mf

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Oduko**

Respondent: **Department For Work And Pensions**

Heard at: **East London Hearing Centre** **On: 7-9 March 2018**

Before: **Employment Judge A Ross (sitting alone)**

Representation

Claimant: Ms M Landy (Solicitor)

Respondent: Mr T Restall (Counsel)

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that:-

1. **The complaint of unfair dismissal is not well-founded.**

2. **The Claim is dismissed.**

REASONS

Complaints and Issues

1 The Claimant was continuously employed by the Respondent from 12 May 1997 until 4 January 2017. By a claim presented on 5 May 2017, the Claimant complained that he was unfairly dismissed for gross misconduct from his job as a work coach at the Dagenham jobcentre.

2 On the first morning of the hearing Ms Landy applied to amend the claim to include a complaint of breach of contract. A written application had been served and filed around lunchtime on 6 March 2018. I refused that application for reasons given at the time.

3 With the help of the parties, a list of issues for the liability stage of the hearing was agreed. A final copy was handed to the parties before submissions commenced. This list of issues appears at the conclusion of this set of Reasons.

Evidence

4 I read witness statements for the following witnesses. For the Respondent:-

4.1 Muzahid Misbah;
4.2 Mark Creasey;
4.3 Rizwan Ahmad;
4.4 Stephen Hanshaw

For the Claimant:

4.5 Maggie Ansah;
4.6 Ayotunde Abimbola Owolabi;
4.7 Juan Martin Sanlestourina;
4.8 Jewel Toropdal;
4.9 Patricia De Costa Henry;
4.10 The Claimant.

5 I heard oral evidence from all the above save for Ms De Costa Henry. I attached such weight as I thought appropriate to her evidence, which was very limited in weight in circumstances where I heard oral evidence from the Respondent's witnesses which conflicted with it.

6 By agreement, the Claimant's witnesses appearing under a witness order gave their evidence before the Respondent's witnesses.

7 There was an agreed bundle of documents from page 1 to page 306. Page references in this set of reasons refer to pages in that bundle.

8 I was also provided with the Respondent's "Standards of Behaviour" (marked R3), to which neither party referred me.

9 The evidence referred to two customers of the Respondent who were alleged by the Claimant to be suspected of fraud. It was agreed that these would be referred to by the initials "B" and "D", which I agreed to in order to preserve their anonymity.

Findings of fact

10 Part 3 of the bundle contained relevant policies of the Respondent.

11 The disciplinary procedure (pages 148 to 159) includes the following:

> "1. The primary purpose of the discipline procedures is to help, encourage and support employees to improve rather than just a way of imposing a punishment. This document sets out the procedure to use when it is suspected

or alleged that any employee has failed to meet acceptable standards of behaviour or conduct in any way. It should be read in conjunction with the Discipline policy.

…

14. In serious cases of misconduct, suspension or restriction of duties may be appropriate whilst the alleged misconduct is investigated. Line managers should not use either as a penalty. It should be made clear to the employee that the suspension/restriction is not disciplinary action and does not assume any guilt on behalf of the employee being suspended/restricted. The period should be as brief as possible and kept under regular review by the line manager.

…

33. The line manager would normally carry out the investigation unless one of the following three circumstances apply.

- **Fraud/Dishonesty** – Managers should consult the Counter Fraud and Investigation team in all cases involving alleged internal fraud, dishonesty or other serious wrongdoing. The Counter Fraud and Investigation team will either assume responsibility for the case or give advice. See paragraphs 34-36 below.

- **Sensitivity/Complexity** – Managers should consult the HR Mediation and Investigation Service if a non-fraud case appears to be particularly sensitive or complex. The HR Mediation and Investigation Service will either assume responsibility for investigating severe, complex or particularly sensitive cases or give advice. See paragraph 37 below.

- **Other** – A line manager may appoint an independent investigator or equivalent or higher grade to them for other local reasons, for example if they are currently unable to devote time to an investigation due to leave or work demands but another manager can undertake it. These are matters for local decision.

…

48. The Decision Maker should decide whether the case has been proven or not before taking mitigation into account.

49. If the **case is proven**, penalties should be decided after the employee has been given the opportunity to put forward any mitigating circumstances and after providing evidence of mitigation where available. More advice on mitigating factors can be found in How to: Assess the level of misconduct and decide a discipline penalty."

12 The disciplinary advice question and answer explains at question 4 (page 162) that the circumstances in which it is appropriate to use the fast track process. It is not appropriate to use it where the allegation is one of dismissal. In any event, it confirms

the position under the disciplinary procedure that the line manager would conduct the fact gathering, compile evidence and consider the facts of the case.

13 It would also not be appropriate to use the fast track process where the line manager could be: "reasonably perceived to be somehow implicated in the original decision or the circumstances of the case".

14 The Respondent's policy on: "How To: Deal with security incidents and breaches of information security" is at pages 172 to 189 "The Information Security Policy".

15 This includes at paragraph 7:

> "Unauthorised access and browsing of personal/customer records is a breach of Departmental policy and is treated as no less than **serious or gross misconduct**. Managers should take disciplinary action against employees who access records and information without a legitimate business reason and appropriate authorisation for doing so.
>
> …
>
> **10. Understanding the consequences of breaching information security policies**
>
> Information security is important and breaches can, in the most severe circumstances, result in dismissal. Not reporting a breach, or suspected breach, is in itself a disciplinary matter. This table outlines a number of scenarios that represent the most common types of breaches within the business. It is not designed to cover every possible incident and should only be used as a guide to help support the thought process of decision making. **Please note this tool does not replace the need to seek advice from and report breaches to the Security Advice Centre or to refer to relevant security policies**"

16 Examples of the type of misconduct which may occur and indicative sanctions are contained within the Information Security Scenario Matrix (pages 175 to 186). At 1.2 the matrix provides as follows:

"**1.2** An employee accesses or browses through multiple customer records or makes multiple accesses to the same record, their own record, or those of their family, friends or celebrities without a legitimate business reason or appropriate authorisation. The access, browsing or searches may happen on the same day or	**Gross misconduct** When determining the appropriate level of penalty, the manager will consider the motive of the employee in accessing the records, the amount of records accessed and any resulting impacts.	**Possible outcome** Dismissal – this will be appropriate if the manager has good reason to believe the actions to be suspicious or malicious and/or the employee can provide no legitimate reason or reasonable justification for accessing the records

over a period of time.		**Final Written Warning** – This may be appropriate if the employee can provide some reasonable explanation as to why they may have accessed the records or some other relevant mitigation
1.3 An employee accesses or browses through customer data and records without legitimate business reasons or appropriate authorisation. This may also include accessing their own record, or those of their family, friends or celebrities on one single occasion. Unlike scenario 1.2, that involved multiple records or multiple accesses to the same record, under this scenario the employee accessed only one record, on only one occasion. If the manager has good reason to believe that the single access was suspicious or made with the intention of personal gain, they should consider under scenario 1.1.	**Serious misconduct** The manager will consider the intention of the employee in accessing the record and any mitigation presented to determine the most appropriate penalty	**Possible outcome** **Final Written Warning** – this would normally be appropriate if the employee has no legitimate reason or reasonable justification for accessing the record. **First Written Warning** – This may be appropriate if the employee can provide some reasonable explanation as to why they may have accessed the record or some other relevant mitigation"

17 The Respondent also has a policy on "How to: Assess the level of misconduct and decide a disciplinary penalty" (pages 190 to 198) which includes a definition of gross misconduct (page 196) and explains under the: "Possible Outcome" for gross misconduct:

> "The normal penalty will be Dismissal (with or without notice). If managers accept mitigation put forward by the employee this may mean it can be reduced to a Final Written Warning…"

The investigation

18 The need for an investigation into the Claimant's conduct arose from an Audit Trail Team Analysis report dated 8 November 2016, which stated that the Claimant had accessed or attempted to access the Respondent's "LMS" system 10 times on

8 September 2016 between 14:57 and 15:56. The report provided as follows (and amended so as to preserve anonymity) having listed the 10 occasions:

> "During the search NINO xxxx was accessed D, but this is a Croydon case and the search continued but no NINO accessed. We have found he made a similar trace in June and again in April. In April he accessed a NINO D DofB 25/10/1971 and this has a duplicate account of [xxxxxx].
>
> His Manager Stacey Patis-Stannard reported that she could find no record of D customer at Dagenham Office and that the NINO we had found in April related to a Redbridge customer and there had been no interaction with Dagenham Office. We believe the traces in April, June and September are searching for the same person but we have not found a connection."

19 Muzahid Misbah was appointed to investigate the alleged breach of information security. He was appointed by Stacey Patis-Stannard, an SEO, and manager of the Claimant at the site at the level above his line manager.

20 The Claimant's line manager was Loretta Williams. Mr Misbah and Mr Creasey did not explain coherently why Ms Williams was not appointed as investigator, but I concluded this was probably because neither of them knew the actual reasons given that Ms Patis-Stannard made the decision not to appoint her. Mr Creasey tried to rely on question 4 of the disciplinary advice (page 162) which was unlikely because there was nothing to suggest that she could be reasonably perceived to be somehow implicated in the original decision all the circumstances of the case.

21 In the event, I accepted the hearsay evidence of Mr Ahmad who gave three clear reasons why Ms Williams was not appointed as investigator by Ms Patis-Stannard. Mr Ahmad had asked Ms Patis-Stannard why Mr Misbah was appointed during the course of the appeal. The reasons given to him were as follows:-

21.1 Mr Misbah was new to the office and independent.

21.2 Ms Williams had two to three weeks leave due about the relevant time.

21.3 Ms Williams had had performance action taken against her.

22 On balance, I decided that these reasons were probably genuine. This is in part because I found Mr Ahmad to be an honest witness and in part because he checked whether Ms Williams was on a performance action and found that she was. His evidence once accepted shows the Respondent's action in appointing Mr Misbah consistent with paragraph 33 of the disciplinary procedure; although Ms Williams would normally have carried out the investigation she was due to go on annual leave and she was subject to performance action (which I find to satisfy the requirement of "other work demands").

23 I have considered carefully the role of Ms Patis-Stannard and whether there was evidence that the alleged negative feelings towards the Claimant had influenced the decision to investigate or the investigation. On the balance of probability, irrespective of whether this negative feeling existed, I do not find that she influenced the

investigation by Mr Misbah or his decision to find that there was a case to answer. My reasons are as follows:-

23.1 I accepted the evidence of Mr Misbah about this.

23.2 The evidence of Mr Misbah was corroborated by the content of the audit trail team report which meant that some form of investigation was inevitable.

23.3 The fact of the ten attempts to access these records were admitted or accepted and it was therefore for the Claimant to show a legitimate business reason for these attempts.

23.4 Mr Misbah did ask open questions in the investigation and allowed the Claimant a full opportunity to provide him with evidence to support his case. I found the Claimant's evidence that he was too busy to provide information within the period allowed by Mr Misbah given the seriousness of the allegation to be unreliable in that I noted this information was provided within a short time of the disciplinary hearing once it was requested at that point.

23.5 The Claimant could not give any good explanation of what Ms Williams would have done differently. His response was:

"*What would Ms Williams have done differently?*

A: She is my manager, knows what I would done, knows my workload. Words in writing up investigation would be different and she would not jump to conclusion".

24 Moreover, Ms Patis-Stannard did not instigate the investigation; it was made inevitable by the audit trail report.

25 The Claimant was invited to an investigation meeting on 15 November 2016. The letter advised him that the investigation was into a breach of information security and this was potentially gross misconduct. It included an extract from the audit trail report. The Claimant broke down with emotion at an early stage of this meeting and Mr Misbah stopped the meeting. The Claimant explained that he had been diagnosed with bowel cancer.

26 The investigation meeting was re-arranged for 28 November 2016. The notes are at pages 53 to 56 and are accurate if not verbatim.

27 The Claimant gave an explanation that D (the subject of his searches on LMS) came into the office to interpret for another customer; and the Claimant suspected they were cohabiting and by implication guilty of fraud. This happened on two to three occasions, so the Claimant asked D to write her details on a piece of paper. D wrote her name and address and date of birth. The Claimant's case was that he intended to make a referral to the Fraud directorate on a Fraud Referral Form so they could investigate.

28 At the disciplinary, the Claimant stated he had put the paper in his work papers and later spilled Coca-cola on it, so the details were obscured; this was why he had to go into the LMS system to check. The Claimant stated he had the highest caseload in the office. In September, after his attempts, he could not get details of D so he put the paper into the confidential waste. The Claimant stated he had a rough idea which customer D was related to.

29 At the end of the meeting, Mr Misbah said that the Claimant would have a legitimate business reason to use LMS to get an advisor activity list for the relevant period of time.

30 At the meeting, neither the Claimant nor his representative stated that 24 hours was not a sufficient time to get the information. My reading of the notes is that the trade union representative, not the Claimant, was intending to do the search.

31 Having taken Civil Service Human Resources advice, by telephone, Mr Misbah decided there was a case to answer. I rejected Mr Misbah's evidence that he had no discussion with his manager Ms Patis-Stannard, because he was relatively inexperienced as an investigator, and because, as he admitted, he was attempting to follow procedure; and part of the procedure shown by the template at page 61 was that he discussed matters with his line manager. This entry is more reliable than Mr Misbah's memory.

32 The investigation report template explains why Mr Misbah decided that there was a case to answer: see pages 59 to 60.

33 The Claimant relied on an incident which occurred after Mr Misbah was appointed as investigator in which Mr Misbah found the Claimant's phone in the canteen. He put it in his pocket. He said this was for a joke. I had my doubts because they did not know each other well, but I accepted that Mr Ahmad was told on investigation that the Claimant and Mr Misbah had banter about this incident. Whatever Mr Misbah's reasons I cannot see this was relevant to the investigation; there was no evidence he misused the phone, or accessed the Claimant's data.

34 The decision of Mr Misbah was to refer the matter to a decision-maker, because he decided there was a case to answer.

35 I accept Mr Misbah was an relatively inexperienced officer when it came to investigations and that he may have asked the Claimant outside of the formal investigation meetings why he did what he did on 8 September 2016, but I find this was the product of inexperience and a wish to conclude the investigation, even if it was not a particularly professional thing to do.

Disciplinary hearing

36 The hearing officer appointed in a neutral way through a rota system was Mark Creasey.

37 By letter at pages 65 to 65a the Claimant was invited to a disciplinary hearing. He was warned that the outcome could be dismissal. It enclosed the investigation report of Mr Misbah (pages 59 to 62).

38 The disciplinary hearing took place on 19 December 2016. The notes of that meeting, which I find to be accurate although not verbatim, are at pages 72 to 75. The Claimant's evidence at that meeting was consistent with that given at the investigation stage, and the gist is recorded in the witness statement of Mr Creasey. His witness statement at paragraph 15 also explains how a fraud referral is made by completion of a Fraud Referral Form. I found that, generally, a Fraud Referral Form would take around 10 minutes to complete. Fraud enquiries were to be made by the fraud directorate, but those in the Claimant's position were expected to complete a Fraud Referral Form as fully as possible.

39 At the disciplinary hearing, the Claimant stated:-

39.1 The Claimant had a caseload of 130 cases but with another 20 ESA/IS claimants.

39.2 He had made some fraud referrals in the past 12 months.

39.3 The piece of paper with D's details on it was kept in a tray with his labour market units. Due to his increased caseload, the Claimant said he did not have time to keep up to date with administration.

39.4 The Claimant explained he did try to trace this account in April 2016, at the time when he was due to move to Universal Credit Live Service ("UC Live") and he was making an effort to clear outstanding administration. When another officer was chosen to go to UC Live, he returned the paper to his tray. Then in June, he was informed he was moving to UC Live and attempted to clear the tray again, so he attempted to trace the account of D again. Again someone else was selected to go to UC Live so he returned the paper to the tray. At the hearing, his trade union representative added the caseload of the Claimant was higher for a time but it had now levelled out.

40 The Claimant's case was that he had a legitimate business reason for the searches.

41 Mr Creasey stated this was a serious allegation and the Claimant could have done more to support the reasons for the access attempts. He gave the Claimant an opportunity to provide further evidence. Mr Creasey suggested provision of an advisor access search from January to September 2016.

42 Within 24 hours, the Claimant through his representative provided the information from an advisor action search. This is at page 75a to 75m. It showed the Claimant's contact with customer B, for whom D interpreted.

43 After the hearing Mr Creasey made some further enquiries. The evidence collected included:-

43.1 Evidence from the work coach team leader at the Dagenham Jobcentre Plus, Louise Pummell, which is at page 78. This stated:

> "Were all sent on training in September in February Abiola joined the UC team. In March Tunde joined and in June Clarence joined the team (this was Rhonda's decision) I joined the team in July and it was not my impression that Ade would ever be joining the team. Neither Rhonda or Steve Earl mentioned that they had plans for that to happen.
>
> Since I have joined the team we have had a part time member of staff (Shalin) join and one new recruit (Sabbir). Ade has not questioned this or asked why he was not asked to join the team."

Ms Pummell was a more appropriate person than Ms Williams to ask about this issue because she was the UC Live lead and had most knowledge of deployment and development plans in this area.

43.2 Ms Patis-Stannard stated that the Claimant's real live caseload was on a par with others at the relevant time. Although there was no written evidence of this enquiry on balance I accepted the evidence of Mr Creasey on this point. On balance, considering the template at page 88, it is clear that some conversation with Ms Patis-Stannard did take place.

44 Having gone through with a Human Resources officer whether dismissal was appropriate, Mr Creasey was advised that if he found the Claimant was not able to justify his actions and found that the accesses were not legitimate, dismissal would be consistent with the policy on information security.

45 In reaching his decision to dismiss, Mr Creasey took into account the following factors which he considered pointed against there being a legitimate business reason for the accesses:-

45.1 The number of accesses.

45.2 He found the Claimant's explanation implausible because the customer was B, not D. It was very unlikely to interview a customer who did not have English as a first language and then to ask the interpreter for that person for their name and date of birth.

45.3 He believed the Claimant failed to explain adequately why he had not sent a Fraud Referral Form after April 2016 despite sending other Fraud Referral Forms over that time. This was the proper process for the investigation of fraud. He also found this implausible because the Fraud Referral Form would take less time than the 10 access searches on 8 September 2016.

45.4 Mr Creasey also doubted the Claimant's account of keeping the paper in the storage tray when the training of the Respondent and advice given was against the storage of customer data in an open way.

45.5 The template at pages 85 to 88 records Mr Creasey's reasons at the time for reaching his decision to dismiss. It was not put to him that these were not genuine reasons.

46 In reaching his decision to dismiss, Mr Creasey admitted in evidence that he had taken into account the evidence recorded at page 88 of the decision-maker's template:

> "I am satisfied that Ade had no legitimate business reason for accessing the customer's records. His reasons for this are implausible and at odds with one could reasonably expect a Coach of his experience, and previous learning, to deliver.
>
> The decision rested on him stating he wanted to access her record to make a Fraud referral as he suspected her to be living with a claimant he regularly interviewed. However colleagues are expected to make the Fraud referral on the claimant he was interviewing, not this lady that he claims he did not know well.
>
> Risk. I think the colleague's ways of working leave him vulnerable into further breaches of information security and could cause our Department embarrassment in the future. Additional evidence from one of his Managers at Dagenham Jobcentre Plus confirmed the sheer weight of paperwork he had left in trays – causing potential security breaches and poor customer service."

47 Mr Creasey admitted that the evidence about the sheer weight of paperwork that he had left in trays causing potential security breaches and poor customer service was never put to the Claimant for his comment. From the contemporaneous notes of the disciplinary hearing and the appeal hearing the Claimant had no idea Ms Patis-Stannard had given such evidence.

48 I find Mr Creasey did have an honest belief based on reasonable grounds that the Claimant was guilty of the gross misconduct with which the Claimant was charged. I accepted Mr Creasey's evidence that even without the evidence from Ms Patis-Stannard about the potential security breaches from the amount of paperwork in the Claimant's tray, the Claimant would have been dismissed, because he regarded the gross misconduct charged as very serious.

Mitigation

49 In his witness statement at paragraph 26, Mr Creasey referred to the Claimant's lack of mitigation. The Claimant relies on this to argue his mitigation was not taken into account. I concluded Mr Creasey found a lack of mitigation sufficient to reduce the sanction to a lesser penalty. His evidence was corroborated by the template at page 87. It is clear from this template that Mr Creasey did take account of the Claimant's mitigation, but felt dismissal was the only option. His oral evidence is also corroborated by the advice note from Human Resources at pages 79 to 80, in which he states mitigating circumstances have been considered; I concluded it was likely that Mr. Creasey had discussed mitigation with a Human Resources adviser. Dealing with the mitigation referred to in the list of issues:-

49.1 Mr Creasey treated the Claimant as a person without live disciplinary sanctions and knew he had 19 years service which he took to be good service.

49.2 Mr Creasey did consider the Claimant's health but this did not affect his decision.

49.3 Mr Creasey did consider the Claimant's workload. He found it was in line with the majority of colleagues and his own work coaches. He had some experience of workloads because he chaired a body reviewing levels across the East London district.

49.4 Mr Creasey did consider the possibility of a downgrading and did consider whether a final written warning would be appropriate. He decided that the only option was dismissal. He found the breach in this case to be very serious.

49.5 Mr Creasey did consider the Claimant's corrections to the minutes of the meeting, but did not consider these altered his decision.

50 At no time (during the investigation or the disciplinary process) was the Claimant suspended or placed on restricted duties. I find it was most likely that Mr Creasey did not suspend the Claimant because Human Resources did not advise him to and he believed there was a small risk of re-offending. This is hardly surprising given the Claimant's long and unblemished service.

51 From what I heard, Mr Creasey did take into account the "Possible Outcome" section of the Information Security Policy and relevant parts of the disciplinary procedures.

52 By letter dated 4 January 2017, Mr Creasey informed the Claimant that he was dismissed for gross misconduct and set out his reasons (pages 81 to 85). This letter stated that any appeal should be addressed to Mr Ahmad at Hackney Jobcentre Plus, 271 Mare Street.

53 In fact, this was the wrong address. Mr Creasey included the wrong address by accident, not realising that the correct address was 13 Dodd Street.

54 The use of the incorrect address made no difference in any event because Mr Ahmad accepted the appeal was made in time; and Mr Ahmad never refused to deal with the appeal.

The Appeal

55 The Claimant filed detailed grounds of appeal. The appeal hearing took place on 21 February 2017. The notes of the appeal taken by Stephen Hanshaw are more likely to be the correct version of events than the amended version of the notes produced by the Claimant. This is because Mr Hanshaw made his notes contemporaneously and because I preferred the evidence of Mr Hanshaw on this point.

He candidly accepted he was not a specialist note-taker and his notes were not verbatim but that his notes were accurate. I found the Claimant's insistence that large passages were missed out of Mr Hanshaw's notes unlikely to be accurate. I put this down to the Claimant's emotional involvement clouding his recollection.

56 The Claimant's representative at the appeal hearing was Mr Toropdor. The Claimant disputed the finding that there was no legitimate business reason for the accesses and that he did not have a heavy workload pressure. The Claimant argued that Mr Creasey deliberately went to the wrong person, Ms Patis-Stannard, in order to manipulate facts, and that his line manager Ms Williams should have done the investigation. He argued that Ms Patis-Stannard was against him and because of this Mr Misbah was assigned to do the investigation. The Claimant stated it was a disproportionate punishment; other officers had accessed the system and faced no such penalty. He put forward mitigation.

57 As a result of the appeal hearing evidence Mr Ahmad carried out further investigation. He interviewed three witnesses (pages 117 to 119): Maggie Ansah, Ayotunde Owolabi and Patricia De Costa Henry.

58 The appeal decision (pages 145 to 147) is dated 25 April 2017.

59 I accepted Mr Ahmad's evidence as to the reasons for the delay in communicating his decision which were:-

59.1 He had wanted to interview the three witnesses mentioned by the Claimant at the appeal, which he did on 17 March 2017.

59.2 He waited for a response to the minutes of that hearing which were not received by the Claimant until 29 March 2017 with corrections sent shortly after.

59.3 There was further delay caused by his leave commitments, which were two weeks holiday.

59.4 There was additional delay because he needed to get advice from Human Resources and, at the time he tried, a reorganisation was in process.

60 Mr Ahmad upheld the decision to dismiss. He concluded that Mr Creasey had correctly categorised the misconduct as gross misconduct. He believed in this case there was a breakdown of trust between employer and employee: this was not a case where the Claimant had admitted what he had done. He considered that it was reasonable to dismiss despite the length of service.

61 Although Mr Ahmad considered the gross misconduct was moderately severe in the scale of breaches of this type, he did consider the breach serious and that it was a breach of trust for the reasons he gave. In short, I accepted Mr Ahmad's evidence on this point.

The Law

Law in respect of Unfair Dismissal

62 In determining whether a dismissal was unfair, it is for the employer to show that the reason for the dismissal is a potentially fair reason within section 98 Employment Rights Act 1996 ("ERA").

63 A potentially fair reason is one which relates to conduct: section 98(2)(b) ERA.

64 Gross misconduct is conduct which is so serious that it goes to the root of the contract. By its very nature, it is conduct which would justify dismissal, even for a first offence.

65 I directed myself to section 98(4) of the Employment Rights Act 1996, which provides as follows:

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

66 The burden of proof on the issue of fairness is neutral.

67 In conduct cases, in considering the fairness of a dismissal, the necessary questions for a Tribunal to consider are:-

67.1 Did the employer have an honest belief that the employee was guilty of misconduct?

67.2 Was that belief based on reasonable grounds?

67.3 Was that belief formed on those grounds after such investigation as was reasonable in the circumstances?

(See BHS v Burchell [1980] ICR 303)

68 I directed myself to the principles which it must apply when applying section 98(4):-

68.1 The Employment Tribunal must not substitute its own view for that of the employer as to what was the right course to adopt for that employer.

68.2 On the issue of liability, the Tribunal must confine itself to the facts found by the employer at the time of the dismissal.

68.3 The employer should ask: did the employer's action fall within the band of reasonable responses open to an employer in those circumstances?

(See Foley v Post Office and HSBC Bank plc v Madden [2000] IRLR 3.)

69 The Tribunal reminded itself that the range of reasonable responses test applied not only to the decision to dismiss but also to the procedure by which that decision is reached including the investigation: see Sainsbury plc v Hitt [2003] ICR 111. I directed myself to the following passage in Hitt, with emphasis added by me, which I found to be relevant to this case:-

> *"The investigation carried out by Sainsburys was not for the purposes of determining, as one would in a court of law, whether Mr Hitt was guilty or not guilty of the theft of the razor blades.* ***The purpose of the investigation was to establish whether there were reasonable grounds for the belief that they had formed, from the circumstances in which the razor blades were found in his locker, that there had been misconduct on his part, to which a reasonable response was a decision to dismiss him.*** *The uncontested facts were that the missing razor blades were found in Mr Hitt's locker and that he had had the opportunity to steal them in the periods of his absence from the bakery during the time they went missing. Investigations were then made, both prior to and during the period of an adjournment of the disciplinary proceedings, into the question whether, as Mr Hitt alleged, someone else had planted the missing razor blades in his locker. In my judgment, Sainsburys were reasonably entitled to conclude, on the basis of such an investigation, that Mr Hitt's explanation was improbable. The objective standard of the reasonable employer did not require them to carry out yet further investigations of the kind which the majority in the employment tribunal in their view considered ought to have been carried out*."

70 Reading Hitt and Foley together, it is clear that the Tribunal must not substitute its own standards of what was an adequate investigation for the standard that could be objectively expected of a reasonable employer. Moreover, it is to be noted that in Hitt, further investigation was carried out during an adjournment of the disciplinary hearing.

71 Section 98(4) focuses on the need for an employer to act reasonably in all the circumstances. In A v B [2003] IRLR 405, the EAT (Elias J presiding) held at paragraph 60 that the relevant circumstances include the gravity of the charge and their potential effect upon the employee.

72 It is particularly important that employers take seriously their responsibility to conduct a fair investigation where the employee's reputation or ability to work in his chosen field is likely to be affected by a finding of misconduct: see Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457.

73 I have taken account of the other submissions of law made by Ms. Landy, including the relevance of the point that the Claimant was not motivated by financial gain, nor did he act dishonestly. In support of that submission, reference is made to DWP v Mughal UKEAT 0343/15, in which this is accepted to be a significant mitigating

factor (for which the EAT held there had been no evidence in the Mughal case). In Mughal, the employee had accessed the benefit records of her own tenant, who was in arrears, on one occasion, allegedly in a moment of madness. Mrs. Justice Simler DBE, at paragraph 31, held as follows:

> *"31 Ms Bryan submits that personal gain in context means gaining something to which the individual was not previously entitled. I disagree. In any event, this was not the meaning adopted by Employment Judge Spencer, nor was it relied on by anyone below. It is not the meaning adopted or understood by Ms Janagal or Ms Cierebiej, nor was it put to them or explored in evidence. In the context of DWP providing computer systems to employees for the purposes of fulfilling their official responsibilities and functions and authorising the use of computer systems for that purpose only, it would be surprising if personal gain had such a restricted meaning. It seems to me that the emphasis by DWP in relation to information security is on the use of computer systems for the purposes of the legitimate business interests of DWP only and on the prohibition of the use of such systems for an employee's own personal interests or personal gain, whatever that gain might be."*

The significance of procedural defects

74 I directed myself that that whether a procedural defect is sufficient to undermine the fairness of the dismissal as a whole is a question for the Tribunal. Not every procedural error will do so; the fairness of the whole process should be looked at. This is part of the ratio in Lloyds Bank v *Fuller [1991] IRLR 336*. In the more recent case of South Mauldsley NHS Foundation Trust –v- Balogan UKEAT0212/14, the EAT explained at paragraph 9:

> *"As this Tribunal has said countless times, the crucial thing is the statutory test in section 98(4) namely whether in all the circumstances the employer acted reasonably in treating its reasons for dismissing the employer sufficient. A procedural defect is a factor to be taken into account but the weight to be given to it depends on the circumstances and the mere fact that there has been a procedural defect should not lead to a decision that the dismissal was unfair. The fairness of the whole process needs to be looked at and any procedural issues considered together with the reason for the dismissal, as the two will impact on each other."*

The significance of suspension

75 In Crawford v Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402, the Court approved the guidance in both Roldan and A v B. Elias LJ went on to give the following guidance, by way of footnote:

> "*71 This case raises a matter which causes me some concern. It appears to be the almost automatic response of many employers to allegations of this kind to suspend the employees concerned, and to forbid them from contacting anyone, as soon as a complaint is made, and quite irrespective of the likelihood of the complaint being established. As Lady Justice Hale, as she was, pointed out in Gogay v Herfordshire County Council [2000] IRLR 703, even where there is evidence supporting an investigation, that does not mean that suspension is*

automatically justified. It should not be a knee jerk reaction, and it will be a breach of the duty of trust and confidence towards the employee if it is. I appreciate that suspension is often said to be in the employee's best interests; but many employees would question that, and in my view they would often be right to do so. They will frequently feel belittled and demoralised by the total exclusion from work and the enforced removal from their work colleagues, many of whom will be friends. This can be psychologically very damaging. Even if they are subsequently cleared of the charges, the suspicions are likely to linger, not least I suspect because the suspension appears to add credence to them. It would be an interesting piece of social research to discover to what extent those conducting disciplinary hearings subconsciously start from the assumption that the employee suspended in this way is guilty and look for evidence to confirm it. It was partly to correct that danger that the courts have imposed an obligation on the employers to ensure that they focus as much on evidence which exculpates the employee as on that which inculpates him.

72 I am not suggesting that the decision to suspend in this case was a knee jerk reaction. The evidence about it, such as we have, suggests that there was some consideration given to that issue. I do, however, find it difficult to believe that the relevant body could have thought that there was any real risk of treatment of this kind being repeated, given that it had resulted in these charges. Moreover, I would expect the committee to have paid close attention to the unblemished service of the relevant staff when assessing future risk; and perhaps they did."

76 In Graham v Secretary of State for Work and Pensions [2012] IRLR 759, a case determined after Crawford, a subsequent Court was not apparently referred to this guidance. In Graham, the Court of Appeal upheld the Employment Tribunal's finding that the employer's belief that gross misconduct had been committed was not based on reasonable grounds. The case was based on different facts from the present case. The relevant actions were that the employee had accessed the records of a third party after they had allegedly become "acquainted" for the purposes of the relevant policy. The Tribunal found it incongruous that the employer stated that its trust and confidence in the employee had evaporated when it accepted that she had acted in good faith to help a vulnerable customer, and had not suspended her, but had moved her to a similar position in another office. In concluding that the EAT was guilty of substituting its own findings for those of the Employment Tribunal, the Court also made the following point:

"*62 The EAT criticised the fact that the ET took account of the fact that Mrs Graham was not suspended after Mr Glover's initial investigation and between the time of his letter of 14 July 2008 and the decision to dismiss. In my view, the ET was entitled to take that fact into account when assessing whether the DWP really did think, reasonably, that its confidence and trust in Mrs Graham had been so destroyed that she could not longer remain in its employment. With respect, I agree with the ET's expression that Mrs Graham's summary dismissal does not "sit well" with the decision to allow her to do similar work but at a different job centre and to permit her to have access to the computer system there. It was a point well made*."

Section 122(2) and 123(1) ERA 1996: Polkey

77 Applying section 123(1) ERA 1996, if a Tribunal finds a dismissal unfair on procedural grounds, but the employer can show that it might have dismissed an employee if a fair procedure had been followed, the Tribunal may make a percentage reduction in the compensatory award which reflects the likelihood that the Claimant would have been dismissed: see **Polkey v AE Dayton Services** [1988] ICR 142.

78 By section 122(2), a reduction on the ground of the employee's conduct an be made where "the tribunal considers that any conduct of the complainant before the dismissal … was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent". This type of reduction can be made irrespective of any finding that the employee has caused or contributed to the dismissal. Section 122(2) confers a wide discretion upon the tribunal.

Submissions

79 The Claimant made detailed written submissions which I have read and considered. These were supported by oral submissions on the evidence made by Ms Landy.

80 The Respondent made detailed oral submissions.

81 No more could have been said for either party by their representative. I mean no disrespect to either party by not referring to all the submissions, but I confirm that I have taken all of those submissions into account.

Conclusions

82 Applying my findings of fact to the issues agreed with the parties, and applying the law set out above, I have reached the following conclusions.

Issue (1): was the decision to dismissal procedurally fair?

83 I reminded myself that the procedure adopted by the employer only needed to be within the band of reasonableness open to the employer. Also, I directed myself to the statutory wording of section 98(4) ERA, which sets out in full the statutory test of fairness. This requires me to consider, when considering whether the dismissal was fair, both whether the employer acted reasonably in treating the misconduct as sufficient reason for dismissal; and whether it was fair *"in accordance with equity and the substantial merits of the case"*.

84 I have carefully considered whether the decision to dismiss was procedurally unfair because, in reaching his decision to dismiss, Mr. Creasey took into account the evidence he collected from Ms. Patis-Stannard which is set out in paragraph 46 above, which was that she "*confirmed the sheer weight of paperwork he had left in trays – causing potential security breaches and poor customer service*". This allegation, concerning performance or a different form of misconduct, was never put to the Claimant at any point, so he had no opportunity to rebut it, nor to explain any mitigation for it.

85 On balance, and mindful of the law explained in cases such as Balogan and Hitt, I have concluded that the procedure as a whole adopted by the Respondent fell within the band of reasonableness open to this employer.

86 My reasons for rejecting the argument at paragraph 84 above are as follows:

86.1. This piece of evidence was not formulated into a formal allegation and was never part of any charge faced by the Claimant in this disciplinary process.

86.2. From the template at page 88, this piece of evidence was used by the dismissing officer in his assessment of risk going forward, but it was not relevant to the central findings that (1) the ten accesses took place (which was admitted) and (2) there was no legitimate reason for the accesses or justification for them.

86.3. This piece of evidence was not the reason that Mr. Creasey reached the decision to dismiss; he had a considerable amount of other evidence. From the primary facts provided by the evidence he had, he concluded by inference that the explanation advanced by the Claimant was implausible.

86.4. The investigation itself was within the band of reasonableness permitted to this employer given the charge.

86.5. There was a fair appeal process. Prior to the appeal decision, further investigation was carried out. I accepted Mr. Ahmad's evidence for upholding the decision to dismiss.

Issue 2: did the Respondent act reasonably by treating the misconduct as sufficient reason for dismissal?

87 On the findings of fact, it should be apparent that I have concluded that Mr. Creasey had an honest belief based on reasonable grounds that the Claimant was guilty of the gross misconduct for which he was charged.

88 The investigation was reasonable in the circumstances, particularly when the guidance in Hitt is considered. The purpose of the investigation was to establish whether there were reasonable grounds for the belief that the Respondent had formed. Mr. Creasey carried out some further investigation and this further investigation coupled with the evidence that he already had ensured that he had reasonable grounds for the belief formed.

89 I concluded that the decision to dismiss was within the band of reasonable responses open to this employer.

90 To ensure that the parties understand my reasoning, I address each of the allegations of unfairness.

Issue 2.1

91 The investigation would usually be carried out by the Claimant's own line manager. I accepted the evidence of Mr. Ahmad as to why this did not happen in this case. This did not appear to be a breach of the disciplinary procedure.

92 If I am wrong about this, and there was a breach of procedure, given that the purpose of the investigation was to establish whether there were reasonable grounds for the belief that the Respondent had formed, there was no factual evidence (as opposed to the Claimant's own opinion) that the lack of an investigation by Ms. Williams affected the type or the outcome of the investigation.

93 The investigation was not instigated by Stacey Patis-Stannard; it arose because of the Audit report.

94 I have considered carefully whether there is evidence that Ms. Patis-Stannard influenced the investigation, rendering it unfair and not transparent. I have concluded that she did not do anything herself which took the investigation outside the band of reasonableness. Although she may have had negative feelings towards the Claimant, having been appointed by Ms. Patis-Stannard, Mr. Misbah reached his own conclusions as investigator. This conclusion is reached in part because Mr. Misbah had a fairly narrow factual issue to determine, specifically whether the Claimant had a legitimate business reason for accessing the LMS system on ten occasions on 8 September 2016. He concluded the Claimant had not shown a legitimate reason.

95 There is no evidence that Mr. Creasey had any reason to doubt the evidence that he received from her.

Issue 2.2:

96 The Claimant accepts at point 5 of his written submissions that he was guilty of "serious misconduct", rather than gross misconduct, and contends that the punishment should have been a lesser sanction. The Claimant did not dispute that he had made the accesses or traces in April, June and September. He admitted that he had had relevant training.

97 I agree with Simler J (President) that the emphasis by DWP in relation to information security is on the use of computer systems for the purposes of the legitimate business interests of DWP only. Mr. Creasey honestly decided that the LMS system had been used for a purpose other than a legitimate business purpose. He had reasonable grounds for that belief, which he explained; he was a credible witness.

98 I accepted the evidence of Mr. Creasey that he would have dismissed the Claimant in any event, even without the evidence from Ms. Patis-Stannard about the workstation. The reasons that he gave included that the offence as charged amounted to a very serious breach of the Information Security policy; and his reasons appeared to be corroborated by the contemporaneous documents. He rejected some of the Claimant's explanations as highly implausible. It is not for me to carry out a re-hearing of the evidence, nor for me to weigh the severity of the breach.

99 Mr. Creasy did consider whether to impose a final written warning but determined that dismissal was the only appropriate option.

100 I have carefully considered whether the failure to suspend the Claimant demonstrated that Mr. Creasey lacked reasonable grounds for a belief that the Claimant was guilty of gross misconduct, and that the employer must have retained trust and confidence in him. On balance, I rejected that submission. The Claimant had 19 years of unblemished service; in those circumstances, it was reasonable for Mr. Creasey (and any Human Resources officer advising him) to decide not to suspend him.

Issue 2.3:

101 As I have explained in the findings of fact, Mr. Creasey and Mr. Ahmad did take into account relevant mitigation.

102 The key findings of fact show that the Respondent's managers did consider the mitigation put forward, but did not find that it reduced the penalty to a sanction short of dismissal.

103 Mr. Creasey decided that the Claimant's workload was in line with other colleagues at the relevant time. He did not find that it constituted "exceptional pressures on the employee". I cannot re-hear this aspect of the case.

Issues 2.4 and 2.5

104 I accepted the evidence of Mr. Creasey and Mr. Ahmad. In my judgment, they followed the Disciplinary Procedure and its guide, by implementing a decision based on what they honestly believed, on reasonable grounds, in respect of the charge of breach of information security. I cannot substitute my view for these decisions.

Issue 2.6

105 The appeal process did not render the disciplinary process unfair. The wrong address was given to the Claimant by mistake; and this had no impact on the appeal which was heard in any event.

106 There was delay in confirming the outcome of the appeal. This was explained by Mr. Ahmad; and, whilst recognising that there was some delay that was not explained, the delay did not affect the outcome of the appeal. Indeed part of the delay was caused by Mr. Ahmad making further inquiries to see if there was evidence in support of the Claimant; part was caused by him seeking Human Resources advice; and part was caused by his two weeks holiday.

Issue 3: If procedurally unfair, what was the percentage chance that the Claimant would have been dismissed in any event?

107 Even if I am wrong in my determination as to procedural fairness, I have decided that it was inevitable that the Claimant would have been dismissed on the same date in any event, had a fair procedure been adopted and the evidence of Ms. Patis-Stannard

about the Claimant's tray, data storage and suggested poor performance not been taken into account. This is because I accepted the evidence to this effect from Mr. Creasey.

108 Moreover, I do not consider that any of the other procedural matters relied upon by the Claimant would have affected either the timing or the likelihood of dismissal occurring.

109 This is demonstrated by the reasons set out above in respect of issue 2. I accepted the evidence of Mr. Creasey that he believed that the Claimant was guilty of a very serious breach.

110 Accordingly, even if the dismissal were unfair on the procedural ground identified at paragraph 84, I concluded that the compensatory award should be reduced by 100%.

111 I have considered whether, in those circumstances, the basic award should also be reduced by the same amount. I decided that it would be just and equitable to reduce it by the same amount. This is for the following reasons:-

111.1 The Claimant accepted that he was guilty of serious misconduct, rather than gross misconduct.

111.2 The Claimant had delayed a long time after obtaining the information from D and failed to complete a Fraud Referral Form, despite this being his duty.

111.3 He was not able to produce any evidence, other than his own evidence, to support his case that he had a legitimate business interest for using the system as he did.

Summary

112 The complaint of unfair dismissal is not upheld. Having reached the above conclusions, it is not necessary for me to consider issues 4 and 5.

Employment Judge Ross

28 March 2018