



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4121685/2018

Held in Aberdeen on 7 and 8 February 2019

Employment Judge: M Sutherland

Nicola Taylor

Claimant
Represented by:
F Lefevre - Solicitor

Dick Flemming Communications Limited

Respondent
Represented by:
C Elvin - Consultant

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is the Claimant was not unfairly dismissed and the claim is dismissed.

REASONS

Introduction

1. This is a claim of unfair dismissal.
2. Parties agreed that the reason for the Claimant's dismissal related to her conduct.
3. The Respondent led evidence from Ashleigh Adie, Office Manager and Fiona Fraser, Managing Director. The Claimant then gave evidence on her own behalf.
4. The parties lodged a joint set of documents.
5. The parties made closing submissions.

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6. The Claimant clarified that she was not raising any issue with the disciplinary procedure adopted other than the procedure adopted in relation to the appeal.
7. The Claimant's representative objected to evidence being led in respect of the third reason for dismissal regarding the sensitive email. The Claimant asserted that the Respondent had pled that the reason for dismissal related to the disclosure of confidential financial information (reasons 1 and 2) and not to the sensitive email (reason 3). This assertion was made with reference to paragraph 33 of the ET3 Response namely "Despite the Claimant's plea that the sanction was too severe, the Respondent had lost trust and confidence in the Claimant as a result of her actions, namely disclosing private and confidential financial information". The Claimant asserted that the failure to mention the third reason meant that this reason was not relied upon. Although not discussed at the final hearing it is also noted that paragraph 35 states: "The decision to dismiss the Claimant was a direct result of the Claimant's gross misconduct, by virtue of divulging confidential financial information".
8. The purpose of the pleadings is to give fair notice of the material facts and to identify and focus the material issues in dispute. "Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it." (*Chandhok –v- Tirkey* [2015] IRLR 195, EAT). The legal authorities and the overriding objective countenance against taking an overly formal view of the pleadings. The pleadings make reference to the Claimant's actions concerning the sensitive email in paragraphs 20 and 26. In paragraph 28 the pleadings states that she was being dismissed "as there had been a breakdown of trust between the Claimant and Respondent as a result of the Claimant's actions." The letter of dismissal refers to the sensitive email. The Claimant had not alleged in her pleadings (either initially or by way of amendment) that the third reason was not in fact relied upon by the Respondent. The Claimant's representative did not object to evidence in chief about the sensitive email. The Claimant's

representative also asked questions in cross examination about the sensitive email. The objection was not raised by the Claimant's representative until the Claimant's cross examination. The objection was overruled on the basis that it was not apparent from the pleadings that the Respondent was asserting that the sensitive email was not relied upon as a reason for dismissal and in any event the objection had been made too late. The pleadings were however relevant to the relative importance of the three reasons given for dismissal.

9. The following abbreviations are used in the findings of fact–

Abbreviation	Name	Title
AA, Office Manager	Ashleigh Adie	Office Manager
CF, Director	Craig Forsyth	Director
FF, MD	Fiona Fraser	Managing Director/ Owner (Dismissing Officer)
MA, Accountant	Margaret Archibald	Accountant
SR, HR Consultant	Saragh Reid	HRFace2Face Consultant, Peninsula (Appeal Officer)

Issues

10. The issues to be determined by the Tribunal at this final hearing were confirmed with the parties at the start of the hearing to be as follows –

- (i) What was the reason (or, if more than one reason, the principal reason) for the Claimant's dismissal?
- (ii) Was the reason for dismissal potentially fair within the meaning of Section 98 (1) or (2) of the Employment Rights Act 1996?
- (iii) Was the dismissal fair having regard to Section 98(4) of the Employment Rights Act 1996 including whether in the circumstances the Respondent acted reasonably in treating it as a sufficient reason for dismissing the Claimant? Did the decision to dismiss (and the procedure adopted) fall within the 'range of

reasonable responses' open to a reasonable employer? *Iceland Frozen Foods Ltd v Jones* 1983 ICR 17

- (iv) If the reason for dismissal relates to the conduct of the Claimant –
1. Did the Respondent have a genuine belief in the Claimant's guilt?
 2. Did the Respondent have reasonable grounds for that belief?
 3. Had the Respondent conducted a reasonable investigation into that conduct?

British Home Stores Ltd v Burchell [1978] IRLR 379, [1980] ICR 303

- (v) Did the Respondent adopt a reasonable procedure? Was there any unreasonable failure to comply with their own disciplinary procedure and the ACAS Code of Practice on Disciplinary and Grievance Procedures? Did any procedural irregularities affect the overall fairness of the process having regard to the reason for dismissal?
- (vi) If the Respondent did not adopt a reasonable procedure, was there a chance the Claimant would have been dismissed in any event? *Polkey v AE Dayton Services Ltd* 1987 3 All ER 974.
- (vii) Does the Claimant wish to be reinstated or re-engaged? Is it reasonably practicable? Did the Claimant cause or contribute to her dismissal?
- (viii) To what basic award is the Claimant entitled? Did the Claimant engage in conduct which would justify a reduction to the basic award?

- (ix) What loss has the Claimant suffered in consequence of the dismissal? What compensatory award would be just and equitable? Did the Claimant contribute to her dismissal? Has the Claimant taken reasonable steps to mitigate her losses?

Findings in fact

11. The Tribunal makes the following findings in fact:
12. The Claimant was employed by the Respondent as a Financial Controller from 2 December 2014 until 26 July 2018. The Respondent is an Aberdeen based company specialising in business communications including mobile phone, landline, internet connectivity and web design. The Respondent has around 15 employees and made recourse to professional external HR providers, Peninsula. The Respondent took advice from Peninsula throughout the disciplinary process.
13. The Claimant's duties involved attending to supplier and customer invoices and queries; posting payments to the Sage Accounting System; and checking the bank statement and doing bank postings and reconciliation. The Claimant was in a relatively senior position within the company. She was entrusted with confidential financial information. Her gross annual salary at termination was £19,630. The employer's monthly pension contribution was £129.03 and their health care contribution was £18.13.
14. FF, MD Has been a friend of the Claimant for approximately 11 years and personally recommended the Claimant for employment with them. The Claimant reported to FF, MD as her line manager. FF, MD conducted her appraisals. The Claimant discussed significant work-related issues with FF, MD e.g. her significant absences. The organogram in the first Employee Handbook shows a reporting line from the Accounts Team (including the Claimant) to FF, MD.
15. The Claimant shared an office space with AA, Office Manager. AA also reported to FF, MD. In the organogram in the first Employee Handbook AA, OM is not in the Accounts Team and is on the same level as the Claimant. She

also has a reporting line to FF, MD. There is no reporting line from the Claimant to AA. AA as office manager undertook some HR related duties such as recording absences and holidays. The Claimant and AA, Office Manager had a good working relationship and the Claimant regarded her as a lovely, well natured person in whom she confided personal matters.

16. The Claimant's contract of employment expressly incorporated the disciplinary rules and procedures. The Claimant had a clean disciplinary record.
17. The Claimant had previously entered into Confidentiality Agreements with the Respondent. The Confidentiality Agreement entered into on 2 December 2014 expressly provided that "confidential information" included "information concerning the business and/or finances of the Company and any customers [,etc] which you shall have received or obtained at the time by reason of or in connection with your service with the Company". The Confidentiality Agreement stated that the Claimant "Will not inappropriately discuss or transmit any confidential information either internally or externally obtained in my role as manager within the company... I understand that any breach of this Agreement may result in disciplinary action up [to] summary dismissal".
18. There were two Employee Handbooks, the first of which was in place at the time of the alleged misconduct and the second of which was introduced on Friday 20 July 2018 i.e. after the alleged misconduct but before the disciplinary process. The Claimant did not normally work a Friday and was suspended on Monday 23 July 2018. The Respondent elected to apply the first employee handbook during the disciplinary process.
19. The first Employee Handbook declared that the disciplinary procedure was non-contractual. It provided that gross misconduct includes "unauthorised access to, or disclosure of, any confidential information." It provided that "employees being disciplined will have the right of appeal, wherever practicable, to a level of management not previously involved" and that "The company will endeavour to ensure that the person hearing the appeal was not party to the original disciplinary decision".

20. The second Employee Handbook did not include “unauthorised access to, or disclosure of, any confidential information” within its examples of gross misconduct. It stated that “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”. It also provided that “the appeal procedure will normally be conducted by a member of staff not previously connected with the process so that an independent decision into the severity and appropriateness of the action taken can be made”.
21. During the Claimant’s absences from work AA, Office Manager undertook the majority of the Claimant’s duties and MA, Accountant undertook the remainder of the Claimant’s duties relating to checking the bank statement and doing bank postings and reconciliation. This division of her work had been discussed with the Claimant. Whilst AA, Office Manager had access to the Sage Accounting System for debtor and creditor purposes she was not able to access the same financial information as the Claimant or the Accountant.
22. The Respondent had been experiencing financial difficulties for a number of years. In January 2018 the Respondent proposed a 10% reduction in staff hours (and therefore pay) as an alternative to redundancies to which staff (including the Claimant) had agreed.
23. The Claimant had several periods of absence in the 18-month period prior to her dismissal. These absences are related to her mental health issues and to her caring for her husband who is terminally ill with cancer. Unbeknown to the Respondent, the Claimant was diagnosed on 9 February 2018 as having recurrent depression with a major depressive episode (moderate to severe). In January 2018 FF, MD suggested that the Claimant take a period of compassionate leave from 9 January to 12 January 2018. During the Claimant’s absence from work from 29 January 2018 until 5 March 2018 the Respondent exercised its discretion and paid the Claimant sick pay.
24. FF, MD perceived that at that time the Claimant was struggling to cope with her personal issues and following the Claimant’s return to work, and with

reference to allowing her time to focus on those issues, FF, MD offered the Claimant 6 months' salary by way of an exit package. This offer was not made on a without prejudice basis or as part of protected conversation. The Claimant regarded the offer as generous but refused saying she preferred the stability and distraction of work.

25. When the Claimant returned to work in March 2018, the duties of her role which were being covered by AA, Officer Manager and MA, Accountant were transferred back to the Claimant over a period of 2 to 3 weeks by way of a phased return. AA, Office Manager provided her with tasks to do during that period. Thereafter she was "back in the swing of things" and managing her role fully.
26. In mid-July 2018 the Claimant and AA, Office Manager had conversations about financial information and a sensitive email. The Claimant was very concerned about the company's finances and staff job security. AA was upset by the financial information and worried that her job was at risk. AA, Office Manager relayed these conversations to FF, MD. FF, MD was shocked about these conversations. If this was true, she felt she had completely lost trust in the Claimant.
27. On 23rd July 2018 FF, MD held an investigative meeting with the Claimant. Notes Were taken by MA, Accountant. The Claimant had no prior warning of the nature of the meeting. The Claimant was advised of allegations that she had "expressed concern to another member of staff that the bank balance was low, stating that this was cushioned as 'this is between you and me'; spoken about dividends taken by the directors including the amount; expressing her concern that the directors are taking dividends when all staff have had a cut in hours and pay; BCC'd another member of staff into a sensitive email". The notes of the meeting record that the Claimant replied by stating she said the bank is the lowest she'd seen it; she didn't tell AA, Office Manager the amount of the dividend but instead suggested that AA had overheard her telephone call with CF, Director; she did pass comment she was surprised the dividends were still being paid given the cut to staff hours ; she didn't think there was an

issue telling AA anything as she thought as office manager she knew everything anyway.

28. On 23 July 2017 the Claimant was suspended pending the outcome of a disciplinary investigation.
29. On 24 July 2018 AA, Office Manager provided a statement as part of the disciplinary investigation. She recalled a conversation on 12 July 2018 with the Claimant about CF, Director in which she had joked to the Claimant at he deserves a holiday because he's the only one who works full time. AA, recalled that the Claimant stated in reply that he didn't take a hit in wages like we did; and slightly later the Claimant stated "just between us, the bank balance is looking very low"; that she was concerned about losing her job and the company getting rid of people; that she thought the directors would have taken more action before we had to reduce our wages; that they had recently take out dividends and she had been asked to make a payment for both CF, Director and FF, MD for £4,000 and that Mrs F, the founder, also gets a dividend. (Mrs F is FF, MD's mother.) AA, OM advised that she was not privy to this financial information and that it made her feel uncomfortable.
30. In her statement AA, Office Manager also recalled a conversation with the Claimant on 12 July 2018 in which the Claimant criticised a colleague for disclosing very sensitive personal information regarding a customer; that the Claimant then proceeded to disclose that sensitive information to her. AA, Office Manager advised her to raise the issue with the Directors. When the Claimant raised it with FF, MD by email she had "bcc'd" AA, Office Manager.
31. On 24 July 2018 FF wrote to the Claimant inviting her to attend a disciplinary hearing. The three allegations were noted to be as follows –
 - *"That you allegedly discussed with [AA, Office Manager] the drop in the bank balance making comment about the financial state of the company - information that AA has not got access to. Starting the conversation with "between you and I" suggesting that you knew [AA] was unaware of this information. You then allegedly went on to disclose exact amounts of dividend payments made to the directors of the company (FF and CF)*

making comment that the directors have not had any cutbacks where other staff members have and that we are not looking after the wellbeing at the company. You have said that you did not say this to [AA] but that she overheard a phone conversation between yourself and [CF, Director] when you mentioned the dividend amounts - we have attached a copy of the phone transcript for you to read". (According to the phone transcript the Claimant did not discuss the amount of the dividends with CF, Director.)

- *"You also allegedly disclosed to [AA] that [Mrs F] the founder of the company has also received dividend payments. Again, information that [AA] is not Privy to".*
- *"You allegedly bcc'd [AA] in on a sensitive email relating to another member of staff on an incident that was not involving her".*

32. The Claimant was warned that "if these allegations are substantiated, we will regard them as gross Misconduct. If you are unable to provide a satisfactory explanation, your employment may be terminated without notice".

33. The Claimant was provided with a copy of the disciplinary procedure from the first employee handbook; the statement from AA; the transcript of the phone call with CF, Director, and the signed Confidentiality Agreement. The Claimant was advised of her right to be accompanied by a fellow employee.

34. The disciplinary hearing was held on 26 July 2018. FF, MD chaired the meeting at which MA, Accountant took notes. The Claimant was not accompanied. FF, MD had prepared questions which the Claimant did not want to answer. The Claimant had instead attended with a pre-prepared statement which she read out at the hearing including that:

- (i) *"I am not insinuating AA is lying... but her statement is inaccurate with words being taken out of context";*
- (ii) *"I said in a joking manner 'Aye, but he probably hasn't had to take a cut in wages like we have'";*

- (iii) *“I also did not mention anything about ‘the financial state of the company’. What I said was, ‘just between you and me, I have never seen the bank balance as low as it is just now’. What I meant by ‘just between us’ was that I wouldn’t want her to repeat the information to anyone else...I said this in a concerned manner to my line manager (AA) who as the same access levels to Sage as I go and can therefore access the bank balance information at anytime if she so wanted”*
- (iv) *“ I did go on to say I was worried I may lose my job if more cutbacks were needed, to which AA asked “if you were to go, who would do your job?”. To which I replied ‘probably you’”*
- (v) *“I categorically did not say that “I thought the directors would have taken more action before we had to reduce our wages”;*
- (vi) *“Yes, I did say to Ashley I was surprised with all the cutbacks, that [FF and CF, Directors] had recently taken dividends of £4000 out of the company, when we were all on reduced wages. This comment was made at the end of June... I made this to comment to AA as my line manager, trusting it would go no further, and also AA could easily find the information in Sage if she wanted to”*
- (vii) *“I do not recall mentioning Mrs. F getting dividends, but again I would expect my manager to already know this”*
- (viii) *“I told AA as my manager about the contents of said email...AA advised me to forward it to FF to deal with. I felt AA as office manager should be copied in on the email, so she was kept in the loop and could read the contents for herself. My decision to change the CC copy to a blind copy, was perhaps an incorrect judgement but it was to give both FF and AA a copy as the same time”*
- (ix) *“FF said at our meeting on Monday that she thought I was a friend, that she was disappointed with me, and all the trust she had in me has gone. I feel FF saying the trusted in me had gone means that*

decision of my 'guilt' has already been made without me being given a fair opportunity to explain my version of events".

- (x) *"I can't help but feel, with the nature of the way her statement is written with dates etc, that she has possibly been asked to keep an eye on me, note down anything untoward, and that these allegations have come about in a planned persecution to terminate my employment with DFC, after me turning down FF's earlier offer".*
- (xi) *"I have always respected FF as my boss for the last 3 ½ years, and as a good friend for 11 years...I strongly feel I haven't done anything to deserve dismissal, and I value my job very much. I already have so much to deal with, with my husband currently fighting for his life, my own clinical depression, ...and FF knows that I am the only bread winner in my family, and already struggling to keep a roof over our heads".*

35. At the disciplinary hearing FF, MD responded that AA may be her line manager for HR (being responsible for recording absences and holidays) but this did not extend to her financial duties and that AA is an Office Manager not a Finance Manager. FF, MD asked the Claimant if she could see how her statements could cause animosity between the employees and the Directors and concerns regarding their job security. The Claimant did not accept this. FF, MD explained that payment of a dividend is how the Directors get wages (they had taken a substantial cut in dividends). The Claimant agreed that possibly she should not have disclosed the information but that it did not amount to gross misconduct. FF, MD stated that her handling of the BCC'd email showed a lack of professionalism. The disciplinary hearing was adjourned for about half an hour to enable FF, MD to consider matters and get advice from their external HR advisors. When the meeting resumed FF advised the Claimant there is a huge breakdown in trust between us and she was being dismissed for gross misconduct the key issue being the disclosure of financial information – that she was gossiping about confidential financial matters. She was advised that her right of appeal lay with CF, Director.

36. FF, MD was concerned that the Claimant didn't think she had done anything wrong. She was concerned that the Claimant was creating animosity between staff and the Directors. The focus of her concern lay with the disclosure of the financial information. She would not have dismissed the Claimant for her conduct in relation to the emails alone.
37. On 26 July 2018 FF, MD wrote to the Claimant confirming the decision to dismiss: "At the hearing her explanation(s) was/were that you discussed these items with AA only and as your line manager you did not see that you had done anything wrong will...I considered your explanation(s) to be unsatisfactory because the level of information you gave to AA was not something that she is privy to and the context in which you were discussing these items were wholly inappropriate, highly unprofessional and gave cause for concern. You have never reported to AA on a financial level and so this incident has resulted in total breach of trust. Having carefully reviewed the circumstances and considered your responses...The appropriate sanction to this breach is summary dismissal." She was advised that her right of appeal lay with CF, Director.
38. The Claimant was 45 years old as the date of termination.
39. On 27 July 2018 the Claimant submitted her grounds of appeal namely that the accusations are unfair; that the sanction of dismissal was too severe; that the decision to terminate was determined; that the points raised were not fully considered or thoroughly investigated; that she's never had such conversations with other staff; and that her side has not been taken into account.
40. On 2 August 2018 CF, Director wrote to the Claimant to advise that an impartial consultant from Peninsula has been appointed to hear her appeal. The Respondent is a small company and was trying to make the appeal impartial. The Claimant was advised that the consultant would not be able to give her a decision, however they will provide recommendations and upon receipt of the report they would write with to her with an outcome. She was advised of the

right to be accompanied by a fellow colleague. The Claimant did not object to the appeal being dealt with in this manner.

41. On 15 August 2018 SR, Consultant held the Disciplinary Appeal hearing with the Claimant. SR, Consultant worked for Peninsula who had provided advice to the Respondent throughout the disciplinary process. The meeting was recorded. The Claimant elected not to be accompanied. SR, Consultant acknowledged that she was not independent because the Respondent had paid for Peninsula to do the disciplinary appeal on their behalf but she had no prior involvement. The Claimant advised that there was a huge difference between saying the bank is low and saying the bank is the lowest I've seen it; that AA has the same level of access to Sage where the bank balance is clearly visible and dividend payment amounts can be easily found; she has recently found out that Companies House provides a figure for Director's dividends for 2016; she was not gossiping – the comments were relevant to her work; she was not acting unprofessionally; the real reason for her dismissal was that she has needed a considerable amount of time off in the last 15 months and that FF, MD was aware that she needed considerable time off in the future; that her work requires the handling of sensitive, confidential information and that she wouldn't compromise the bond of trust; it was the office manager she was speaking to – she wasn't broadcasting it to staff; she'd never before discussed the bank balance with AA before; the work she was doing was monitored by AA for 3 – 4 weeks; that the Respondent had been very supportive of her situation and absences but she was gobsmacked when she was offered an exit package; and that FF, MD did not challenge her description of AA as her line manager in the disciplinary meeting.
42. On 27 August 2018 SR, Consultant produced a Report of the Appeal Hearing which considered all the grounds of appeal in detail. In summary she found: that the decision to dismiss was not pre-determined and had the Claimant not conducted herself in that manner she would not have been dismissed; that it was apparent from the organisational chart and from emails that FF, MD was her line manager and the Claimant raised queries relating to her financial role with either FF or MA, Account; that the points she raised were fully considered;

that the Claimant knew that it was not appropriate for her to discuss financial matters with AA, Office Manager and any issues of genuine concern ought to have been raised with FF, MD; the information posted on Companies House was from 2016 and not comprehensive; the Claimant had acted in breach of the Confidentiality Agreement; that nature of the disclosure caused the Respondent to lose trust and confidence and dismissal was the appropriate sanction. SR, Consultant recommended that her appeal be dismissed and the sanction of dismissal upheld.

43. FF, MD and CF, Director discussed the recommendations with a view to reaching a joint decision on whether to accept them. The the only new information was the dividend information available on Companies House but they considered that it was an historic global figure and wasn't necessarily access by staff. They discussed and discounted her returning to a lesser role. They made a unanimous decision to accept the recommendations. On 27 August 2018 FF, MD wrote to the Claimant to provide her with a copy of the HR Consultant's Report on the Appeal Hearing and stating that having carefully considered the Consultant's findings and the original decision to dismiss was upheld.
44. Following her dismissal, the Claimant has not been replaced and her work is being undertaken by AA, Office Manager and MF, Accountant who had previously undertaken her work during her previous absences.
45. Following her dismissal, the Claimant was unable to apply for alternative employment due to ill health and caring for her husband. Her dismissal had added to her stress.
46. Since 6 August 2018 the Claimant has been in receipt of Carer's Allowance in respect of her husband's condition which substantially limits the amount of paid work she may undertake.

Observations on the evidence

47. The Respondent witnesses gave their evidence in a measured and consistent manner and there was no reasonable basis upon which to doubt the credibility

and reliability of their testimony. They answered the questions in full, without material hesitation and in a manner consistent with the other evidence. There was no evidence of any inappropriate motivation behind AA, Office Manager's decision to advise the Respondent of the events which resulted in the disciplinary process. She appeared genuinely upset at having to do this to a colleague she regarded as a friend and didn't take the decision lightly. FF, MD appeared entirely genuine and sincere in her belief that the Claimant had engaged in the alleged misconduct and that that it amounted to gross misconduct. FF, MD's only hesitation arose over when she first considered that the Claimant was at risk of dismissal. She was unsure and stated that it was maybe after she had spoken to the Claimant during the investigation. However it was apparent from FF, MD's reaction on first hearing the allegations from AA, OM that she must have considered that the Claimant was at risk of dismissal.

48. The standard of proof is on balance of probabilities, which means that if the tribunal considers that, on the evidence, the occurrence of the event was more likely than not, then the tribunal is satisfied that the event did occur.
49. The Claimant asserted that her direct report/ line manager was AA, Office Manager. The Respondent asserted that FF, MD was her direct report/ line manager. FF, MD conducted her appraisals. The Claimant discussed significant work related issues with FF, MD e.g. her significant absences from work. AA was responsible for recording absences and holidays. AA, OM is not in the Accounts Team but is on the same level. She also has a reporting line to FF, MD. There is no reporting line from the Claimant to AA, OM. During the Claimant's absences from work AA, Office Manager undertook the majority of the Claimant's duties and MA, Accountant undertook the remainder of the Claimant's duties relating to checking the bank statement and doing bank postings and reconciliation. When the Claimant returned to work in March 2018, the duties of her role which were being covered by AA, Officer Manager and MA, Accountant were transferred back to the Claimant over a period of 2 to 3 weeks by way of a phased return. AA, Office Manager provided her with tasks to do during that brief period. It is considered more likely that FF, MD rather than AA, Office Manager was her direct report/ line manager.

50. The Claimant asserted that AA, Office Manager had access to the same financial information as her. Both AA and FF, MD asserted that AA does not have access to the same financial information as the Claimant. AA had no motive to lie. Both the Claimant and AA had access to SAGE Accounting System operated by the Respondent which has multiple levels of access. The Claimant did not know what level of access AA had – she only knew her own level of access and presumed AA had the same access because she covered her duties during her absences. AA is not in the Accounting Team. AA did not cover all of the Claimant’s duties during her absences – some of her duties relating to checking the bank statement and doing bank postings and reconciliation were undertaken by MA, Account. It is considered more likely that AA did not have access to the same financial information as the Claimant.

Relevant Law

51. Section 94 of Employment Rights Act 1996 (‘ERA 1996’) provides the Claimant with the right not be unfairly dismissed by the Respondent.
52. It is for the Respondent to prove the reason for her dismissal and that the reason is a potentially fair reason in terms of Section 98 ERA 1996. At this first stage of enquiry the Respondent does not have to prove that the reason did justify the dismissal merely that it was capable of doing so.
53. If the reason for her dismissal is potentially fair, the tribunal must determine in accordance with equity and the substantial merits of the case whether the dismissal is fair or unfair under Section 98(4) ERA 1996. This depends whether in the circumstances (including the size and administrative resources of the Respondent’s undertaking) the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant. At this second stage of enquiry the onus of proof is neutral.
54. If the reason for the Claimant’s dismissal relates to her conduct, the tribunal must determine that at the time of dismissal the Respondent had a genuine belief in the misconduct and that the belief was based upon reasonable grounds having carried out a reasonable investigation in the circumstances (*British Home Stores Ltd v Burchell* [1978] IRLR 379, [1980] ICR 303).

55. In determining whether the Respondent acted reasonably or unreasonably the tribunal must not substitute its own view as to what it would have done in the circumstances. Instead the tribunal must determine the range of reasonable responses open to an employer acting reasonably in those circumstances and determine whether the Respondent's response fell within that range. The Respondent's response can only be considered unreasonable if the decision to dismiss fell out with that range. The range of reasonable responses test applies both to the procedure adopted by the Respondent and the fairness of their decision to dismiss (*Iceland Frozen Foods Limited v Jones [1983] ICR 17 (EAT)*).
56. In determining whether the Respondent adopted a reasonable procedure the tribunal should consider whether there was any unreasonable failure to comply with their own disciplinary procedure and the ACAS Code of Practice on Disciplinary and Grievance Procedures. The tribunal then should consider whether any procedural irregularities identified affected the overall fairness of the process in the circumstances having regard to the reason for dismissal.
57. Any provision of a relevant ACAS Code of Practice which appears to the tribunal may be relevant to any question arising in the proceedings shall be taken into account in determining that question (Section 207, Trade Union and Labour Relations (Consolidation) Act 1992). The ACAS Code of Practice on Disciplinary and Grievance Procedures provides in summary that –
- (i) Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.
 - (ii) Employers and employees should act consistently
 - (iii) Employers should carry out any necessary investigations, to establish the facts of the case.
 - (iv) Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.

- (v) Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.
 - (vi) Employers should allow an employee to appeal against any formal decision made
58. Compensation is made up of a basic award and a compensatory award. A basic award, based on age, length of service and gross weekly wage, can be reduced in certain circumstances.
59. Section 123 (1) of ERA provides that the compensatory award is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the Claimant in consequence of dismissal in so far as that loss is attributable to action taken by the employer. Subject to a Claimant's duty to mitigate their losses, this generally includes loss of earnings up to the date of the Final Hearing (after deducting any earnings from alternative employment), an assessment of future loss of earnings, if appropriate, a figure representing loss of statutory rights, and consideration of any other heads of loss claimed by the Claimant from the Respondents.
60. Where, in terms of Section 123(6) of ERA, the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, then the Tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.
61. An employer may be found to have acted unreasonably under Section 98(4) of ERA on account of an unfair procedure alone. If the dismissal is found to be unfair on procedural grounds, any award of compensation may be reduced by an appropriate percentage if the Tribunal considers there was a chance that had a fair procedure been followed that a fair dismissal would still have occurred (*Polkey v AE Dayton Services Ltd* [1987] IRLR 503 (HL)). In this event, the Tribunal requires to assess the percentage chance or risk of the Claimant being dismissed in any event, and this approach can involve the Tribunal in a degree of speculation.

62. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") provides that if, in the case of proceedings to which the section applies, it appears to the Tribunal that the claim concerns a matter to which a relevant Code of Practice applies, and the employer has unreasonably failed to comply with the Code in relation to that matter, then the Tribunal may, if it considers it just and equitable in all the circumstances, increase the compensatory award it makes to the employee by no more than a 25% uplift. The ACAS Code of Practice on Disciplinary & Grievance Procedures is a relevant Code of Practice.

Respondent's submissions

63. The Respondent's oral submissions were in summary as follows: -
64. The Respondent had a genuine belief based upon reasonable grounds in light of a reasonable investigation. The decision to dismiss fell within the range of reasonable responses. It is not for the tribunal to substitute their own view as to what is reasonable.
65. The Claimant held a senior position and was privy to confidential financial information. It required a higher level of trust underscored by the Confidentiality Agreement.
66. Even on the Claimant's version of the conversations with AA, Office Manager, the Claimant had expressed significant concern about the bank balance and conveyed sensitive confidential information.
67. Her recourse to the phrase "just between you and I" evidenced that she knew she was gossiping about confidential information.
68. The Claimant did not know what financial information AA, Office Manager was privy too - at best she had made a poor assumption.
69. There was no reasonable basis for the Claimant to believe that AA rather than FF was her line manager.
70. The precise amount of the dividends could not be ascertained from Companies House and was inevitably historic. In any event the Claimant was not aware

that the confidential information might be publicly available when she made the disclosure.

71. The Claimant would not accept that the disclosure was serious and could cause animosity between staff and the directors and concern about job security.
72. The primary reasons for dismissal related to the disclosure of confidential financial information and the conduct relating to the sensitive email merely leant weight.
73. The first handbook was in place at the time of the conduct and it was reasonable to rely upon it
74. FF, MD regarded the Claimant as a friend and had always treated her very favourably.
75. The HR Consultant was impartial and it was reasonable to follow her recommendations on appeal. The decision to follow her recommendations was made jointly by the Directors and not solely by FF, MD.
76. If the procedure was not reasonable she would have been fairly dismissed in any event (*Polkey*). Her dismissal would have been upheld if the Consultant had been empowered to make that decision.
77. If the dismissal was unfair the Claimant contributed to her dismissal by at least 30%

Claimant's Submissions

78. The Claimant's oral submissions were in summary as follows: -
79. In the event of a dispute on the evidence the evidence of the Claimant should be preferred
80. It could be inferred that her dismissal was pre-determined because she had recently been offered an exit package, the company had been in financial difficulties for a number of years, the Claimant was not replaced, and the

savings on her wages were significant. (This was not put to the Respondent witnesses in evidence.)

81. The Claimant did not disclose the amount of the bank balance
82. The Claimant was raising legitimate issues of concern regard her job security to her line manager
83. AA, Office Manager was aware of the financial information from Sage.
84. Her conduct did not amount to misconduct of any kind and certainly not gross misconduct.
85. The information about the dividends is in the public domain and therefore cannot amount to a disclosure.
86. The Claimant was reporting of the Office Manager – she undertook her duties in her absence. FF, MD did not correct that understanding in the disciplinary interview.
87. The Respondent failed to take into account her difficult personal circumstances (This was not put to the Respondent witnesses in evidence.)
88. The Respondents were tied to their pleadings which stated that the reason for dismissal related to the disclosure of confidential financial information (reasons 1 and 2) and not to the sensitive email (reason 3).
89. The disciplinary process in relation to the appeal left a lot to be desired – FF, MD conducted the investigation, held the disciplinary hearing and determined the appeal. It was totally improper to involve FF, MD in discussions regarding the appeal outcome. There was a failure to appoint someone independent to determine the appeal.
90. The Claimant had a contractual right to have her appeal heard by an independent Director and the approach adopted was in breach. The Appeal Officer ought to have been empowered to reach a decision rather than simply make recommendations.

91. The Disciplinary Handbook was not referred to or relied upon at the hearings or in reaching the decision to dismiss. Only the Confidentiality Agreement was referred to and relied upon. The Confidentiality Agreement was not applicable. In any event, the Confidentiality Agreement is exclusive and ousts recourse to categorisation of gross misconduct in the Disciplinary Handbook. The Confidentiality Agreement makes clear that breach may result in a range of sanctions (and does not simply amount to gross misconduct per the first Disciplinary Handbook).
92. If the dismissal was unfair the Claimant contributed to her dismissal by 10%.

Decision

93. The allegations considered in the disciplinary process were in summary that the Claimant advised the Office Manager of financial and other information to which she was not privy by gossiping about the drop in the bank balance and about the dividends paid to the directors and by advising her of the contents of a sensitive email. The reasons given by the Respondent on termination were that she had disclosed and was gossiping about confidential financial matters and that the Claimant failed to recognise that she had done anything wrong, resulting in a huge a breakdown in trust.
94. Although the Claimant had asserted on appeal that the real reason for her dismissal was that she had already had and would still need a considerable amount of time off, this issue was not put to FF, MD in cross examination. In any event it was accepted by the Claimant that the Respondent's reason for dismissing the Claimant related to her conduct (not her absences), and that reason was a potentially fair reason for dismissal, in terms of Sections 98(1) and 98(2) (b) ERA 1996.
95. FF, MD held an investigative meeting with the Claimant. AA, Office Manager provided a statement as part of the disciplinary investigation. The Claimant also provided a statement during the course of the disciplinary hearing.
96. The findings from these investigations were that -

- (i) According to the Claimant she had said to AA, Office Manager: “just between you and me, I have never seen the bank balance as low as it is just now”; she was surprised the dividends were still being paid to the Directors given the cut to staff hours; she was worried she may lose her job if more cutbacks were needed; and that the Directors had recently taken dividends of £4000 out of the company, when they were all on reduced wages (but that this comment was made at the end of June and further she did not recall commenting on Mrs F).
- (ii) According to the Claimant there was no issue with her telling AA anything because as office manager she knew everything anyway; that AA has access to the same financial information as her and could easily obtain this information; that she was expressing concern to AA as her line manager.
- (iii) At the investigation meeting the Claimant said she didn't tell AA, Office Manager the amount of the dividend but instead suggested that AA had overheard her telephone call with CF, Director but she changed this after seeing the transcript of the call.
- (iv) The Claimant denied AA, Office Managers versions of events saying “I am not insinuating AA is lying... but her statement is inaccurate with words being taken out of context”;
- (v) According to the Claimant her decision to change the CC copy to a blind copy, was perhaps an incorrect judgement but it was to give both FF and AA a copy as the same time
- (vi) According to AA, Office Manager the Claimant had said to her CF, Director didn't take a hit in wages like we did; just between us, the bank balance is looking very low; she was concerned about losing her job and the company getting rid of people; she thought the directors would have taken more action before we had to reduce our wages; the Directors had recently taken out dividends and she

had been asked to make a payment for both CF, Director and FF, MD for £4,000 and that Mrs F, the founder, also gets a dividend.

- (vii) According to AA, OM, she was not privy to this financial information and that it made her feel uncomfortable.
- (viii) According to AA, OM the Claimant criticised a colleague for disclosing very sensitive personal information regarding a customer but had then proceeded to disclose that sensitive information to her. When the Claimant raised it with FF, MD by email she had “bcc’d” her.

97. At the time of her dismissal, FF, MD believed that the Claimant had advised the Office Manager of financial and other information to which she was not privy by gossiping about the drop in the bank balance and the dividends paid to the directors and by advising her of the contents of a sensitive email. There was a reasonable basis for her belief that the Claimant had disclosed this information even based upon the Claimant’s own version of events. It is not material as to whether she said the bank balance was very low or the lowest she’d seen it. Both are relative statements which convey confidential information about the financial state of the business. (Contrary to the Claimant’s submission it was irrelevant that she did not disclose the amount of the bank balance.) The issue was whether there was a reasonable basis for believing that the Claimant was conveying information which she understood to be confidential and whether she was conveying this to AA as her line manager because she was worried or whether she was gossiping to a colleague.

98. The Claimant conveyed financial and other information to AA, Office Manager. AA was not previously aware of this information. She did not require to know this information in her role as Office Manager. Both the Claimant and AA had access to SAGE Accounting System operated by the Respondent which has multiple levels of access. AA was not in the Accounts Team. The Claimant knew that AA did not cover all of her duties during her absence. She knew that MA, Accountant from the Accounts Team covered some of her banking duties

during her absence. There was no reasonable basis for the Claimant to believe that AA had access to the same financial information. Further her use of the phrase "between you and I" indicates that she was aware that she was disclosing confidential information. There was therefore a reasonable basis for FF, MD's belief that the Claimant had disclosed to AA, Office Manager confidential information to which was not otherwise privy.

99. AA, Office Manager was not the Claimant's line manager. The Claimant asserted that she believed AA was her line manager. FF, MD conducted the Claimant's appraisals. Whilst the Claimant discussed some work related issues with AA she discussed significant work related issues with FF, MD e.g. her significant absences from work. AA was responsible for recording absences and holidays. AA, OM is not in the Accounts Team but is on the same level. She also has a reporting line to FF, MD. There is no reporting line from the Claimant to AA, OM. During the Claimant's absences from work AA, Office Manager undertook the majority of the Claimant's duties and MA, Accountant undertook the remainder of the Claimant's duties relating to checking the bank statement and doing bank postings and reconciliation. When the Claimant returned to work in March 2018, the duties of her role which were being covered by AA, Officer Manager and MA, Accountant were transferred back to the Claimant over a period of 2 to 3 weeks by way of a phased return. AA, Office Manager provided her with tasks to do during that period. The Claimant did not assert that AM, OM was her line manager at the Investigative Meeting. She instead stated that she didn't think there was an issue telling AA anything as she thought as office manager she knew everything anyway. The Claimant asserted that AM, OM was her line manager at the Disciplinary Meeting. FF, MD responded that whilst she may her line manage for HR (being responsible for recording absences and holidays) but this did not extend to her financial duties and that AA is an Office Manager not a Finance Manager. During the appeal hearing the Claimant advised that if an issue arose she would discuss it with AA because she covers her absences, then either FF, MD or MA, Account if there was something more serious that AA didn't know about or deal with. Whilst the Claimant may have felt like AA, OM was acting as her line manager during the 3 week phased return it would have been obvious to the

Claimant that FF, MD was ordinarily her direct report/ line manager. There was therefore a reasonable basis for FF, MD's belief that the Claimant had been disingenuous when she asserted that she was making the disclosure to AA as her line manager.

100. The Claimant conveyed confidential information to AA to which she was not privy. She did not require to know this information in her role as Office Manager. This conversation was prefaced with the phrase 'between you and I' which is indicative of gossiping. There was therefore a reasonable basis for FF, MD's belief that the Claimant was gossiping when she had advised the Office Manager of the confidential information.
101. FF, MD appeared entirely genuine and sincere in her belief that the Claimant had in summary advised the Office Manager of financial and other information to which she was not privy by gossiping about the drop in the bank balance and the dividends paid to the directors and by advising her of the contents of a sensitive email. There was no evidence that she had any other reason in mind and that her belief was not genuine. There was a reasonable basis for that belief based upon a reasonable investigation. The tribunal therefore concludes that FF, MD held a genuine belief in the Claimant's misconduct at the time of her dismissal.
102. There were two Employee Handbooks the first of which was in place at the time of the alleged misconduct and the second of which was introduced on Friday 20 July 2018 i.e. after the alleged misconduct but before the disciplinary process. It was not unreasonable for the Respondent to elect to apply the first employee handbook during the disciplinary process. Under the first Handbook the company will endeavour to ensure that the person hearing the appeal was not party to the original disciplinary decision. The ACAS Code provides that "The appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case".
103. The Claimant was initially advised of a right of appeal to the other Director, CF. However the Respondent then elected to appoint a consultant from Peninsula to hear her appeal with a view to making the process more impartial. The

consultant was impartial in that she was from a third-party organisation but not wholly impartial since that third-party organisation had been giving HR advice to the Respondent throughout the disciplinary process. However the particular consultant appointed had no prior involvement. The appeal she conducted was thorough and considered all the grounds of appeal in detail. The Respondent is a small employer and having regard to their size and administrative resources it was not unreasonable for them to appoint that consultant to hear the appeal in the circumstances.

104. The appeal hearing and report was impartial and thorough. The material new finding was that the dividend information was available on Companies House but that was an historic global figure, wasn't necessarily access by staff and wasn't known to the Claimant when she made her disclosure. The recommendations in the circumstances were reasonable.
105. The Claimant was advised that the consultant would not be able to give her a decision but would provide recommendations to be accepted or rejected by the Respondent. The Claimant did not object to the appeal being dealt with in this manner. The Respondent could have undertaken to be bound by the recommendations in advance of the appeal hearing. That would have amounted to a substantial loss of control with an untested consultant and it was not unreasonable for them to receive instead recommendations which they then accepted or rejected.
106. Ideally the recommendations would have been considered by CF, Director alone since FF, MD had prior involvement. However the Respondent is a small employer and it was not unreasonable for the only two Directors to want to discuss the recommendations before accepting or rejecting them. Further FF, MD had no involvement in the appeal hearing itself – her role was restricted to considering and reaching a joint decision on whether to accept the recommendations. Furthermore FF, MD and CF, Director reached a unanimous decision. It was not unreasonable for the Respondent to adopt that approach in the circumstances.

107. The Respondent complied with their own disciplinary procedure and the ACAS Code of Practice on Disciplinary and Grievance Procedures. The Respondent carried out a reasonable investigation to establish the facts of the case. There was no material line of enquiry that was not pursued with a materially relevant witnesses. The Claimant was informed of the basis of the problem and given an opportunity to put his case in response before any decision was made. The Claimant was advised of her right to be accompanied. The Claimant was allowed to appeal against the decision to dismiss. There was no evidence of any unreasonable delay or inconsistent treatment. Considering the disciplinary process as a whole, and having regard to the reason for dismissal, the procedure adopted fell within the range of reasonable responses open to an employer acting reasonably in the circumstances.
108. The Claimant had 3 years' service and no prior disciplinary warnings. The Respondent had concluded that the Claimant had in summary advised the Office Manager of financial and other information to which she was not privy by gossiping about the drop in the bank balance and the dividends paid to the directors and by advising her of the contents of a sensitive email. It was apparent that the disclosure of financial information was regarded as gross misconduct and that the Respondent would not have dismissed the Claimant for her conduct in relation to the sensitive email alone
109. The Confidentiality Agreement entered into by the Claimant prohibited her from inappropriately discussing or transmitting any confidential information either internally or externally and that breach may result in disciplinary action up to an including dismissal. Confidential information expressly included information concerning the finances of the Company obtained by reason her employment. The Claimant's conduct amounted to a breach of the confidentiality agreement.
110. The first Employee Handbook provided that gross misconduct includes "unauthorised access to, or disclosure of, any confidential information." The Claimant's conduct fulfilled the Respondent's definition of gross misconduct as defined in the Employee Handbook. The Confidentiality Agreement was not exclusive and did not oust recourse to categorisation of gross misconduct in

the Disciplinary Handbook. It simply stated that breach any breach may result in disciplinary action up to summary dismissal.

111. The Claimant asserted in submissions that it could be inferred that her dismissal was pre-determined because she had recently been offered an exit package, the company had been in financial difficulties for a number of years, the Claimant was not replaced, and the savings on her wages were significant. This was not put to the Respondent witnesses in evidence and there was no opportunity to react or explain. The Respondent had been in financial difficulties for years and there was no evidence of them adopting anything other than a reasonable approach – they had taken steps to avoid redundancies. The reason for the offer of the exit package was that the Respondent had correctly inferred that at that time the Claimant was struggling to cope (unbeknown to the Respondent she had recurrent depression with a major depressive episode (moderate to severe)). It was not surprising that the Claimant was not replaced given the Respondent's financial difficulties and the fact that two existing employees had previously been covering her duties during her prior absences.
112. The Claimant asserted in submissions that the Respondent had failed to take into account her difficult personal circumstances. This was not put to the Respondent witnesses in evidence and there was no opportunity to react or explain. The Claimant did not assert in the disciplinary process that her mental health issues had been a contributing factor in her conduct. By the time of the alleged misconduct the Claimant was “back in the swing of things” and managing her role fully. The Claimant regarded the treatment of her personal circumstances by the Respondent prior to the disciplinary process as generous. There was no unreasonable failure to take into account her personal circumstances.
113. The Claimant's role of Financial Controller was a relatively senior position within the company and involved her being entrusted with confidential financial information. The Respondent concluded that by disclosing confidential financial information in that manner the bond of trust had been irretrievably broken. That conclusion was not unreasonable in the circumstances.

Accordingly, the penalty of dismissal fell within the range of reasonable responses.

114. The tribunal therefore determined in accordance with equity and the substantial merits of the case that the Respondent acted reasonably (including the procedure adopted) in treating the reason given as a sufficient reason for dismissing the Claimant in the circumstances (including the size and administrative resources of the Respondent's undertaking).

**Employment Judge:
Date of Judgment:
Entered in Register:
And copied to parties**

**Ian McFatridge
26 March 2019
27 March 2019**