it.

73. NT told JB that it was common in the workplace for the respondent's employees to swear though she said this was not done aggressively.

74. JB also discussed the post-hearing recording with NT and the conversation among KM, DG and JR. NT told JB that this was a 'management meeting' among the operational team. She also described it as an 'operational discussion'.

75. On 16 March 2022, JB had a telephone call with ML. In it, ML told JB she remembered wiping down the corridors along with LT and the claimant on the day before the argument which led to DM's suspension. She advised that was all the additional work she had done that day.

76. On 18 March 2022, JB had a telephone discussion with LT. LT said she remembered cleaning the corridors to cover SM's work on the date in question with the claimant and ML and that she may also have cleaned the canteen that day but could not be sure. She confirmed she had not cleaned toilets or emptied bins in SM's area.

77. On 21 March 2022, JB had a telephone call with HD. He said he covered the work of both DM and SM but he recalled it being after the suspension / argument. When asked if he had done any relief cover prior to this point, he said he could not remember doing so but also could not remember if he did not as it was so long ago.

78. The calls with ML, LT and HD were not electronically recorded. JB prepared typewritten notes of the calls based on her handwritten notes. The typewritten notes were never, in the event, signed by HD, ML or HD. JB did not herself seek to arrange their signatures but believed that someone within the respondent was doing so. JB did not ask to be provided with signed copies of the notes before she prepared and issued

her appeal outcome letter. The notes were not sent to the claimant for comment prior to JB preparing her appeal outcome letter.

79. On or about 4 April 2022, JB issued an appeal outcome letter to the claimant. She indicated in a prior email on 22 March 2022 that she would approach the appeal as a review of the original decision as opposed to a re-hearing. In fact, the approach taken was a hybrid. JB had received and taken into account further evidence which was not before KM in relation to a number of the allegations.

80. In her letter, JB confirmed that she had decided to uphold the original decision. She advised that she did not find all of the allegations amounted to gross misconduct, however. The allegations she found to be established were as follows:

    i. Bullying and intimidation, including but not limited to failing to fairly arrange appropriate relief cover of work for absent team members;

    ii. Contributing to and inciting a hostile work environment;

    iii. Giving threats of actual physical violence towards Stephen McFadden.

81. The factual allegations which underpinned JB's upholding of the above were the allegation of a failure to cover SM's area on 7 September 2021 and the (admitted) allegation that the claimant told DG and NT that she would punch SM in the fucking face if he continued growling at her.

82. JB found that the allegation that the claimant said she would leave the respondent if DM returned to work was not sufficiently serious to found a formal disciplinary warning. With regard to the allegation of displaying a poor attitude and demeanour towards line management, JB found that the use of profanity was normalised in the workplace and that that there was a high level of rumour and gossip. In relation to the allegation that the claimant used inappropriate sexualised language about CP, JB said that

she *"did not find this substantiated on this basis … [she] did not investigate this point".*

83. JB did not uphold the challenges made by MC to the procedure which had been followed in the process. She found the refusal of accompaniment at the investigation meeting breached no legal or contractual entitlement. She found there to be no conflict of interest for NT in conducting the investigation which JB said was limited to 'collating statements' and also being a witness. Nor did she find a conflict in NT making the decision to progress the disciplinary process to a hearing.

84. Though JB accepted it would have been sensible for AM to interview the two members of reception staff separately, she considered this practice was not automatically unfair. She also considered it reasonable to rely upon the statements gathered in relation to the grievance in the disciplinary investigation. It was similarly appropriate and relevant, she said, to rely upon statements made at the grievance hearing by the claimant.

85. JB rejected the criticisms of a lack of investigation report and of the failure to hold a separate disciplinary investigation meeting with the claimant prior to the hearing, as the claimant had been given *"ample opportunity to give her explanation of events".*

86. JB accepted the claimant was not given the opportunity to invite witness statements or submit documents. She indicated, however, that she, JB had spoken to the witnesses the claimant had asked to be questioned (ML and LT).

87. Although JB accepted that KM's conversation caught on tape after the hearing was unacceptable, she said that, in principle, it was not unusual for chairs to meet and discuss aspects of a meeting with others, though it was less than ideal that KM did so with DG who provided a statement.

88. JB found that the respondent's disciplinary policy was not contractual. She said, *"I do not find that the job title of the disciplining officer as having any*

bearing on the process followed" and pointed out the caveat in the procedure that the list of authority doesn't prevent a lower level of seniority in the event of the appropriate level (i.e. the managing director) not being available or suitable.

89. JB further rejected the assertion that the claimant was coerced into raising a grievance and found that this was a decision made entirely at her own volition.

The claimant's post-termination losses

90. Following the termination of her employment, the claimant secured new employment with effect from 21 March 2022 with the NHS. She applied for the role in mid February 2022 and was interviewed in the first week in March. She was informed she was successful subject to disclosure checks on or about 11 March 2022 and began soon after her disclosure checks and references were confirmed. The claimant only applied for the job she ultimately secured and did not apply for any others either before or after securing that role.

91. In her new employment, the claimant works 20 hours per week. She previously worked 30 hours per week with the respondent. The claimant earns less than she did with the respondent. She earns £38.18 less (net) per week.

92. She has not sought an additional job to supplement her hours with the NHS or a replacement job offering a greater number of hours. This is because she enjoys her role with the NHS and enjoys working fewer hours. Her husband has retired and financially the claimant feels able to get by with fewer hours.

Observations on the evidence

55. There was relatively little in dispute between the parties of any materiality. On the whole, I found all witnesses attempted to give their evidence in an honest and straightforward fashion in order to assist the Tribunal. All witnesses showed occasional lapses in recollection or a lack of mastery of the written

material in the case. This was apparent in particular in relation to their accounts of the material provided respectively to them in advance of the hearings and, specifically, which witness statements and other documents were or were not provided.

56. Mr Clarke made criticisms of the reliability of the respondent's witnesses. In particular, he sharply criticized JB's evidence. He asserted that she was deliberately less than frank with the Tribunal. Ms Harkins invited me to find JB was a truthful and reliable witness. Mr Clarke listed four examples of occasions where Ms Barnett gave evidence which was factually incorrect. While I accept that Ms Barnett was indeed incorrect in relation to some matters, I do not find that she was deliberately untruthful or wilfully lacking in candour. There were aspects of her evidence which were not reliable but those, I find, arose from a genuine misremembering of events. The separate question raised by Mr Clarke of whether JB was correct or fair in her determination of the appeal, including her assessment of the seriousness of the asserted procedural failings in the case, is considered later in the judgment.

Relevant Law

Unfair Dismissal

93. Section 94 of the Employment Rights Act 1996 (ERA) provides that an employee has the right not to be unfairly dismissed. It is for the employer to show the reason or the principal reason (if more than one) for the dismissal (s98(1)(a) ERA). A reason that relates to the conduct of the employee is one of the 'potentially fair reasons' listed (s98(2)(b) ERA). Where, as here, the employer relies upon a reason related to conduct, it does not have to prove that conduct actually did justify the dismissal; the Tribunal will later assess the question of reasonableness for the purposes of section 98(4).

94. At this stage, the burden on the respondent is not a heavy one. A "reason for dismissal" has been described as a *"set of facts known to the employer or it may be of beliefs held by him which cause him to dismiss the employee."* **(Abernethy v Mott Hay and Anderson** [1974] ICR 323).

95. Once a potentially fair reason for dismissal is shown, the Tribunal must be satisfied that in all the circumstances the employer was acted fairly in dismissing for that reason (Section 98(4) of ERA). There is no burden of proof on either party when it comes to the application of section 98(4).

96. The Tribunal reminds itself that it must not substitute its own decision for that of the employer in this respect. Rather, it must be decided whether the respondent's response fell within the range of reasonable responses open to a reasonable employer in the circumstances of the case **(Iceland Frozen Foods Limited v Jones** [1982] IRLR 439). In a given set of circumstances one employer may reasonably decide to dismiss, while another in the same circumstances may reasonably decide to impose a less severe sanction. Both decisions may fall within the band of reasonable responses. The test of reasonableness is an objective one.

97. In a case concerned with conduct, regard should be had to the test set out by the EAT in **British Home Stores v Burchell** [1978] IRLR 379 in considering section 98(4) of ERA:

"What the Tribunal have to decide is ....whether the employer ... entertained a reasonable suspicion amounting to a belief in guilt of the employee of that misconduct at that time ... First of all there must be established by the employer the fact of that belief, that the employers did believe it. Secondly that the employer had in his mind reasonable grounds upon which to sustain that belief. Thirdly, we think that the employer at the stage at which he formed that belief on those grounds at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. "

98. This well-established guidance was endorsed and summarized by Mummery LJ in **London Ambulance Service NHS Trust v Small** [2009] IRLR 536 where he said the essential enquiry for Employment Tribunals in such cases is whether, in all the circumstances, the employer carried out a reasonable investigation and at the time of dismissal genuinely believed on reasonable grounds that employee is guilty of misconduct. If satisfied in those respects,

the Tribunal then must decide whether dismissal lay in the range of reasonable responses.

99. Both the ACAS Code of Practice on Disciplinary and Grievance Procedures ("the ACAS Code") as well as an employer's own internal policies and procedures should be considered by a Tribunal in assessing the reasonableness of a dismissal. In making an assessment of the reasonableness of the procedure, Tribunals should apply the range of reasonable responses test **(J Sainsbury's Pic v Hitt** [2003] ICR 111).

100. There is no absolute requirement for an employer 'making proper inquiries' to always hold an investigatory hearing, before any later disciplinary hearing. **(Sunshine Hotel Ltd v Goddard** UKEAT/0154/19). Nonetheless, the Code states that:

"It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases, this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing."

101. Where the evidence consists of diametrically conflicting accounts of an alleged incident with no or little evidence to provide corroboration one way or the other, employers ought at least to have tested the evidence where it was possible to do so. They are not obliged to believe one employee and disbelieve another - there will be cases where it is perfectly proper to say they are not satisfied that they can resolve the conflict of evidence and consequently do not find the case proved **(Salford Royal NHS Foundation Trust v Roldan** [2010] ICR 457).

102. Informing the employee of the basis of the problem and giving them an opportunity to put their case in response is one of the basic elements of fairness within the ACAS Code. The Code further provides that:

"If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification."

103. It will be a very rare case indeed for the procedures to be fair where the employer relies almost entirely upon written statements but fails to permit the employee to have sight of them **(Louies v Coventry Hood and Seating Co Ltd** [1990] IRLR 324).

104. Paragraph 26 of the ACAS Code states:

"Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place… "

105. Paragraph 27 of the Code provides:

"*The appeal should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case."*

106. In para 3 of the Code it is stated that:

'Employment tribunals will take the size and resources of an employer into account when deciding on relevant cases and it may sometimes not be practicable for all employers to take all of the steps set out in this Code.'

107. Single breaches of a company rule may found a fair dismissal (e.g. **The Post Office t/a Royal Mail v Gallagher** EAT/21/99). Exactly what type of behaviour amounts to gross misconduct will depend on the facts of the individual case. However, it is generally accepted that it must be an act which fundamentally undermines the contract of employment (i.e. it must be repudiatory conduct by the employee going to the root of the contract - **Wilson v Racher** 1974 ICR 428, CA). Moreover, the conduct must be a

deliberate and willful contradiction of the contractual terms or amount to gross negligence **(Sandwell and West Birmingham Hospitals NHS Trust v Westwood** EAT 0032/009). Even if an employee has admitted to committing the acts of which he is accused, it may not always be the case that he acted willfully or in a way that was grossly negligent (e.g. **Burdett v Aviva Employment Services Ltd** EAT 0439/13).

Relevant law: Compensation

108. An award of compensation for unfair dismissal consists of a basic award and /or a compensatory award.

109. The formula for calculating the basic award is prescribed by legislation. However, where the Tribunal considers that any conduct of the claimant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award, the Tribunal shall reduce that amount accordingly (s.122(2) of ERA). In contrast to the compensatory award, a basic award may be reduced for conduct which was not causative of the dismissal. The Tribunal has a wide discretion as to whether to make any such reduction **(Optikinetics Ltd v Whooley** UKEAT/1275/97.) This contrasts with the position in relation to reducing a compensatory award under s.123(6) ERA.

110. The compensatory award is such amount as the Tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the employee as a result of dismissal insofar as attributable to actions of the employer. The compensatory award is to be assessed so as to compensate the employee, not penalise the employer and should not result in a windfall to either party **(Whelan v Richardson** [1998] IRLR 114).

111. An unfairly dismissed employee is subject to a duty to make reasonable efforts to obtain alternative employment to mitigate his losses and sums earned will generally be set off against losses claimed **(Babcock FATA v Addison** [1987] IRLR 173).

112. The duty is to act as a reasonable man would do if he had no hope of receiving compensation from his employer (per **Donaldson J in Archibold Freightage Ltd v Wilson** [1974] IRLR 10).

113. A qualification to the principle of mitigation is that it will not apply fully to payments earned elsewhere during the notice period. In **Norton Tool Co Ltd v Tewson** [1972] IRLR 86, it was held that the employee was entitled to full wages in respect of the notice period without mitigation on the basis that this was good industrial relations practice. (This principle does not apply to claims for wrongful dismissal). There may be exceptions to the **Norton Tool** principle; in **Babcock FATA Ltd v Addison** [1987] IRLR 177, the Court of Appeal accepted the principle is generally applicable but not as a rule of law entitling the employee in every case to full wages in the notice period. The employer should pay such sums as good industrial relations practice requires and sums earned by way of mitigation should not be offset. Where, however, full wages for the notice period would exceed the sum an employer ought to pay on dismissing in good practice, mitigation will apply to that excess.

114. Where a Tribunal concludes a dismissal was unfair, it may find that the employee would have been dismissed fairly in any event, had the employer acted fairly, either at the time of the dismissal or at some later date. The Tribunal must assess the chance that the employee would have been dismissed fairly in any event then the reduce the losses accordingly. Such reduction may range from 0% to 100% **(Polkey v AE Dayton Services Ltd** 1988 ICR 142, HL).

115. In an unfair or wrongful dismissal case, where it appears to the Tribunal that an employer has unreasonably failed to comply with the Acas Code of Practice on Disciplinary and Grievance, the tribunal may, if it considers it just and equitable in all the circumstances, increase any award to the employee by up to 25%.

116. If the Tribunal finds that the employee has, by any action, caused or contributed to his dismissal, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to

that finding (s.123(6) ERA). Any such deduction can only be made in respect of conduct during the employment which caused or contributed to the dismissal. If the Tribunal determines that there is culpable or blameworthy conduct of the kind outlined, then it is bound to make a reduction by such amount as it considers just and equitable (which might range from 0 to 100%).

117. A Tribunal may vary the amount of a reduction (the percentage deduction applied) across the basic and compensatory awards and, indeed, may apply a reduction to the compensatory award without applying any reduction to the basic award without falling into error **(Les Ambassadeurs Club v Bainda** [1982] IRLR 5, **Montracon Ltd v Hardcastle** UKEAT/0307/12).

Breach of Contract (Notice)

118. The remedy in the event of failure to give due notice is a claim for breach of contract **(Westwood v Secretary of State for Employment** [1984] IRLR 209, HL and **Secretary of State for Employment v Wilson** [1977] IRLR, 483, EAT). An action for wrongful dismissal is an action for damages and, therefore, subject to mitigation. The duty to mitigate is not onerous; the employee must take reasonable steps.

Submissions

Respondent's submissions

119. Ms Harkins gave an oral submission on behalf of the respondent. Mr Clarke gave a written sbmission which he supplemented with an oral submission. His written submission is appended to the judgment.

120. Ms Harkins argued broadly that, insofar as there were weaknesses in the earlier process, these were 'cured' on appeal. She homed in on the factual conduct which was relied upon by JB in upholding the appeal, namely the alleged failure to cover SM's work and the comments about punching SM. Ms Harkins referred to the evidence upon which JB had ultimately relied in relation to these allegations and argued JB formed a reasonable belief in the claimant's guilt. There was nothng fatal, said Ms Harkins, in the earlier procedure which rendered the dismissal unfair. She discouraged the Tribunal

from a slavish following of the ACAS Code and indicated that focus should instead be on the substance of the matters covered by the Code. Ms Harkins took the Tribunal through the main tenets of the Code and argued that the substance was adhered to by the respondent. With regard to the wrongful dismissal complaint, Ms Harkins maintained the claimant was guity of gross misconduct, entitling the respondent to summarily dismiss.

121. In his oral submission, Mr Clarke commented on the reliability of witnesses and invited the Tribunal to prefer the claimant's evidence in cases of conflict. On the matter of procedural unfairness, Mr Clarke referred to his written statement and said there was a 'catalogue of ineptitude and mismanagement'. His overarching argument was that there was a lack of opportunity for the claimant to put her case.

122. The oral submissions of parties are summarized in more detail below within the framework of the discussion on the agreed issues for determination.

Discussion and Decision

Unfair Dismissal - liability

What was the principal reason for the dismissal?

109. Ms Harkins acknowledged that KM relied on a wider set of factual allegations to dismiss the claimant than JB upheld at the appeal stage. R's case is effectively that any defects in the original dismissal decision were 'cured' by the appeal process. Ms Harkins relied upon the more limited subset of the misconduct which JB found established on appeal.

110. Mr Clarke submitted that the respondent did not have a genuine belief that the claimant had committed the gross misconduct as alleged. However, Mr Clarke did not challenge during cross examination JM's assertions that she dismissed for the reasons set out in the dismissal letter. It was not put to Ms Macdonald that she dismissed the claimant because she had raised a grievance, and Mr Clarke made nothing of this point in his supplementary oral submissions.

111. The Tribunal accepts, on balance, that KM dismissed the claimant for a reason relating to her conduct for the purposes of s.98(2)(b) of ERA. I accept KM's evidence that she believed the claimant to be guilty of the factual allegations set out in the dismissal letter.

At the time the belief was formed, had the respondent carried out a reasonable investigation?

112. Mr Clarke challenged the reasonableness of the investigation on several grounds, as set out more fully in his appended submission. Principal among these, in relation to the investigation, are the following:

i. No investigation was conducted into the disciplinary allegations before proceeding to a disciplinary hearing but reliance instead placed on unsigned statements gathered for a previous grievance;

ii. NT, a material witness, was appointed investigator and took the decision to refer the claimant to a disciplinary hearing;

iii. The disciplinary invite letter did not give the claimant an opportunity to submit witness statements / documents in support of her defence;

iv. The disciplinary hearing was not converted to a disciplinary investigation meeting;

v. The key witnesses were not spoken to prior to the disciplinary hearing, and the hearing was not adjourned to speak to these witnesses when the claimant raised them with the dismissing officer.

113. Ms Harkins maintained that the investigation carried out was reasonable and reiterated that any defects were cured by the appeal. Evidence was gathered and sent to the claimant, she pointed out. Although certain witnesses were not interviewed at or following the first hearing, they were interviewed by JB at the appeal stage.

114. **Provenance of the 'statements':** The methodology for the investigation NT conducted is unclear. With the exception of the interview with the reception staff which was conducted by AM of Holly Blue, it has not been possible to make a clear finding in fact regarding who obtained the written statements relied upon by the respondent, when they did so, or in what context. It is not clear whether the statements were prepared by NT. Neither the dismissing officer nor the Appeal Manager could shed light on how, or in most cases, when the statements came to be prepared.

115. It was the claimant's understanding that the statements were prepared by AM in the course of her grievance investigation, and, based on the description of the documents in the bundle index prepared by the respondent, it appears that most of the statements may have been gathered as part of AM's grievance investigation. However, documentary or witness evidence for this is lacking. Further, if they were indeed prepared for the grievance, it is an odd feature of the statements that they largely fail to give any comment on the claimant's grievance allegations about DM which were presumably the principal focus of the grievance investigation.

116. JB's evidence was that NT's role was limited to 'collating' the statements, suggesting JB understood that NT did not herself speak to the witnesses or prepare the typewritten notes with the exception, presumably, of her own statement. KM's evidence was that she couldn't say whether the statements were prepared for the grievance (presumably by AM) or disciplinary; she simply didn't know.

117. Mr Clarke contends it is unfair as a matter of principle to rely on evidence obtained in a grievance investigation for a separate disciplinary process. I make no finding that in every circumstance it will inevitably be unreasonable for an employer to do so. However, in all the circumstances here, I find the approach taken was outwith the range of reasonable responses. It was not reasonable for NT and KM to decline to clarify who prepared the statements, when, and in what context. Failing to do so engendered a lack of clarity over the age of the allegations as well as a lack of transparency about the process. It meant that neither the claimant nor the decision makers could be reassured

about the independence of the individual who interviewed the witnesses. The answers to these questions were readily discoverable by the respondent.

118. **NT's appointment as investigating officer:** Whoever actually prepared the statements, a finding has been made that NT was appointed to the role of investigator. NT was also a material witness to the two allegations which founded the appeal decision.

119. The role of an investigator is to be fair and objective; it is not the investigator's mission to prove the guilt of an employee. The investigation should be even handed and should look for evidence to support the employee's innocence as well as any evidence pointing to guilt.

120. On the facts here, I find that it was not objectively reasonable for the respondent to appoint NT to that role. NT was a key witness to one of the most serious allegations regarding the claimant's comments about SM to her and DG. She also gave evidence which was extensively relied upon by KM and JB regarding other allegations, including the alleged failure to provide cover for SM. In each case the evidence given by NT was evidence against the claimant, not exculpatory evidence. There was, therefore, the appearance of conflict in carrying out the role of an objective and independent investigator. In the context of the respondent's organisation, I find this conflict could reasonably have been avoided. No evidence was led to suggest the respondent had no other managers who could have carried out the role. They employed over 200 people. They also had access to an external HR consultancy resource which could advise on the appropriateness of the appointment of NT.

121. At the disciplinary hearing, KM refused to disclose the identity of the investigator. This may have been because she herself was unclear, based on the material she had been provided with. Nevertheless, it was not within the range of reasonable responses to conceal or withhold the identity of the investigating officer. KM could have adjourned the hearing (as she had before) in the event of uncertainty to make her own inquiries. The situation facing the claimant was that it could not be readily inferred from the material

available who had prepared or collated the statements and when they were taken. KM's refusal to disclose NT's identity, when asked by MC during the was not objectively reasonable given the lack of clarity over the issue.

122. **Quality of the statements and other evidence used by the respondent:** The investigation was ultimately conducted not only by NT but also by KM who undertook fact finding in relation to the claimant's position during the disciplinary hearing and afterwards took further evidence from NT. It was also undertaken by JB who undertook further investigation with the claimant, NT, CP, ML, LT and HD at the appeal stage.

123. The original statements sent with the disciplinary invite were mostly undated and often omitted to set out the basics of the allegations, including, importantly, when and where the conduct was alleged to have taken place. It is difficult for an employee who is the subject of the allegations to meaningfully engage with and answer allegations that lack specification, including to identify relevant witnesses or other evidence that may support their position. It is also difficult for the respondent's internal decision makers and the Tribunal to determine whether the investigation was conducted without unreasonable delay when the dates of the original allegations are unclear.

124. Examples of allegations where such information is not provided include SC's allegation of a sexualised comment about CP, SM's statement about foul language to him following two weeks' leave, and LS's allegation about sharing DM's personal information. It is unclear when any of these allegations were said to have happened. In SC and LS's statement it is said others were present but they are not identified. In SM's statement, it is not stated where the alleged incident occurred or if anyone else was in earshot. Omissions of such basic detail pervades almost all of the allegations in the statements provided.

125. NT had some months to work on the investigation while the claimant was off sick. She had access to external specialist HR advice. She failed to clarify the basic details. Neither were these issues clarified by KM or by JB at the disciplinary or appeal hearing stage. It was not within the range of reasonable

responses to decline to clarify the fundamentals of the allegations with the relevant witnesses.

126. **Gathering evidence to support the claimant:** During the disciplinary hearing, the claimant mentioned witnesses who might support her account regarding the arrangement of cover for SM's absence on 7 September 2021. KM omitted to obtain evidence from these individuals or to adjourn the hearing to enable the investigating officer to do so. KM chose, instead, to discuss the matter with NT and obtain evidence from her about what NT said SM and DM had to say about the matter. This approach was not even handed. The failure to obtain evidence from HD, ML and LT did not fall within the range of reasonable responses.

127. Ms Harkins suggests that this defect was cured by JB's actions at the appeal stage. I do not agree. JB initially refused to allow the claimant to call witnesses when a request was made to do so before the hearing. This refusal was wholly unreasonable in circumstances where the claimant had been deprived of the opportunity to call the relevant witnesses at any earlier stage in the process. It is true that JB did arrange to speak to these witnesses after the appeal hearing before making her decision. However, she too sought and obtained further evidence from NT about the extent of SM's designated cleaning areas and what was and was not covered. JB relied heavily on that evidence which was not put to ML or HD to enable for comment. Given the conflict in the evidence on this allegation between the claimant and NT, it was not within the range of reasonable responses to make no effort to test the evidence, particularly where the claimant's account was to be rejected (see **Roldan).** The approach did not fall within the range of reasonable responses at any stage of the process, including the appeal stage.

128. There were other weaknesses in the investigation.

129. **Signing of statements:** NT took no steps to arrange for the witnesses to approve and sign their statements before the disciplinary hearing. Despite this being raised at the hearing by MC as an issue, the same omission occurred at the appeal stage in relation to the statements gathered by JB. JB did not

take steps to have the witnesses LT, ML and HD confirm their agreement with the evidence attributed to them *before* taking her decision based on that purported evidence.

130. **Interview of reception staff:** AM interviewed two members of reception staff together. She is an HR consultant. Proceeding in this manner carried the risk the witnesses may influence each other's responses or align their evidence. More troubling still was AM's purported record of the interview which attributes all reported answers to both individuals. It is improbable, if not impossible, that they spoke in unison with identical responses. Accordingly, significant doubt must be cast on the veracity of AM's note of that meeting.

131. Taken in isolation, the failure to obtain signed statements at the appropriate time (before making decisions based on those statements) and the inappropriate interviewing of witnesses together, may not on the facts here have rendered the whole procedure unfair. However, when combined with the more significant flaws discussed above, these aspects contribute to a picture of unfairness.

132. **No separate disciplinary investigation meeting:** Mr Clarke also submits the failure to convert the disciplinary hearing to a separate investigation hearing was unfair. As Ms Harkins observed, there is no absolute requirement to always hold an investigatory hearing with an accused employee before a disciplinary hearing. **(Sunshine Hotel Ltd).** I was not satisfied that the investigation process was unreasonable solely in the respect that a hearing was convened in the absence of an investigation meeting having taken place with the claimant. It was open to the respondent to seek to investigate the matter with the claimant during the disciplinary hearing as a matter of principle. However, the approach by KM to doing so was not within the range of reasonable responses for the reasons set out above. Regardless of whether it was styled as a disciplinary hearing or an investigation meeting, KM's failure to adjourn to allow additional evidence to be obtained and existing statements to be clarified did not fall within the range of reasonable responses to the conduct of an investigation.

133. For the reasons set out above, the respondent's investigation was not conducted in a manner which was objectively reasonable. An employer of the respondent's scale and resources, acting reasonably, would have taken a more thorough and even-handed approach to the obtaining and recording of witness evidence.

Did the respondent conduct an otherwise reasonable procedure?

134. The claimant's case is that the principal way in which the process was unfair was the lack of opportunity given to the claimant to put her side of the case. Mr Clarke referred in particular to NT's briefing of the decision makers behind the scenes.

135. Mr Clarke made other specific criticisms of the procedure followed by the respondent. Chief among them are:

a. The refusal to allow the claimant to be accompanied at a proposed disciplinary investigation meeting

b. KM's lack of authority to dismiss under R's disciplinary procedure and her omission to acquaint herself properly with the terms of that procedure

c. KM's discussions with the notetaker and DG immediately after the disciplinary hearing;

d. JB's failure to properly review the papers in advance of the appeal; and

e. That NT, a key witness, was 'briefing KM and JB behind the scenes'.

136. Ms Harkins pointed out there is no statutory or contractual right to accompaniment at an investigation. With regard to KM's authority, she said the respondent's disciplinary procedure was not contractually binding and the respondent was bound only by the ACAS Code. In any event, Ms Harkins argued, there was a caveat in the procedure allowing lower managers to impose dismissal in circumstances which she said applied here. With regard to the other matters, Ms Harkins submitted that certain aspects of the process may have been less than ideal but were not so significant as to have fatally undermined the fairness of the dismissal.

137. **The claimant's opportunity to put her side of the case:** The ACAS Code says this about an employer's notification of the disciplinary case to be answered.

"This notification should contain sufficient information about the alleged misconduct ...to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification."

138. It is not disputed that both KM and JB spoke to NT about the alleged failure to provide cover for SM's absence after the respective hearings. It is not disputed that NT gave further information about the allegation to both decision makers. It is clear from the outcome letters from both decision makers that substantial reliance was placed on this additional evidence. Separately, KM also relied upon the contents of the grievance notes and outcome letter which had not been sent to the claimant with the disciplinary invite letter.

139. Ms Harkins said, with reference to the ACAS Code, that sufficient information was supplied regarding the alleged misconduct when the claimant was invited to the disciplinary hearing. She submitted that although certain evidence obtained from NT was not written down, JB was entitled nonetheless to take into account and give weight to that evidence. She said that the existence of a conversation between NT and JB shouldn't be ignored merely because JB hadn't written down NT's evidence. Ms Harkins suggested that how the Tribunal views the propriety of this action would depend upon how reliable the Tribunal assessed JB to be as a witness.

140. The allegations as framed in the investigation invite and repeated in the disciplinary invite letter gave limited indication of the specific factual allegations faced by the claimant. The claimant was to glean the factual basis for the allegations from the enclosed statements. The deficiencies of these statements have been discussed in the preceding section.

141. Focusing only on the two factual allegations which continued to be relied upon by the respondent at the appeal stage, the undocumented evidence which NT

gave the decision makers concerned, in particular, the alleged failure to cover SM's work. That evidence was not recorded by KM or JB except so far as it is set out in their findings in the respective disciplinary and appeal outcome letters. It was not put to the claimant to enable her to comment before the dismissal decision was taken or before the appeal decision was taken. KM also relied upon evidence in the grievance hearing notes and AM's outcome letter which were not forwarded to the claimant to allow her to explain whether she accepted the relevant notes or findings.

142. Reasonably, this evidence ought to have been notified to the claimant. Ms Harkin's suggestion that it was reasonable for JB to rely on the evidence as long as JB's account of having obtained the evidence from NT was truthful, is rejected. We are concerned with procedural fairness. Whether NT's evidence to JB was ultimately accurate or reliable is nothing to the point at this stage in the analysis. Neither is the honesty of JB's recollection of her post-hearing discussions with NT. It is a fundamental principle that an employee should know the case against them and have an opportunity to answer it. The account taken of 'behind the scenes' evidence from NT which was not disclosed to the claimant fatally undermined the fairness of the respondent's process. MC raised concerns with the respondent about the source of certain evidence and allegations, but his protests were unheeded. The appeal manager holds herself out as an expert in employment law and ought reasonably to have taken on board the concerns and to have identified the flaw in KM's approach. Instead, JB repeated the same error and also took 'behind the scenes' evidence from NT.

143. The approach unreasonably breached an important principle of the ACAS COP. The notification the claimant received did not contain sufficient information about the alleged misconduct to enable her to prepare to answer the case properly either at the disciplinary hearing or the appeal stage. In this respect the procedure followed by the respondent was not objectively a reasonable one.

144. **Refusal of accompaniment at proposed investigation meeting:** I do not find the refusal of accompaniment at an investigation meeting would have

undermined an otherwise fair procedure (had there been one) in the particular circumstances of this case. There was no statutory right to a companion at an investigation meeting and on the evidence before me, it was not clear that the claimant had made a detailed case for her request, explaining the particular difficulties she would experience without a representative as a result of her health situation.

145. **JB's lack of pre-reading:** Neither do I find that JB's failure to read in depth all material before the appeal hearing would of itself have been fatal if the procedure was otherwise fair. This was less than ideal, but JB was honest about the extent of her preparation and did read the information in greater detail before coming to any conclusions.

146. **KM's authority to dismiss:** More significant was the respondent's failure to follow its own disciplinary procedure and KM's admission that she had not even read the procedure in full. MC raised the matter at the disciplinary hearing and KM thus could have adjourned and considered the authority point but failed to do so. The respondent relies upon the caveat that the Managing Director was either unavailable or unsuitable, but there was no evidence before the Tribunal that this was the case or that this explanation was provided to the claimant. Alternatively, Ms Harkins says the procedure was in any event non-contractual. Even if that is so, and I make no finding on its contractual status, the claimant had been informed in her disciplinary invite letter that the hearing would be held in accordance with the Disciplinary Procedure in the handbook. The respondent's departure from that position without explanation was not reasonable.

147. Perhaps if the authority point were the only flaw in in an otherwise reasonable process, it may not have fatally undermined the fairness of the dismissal. However, in the circumstances, this failing was material and served to compound the other more fundamental weaknesses in the investigation and notification of the case to answer.

148. **KM's post hearing discussion with JR and DG:** The conversation held between KM, JR and DG after the disciplinary hearing gave significant cause

for concern. JR had previously moved site because of tensions over her friendliness with DM and SM. She expressed the view "*I can absolutely see her doing all of this*" to which KM replied "*oh, absolutely without a doubt*". Several of the allegations before KM were denied and, in many cases, the evidence to support the allegation was vague and / or uncorroborated. KM did not know the claimant. To hasten to the view that she did on the basis of the conflicted evidence before her within two minutes of the hearing, gave an appearance of a lack of even-handedness and independence in her approach to her deliberations. Ms Harkins places reliance on KM's omission to invite JR's opinion and on KM's assurance that she had no regard to it. I am not persuaded, given the nature of the comments, and given JR's friendliness with key witnesses against the claimant, that Ms Harkins' arguments overcome the appearance of gross unfairness. It was not objectively reasonable for KM to discuss the allegations with JR who had a clear personal conflict, let alone to do so in the terms she did.

149. Based on the unreasonableness of the investigation and the procedural failings outlined above, I find that the dismissal was unfair, applying the test in s.98(4) of ERA. In those circumstances, it is unnecessary to go on to determine whether KM (or JB) had formed a reasonable belief in the claimant's guilt or whether dismissal fell within the band of reasonable responses.

Alternative Events and Polkey

150. Ms Harkins makes the case that dismissal would have been certain to have occurred had a fair procedure been followed. The argument is based on the **Polkey** principle and the Tribunal must assess the chance that the claimant would have been dismissed fairly in any event and (if applicable) the reduce her losses accordingly.

151. On the basis of the evidence which was or reasonably ought to have been available to the respondent, had a reasonable investigation been conducted, I am not satisfied that it would have been within the range of reasonable

responses to dismiss the claimant for gross misconduct based on the two allegations upon which the respondent ultimately relied.

152. To found an allegation of gross misconduct, the employee's behaviour should so undermine the trust and confidence inherent in the contract that the employer should no longer be required to retain the employee. The claimant's behaviour could not reasonably have been characterised in that category. The Tribunal did not accept that a reasonable employer would take the view that the claimant's failure to arrange full cover for SM's work was so unreasonable or negligent as to render her liable to be summarily dismissed in consequence. The claimant had a clean record. No consideration seems to have been given by the respondent, or evidence led to the Tribunal, regarding the feasibility of the claimant and her team covering comprehensively the work of two missing colleagues while also completing their own designated work with out working extended hours to do so. There was no suggestion that the respondent had an expectation of extended hours being worked or that the claimant had any contractual obligation to extend her hours to provide the cover. Even if a reasonable investigation were to disclose that the cover provided on 7 September was culpably inadequate, I do not accept it was within the range of reasonable responses open to the respondent, based on the evidence available to me to characterise it as ';bullying' and treat it as gross misconduct justifying dismissal.

153. The second allegation that the claimant told DM and NT that she would punch SM in the fucking face if he continued to growl at her was admitted by the claimant. The respondent, acting reasonably, would take into consideration all the circumstances in assessing the seriousness of the allegation. The claimant was feeling unwell when she made this comment. She was working in an atmosphere of tension on the day of DM's return. SM had displayed an aggressive attitude towards her throughout the preceding month. It was clear from the response of NT and DG to the claimant's words that they harboured no genuine concern that the claimant may make good on her 'threat'. They did not suspend her as might have been appropriate if a fear had been raised for Mr McFadden's safety. They did not reprimand her at the time, or take

action to protect Mr McFadden and separate him from the claimant during the rest of her shift.

154. The claimant used foul language in the comment she made which was inappropriate. However, bad language was regularly used in the workplace without disciplinary action. Foul and racist language was used by the dismissing officer herself without any formal disciplinary consequences. The claimant had apologised to NT for the comments she made later that day and NT had not given her to believe that any action would be taken at that time. All of that said, the claimant's conduct in making these comments was undoubtedly inappropriate, an issue which is considered below in the context of contributory fault. For **Polkey** purposes, however, given the norms and practices tolerated in the particular workplace, and given the whole backdrop to the claimant's comments, I do not find that dismissal would fall within the band of reasonable responses open to the respondent, acting reasonably.

155. I do not find that the claimant would have been dismissed in any event if a reasonable investigation had been undertaken and a fair procedure followed. I assess the chance that she would have been dismissed following a fair procedure as zero.

Contributory conduct

156. It is necessary for the Tribunal to consider whether the claimant has, by any action, caused or contributed to his dismissal for the purposes of section 123(6) and / or whether any conduct of his before the dismissal was such that it would be just and equitable to reduce the basic award for the purposes of section 122(2) of ERA.

157. The claimant's comments during her conversation on the morning of 18 October 2021 with DG and NT were inappropriate and inflammatory. The claimant's conduct in this regard was blameworthy and no doubt contributed to AM's recommendation to initiate a disciplinary investigation process. It is KM and JB's position that this conduct contributed to the claimant's dismissal and indeed was, for both decision-makers, assessed as the most significant conduct in their deliberations. It is accepted by the Tribunal that the claimant's

comments on 18 October 2021 did, in fact, contribute to the respondent's decision to dismiss (and therefore falls to be considered for the purposes of section 123(6) as well as section 122(2)).

158. Having so found, the Tribunal is bound to consider making a reduction to the compensatory award by such amount as it considers just and equitable. When considering contributory fault, the misconduct need not be gross misconduct to warrant a reduction. The correct threshold is that the conduct is blameworthy. I consider that in all the circumstances, a reduction of 20% to both the basic and compensatory awards is just and equitable. The proportion is assessed as 20% in relation to the compensatory award in reflection of the fact that, notwithstanding the claimant's poor conduct, the respondent was largely to blame for the dismissal in the flawed approach taken to the whole process.

159. With regard to the basic award, the Tribunal has a wide discretion under s.122(2) as to whether to make any reduction. I consider that, having regard to the blameworthy conduct mentioned, it is similarly just and equitable to apply an equivalent reduction of 20% to the basic award element of the compensation.

Unfair Dismissal - Remedy

Basic Award

160. The claimant's basic award before any relevant adjustments is calculated as 9 x £264.54 = £2,380.86.

161. This is a case where the Tribunal has found that the respondent unreasonably failed to comply with the Acas Code, most significantly by repeatedly failing to notify her of the case to answer and the evidence relied upon. I consider it just and equitable in all the circumstances to increase the basic award to the employee by the maximum 25%. The award is thereby increased to £2,976.08.

162. However, the Tribunal has also made a finding that the claimant was guilty of blameworthy conduct before the dismissal as set out above. Having regard to

such conduct, I have determined that a reduction in the amount of the basic award by 20% is just and equitable. It is thereby reduced by £595.22 to **£2,380.86.**

Compensatory Award

163. The first task is to calculate the loss which the claimant sustained in consequence of the dismissal and in so far as the loss is attributable to action taken by the employer.

164. It is agreed that in the period from the date of dismissal on 7 February 2022 to 21 March 2022 when the claimant obtained new employment, the claimant sustained losses of £1,530.72. This period coincided with what would have been the claimant's period of statutory notice had notice been served.

165. I do not find that the claimant's continuing loss from and after 21 March 2022 is recoverable. In that period the claimant had a continuing weekly loss of £38.18 per week. However, the claimant has made no attempt at any stage to mitigate that loss by finding additional supplementary employment or alternative replacement employment. The claimant's evidence was that she was happy to work fewer hours than she did for the respondent and felt able to do so given her husband's recent retirement. I find that the continuing loss is too remote from the dismissal to be recoverable. The loss becomes too remote; it cannot continue to be attributed to the respondent's dismissal of the claimant as opposed to the claimant's work / life balance preference. The claimant made a lifestyle choice that she preferred to work fewer hours and chose not to use reasonable endeavours to mitigate the associated loss of income by increasing her hours or seeking other work in the period from 21 March 2022.

166. The claimant's net loss during the six-week period to 21 March '22 is based on her average net weekly pay and her weekly employer pension contributions. No sums were earned by way of mitigation in that period. The respondent does not argue a failure to mitigate in relation to the period to 21 March 2021

167. This is a case where the Tribunal has found that the respondent unreasonably failed to comply with the Acas Code, as set out above. Based on those findings, it is just and equitable in all the circumstances to increase the award to the employee by 25% (£382.68). Applying such increase, the sum is £1,913.40.

168. The next stage is to apply any reduction for contributory fault pursuant to s.126(3) of ERA. It has been determined that it is just and equitable to reduce the compensatory award by 20%. Applying that reduction, the sum is reduced by £382.68 back to £1,530.72.

169. The Tribunal awards £500 to the claimant by way of compensation for loss of statutory rights. The total compensatory award is, therefore, **£2,030.72.**

Breach of contract - Notice

170. The Tribunal has found that the claimant was unfairly dismissed and has awarded loss of earnings and benefits in the period from 7 February 2022 (the date of the dismissal) to 21 March 202 (the end of what would have been the claimant's period of notice, had lawful notice been served).

171. If the claimant was wrongfully dismissed, the measure of her damages was limited to her entitlement to pay and benefits during that period. There is no entitlement to double recovery in respect of the same period of loss.

172. The Tribunal's jurisdiction is restricted to claims for recovery of damages for breach of contract and extends to no other remedy. Accordingly, in the absence of any damages being due because of the unfair dismissal award, the breach of contract claim falls to be dismissed.

Conclusion

173. The Tribunal declares that the claimant was unfairly dismissed and orders the respondent to pay her an award in the total sum of **£4,411.58.**

174. The Tribunal dismisses the claimant's complaint of breach of contract in respect of the failure to serve the contractual notice period of six weeks.

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10 **Employment Judge:** **L Murphy**
Date of Judgment: **18 October 2022**
Entered in register: **19 October 2022**
and copied to parties

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