EMPLOYMENT TRIBUNALS

Claimant: Miss E L Jackson

Respondent: FBJ Construction Limited

Heard at: Manchester (by CVP) **On:** 21-23 April 2021

Before: Employment Judge McDonald
(sitting alone)

REPRESENTATION:

Claimant: Ms J Grand (Friend)
Respondent: Miss L Quigley (Counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim that she was unfairly dismissed fails and is dismissed.

2. The claimant's claim that the respondent breached her contract of employment fails and is dismissed

3. The claimant's claim that the respondent made unlawful deductions from her wages fails and is dismissed

4. The respondent failed to provide the claimant with a statement of her terms and conditions as required by s.1 of the Employment Rights Act 1996 but the Tribunal can award no compensation for that failure under s.38 of the Employment Act 2002 because none of the claimant's other claims succeeded.

REASONS

Introduction

1. The claimant brought claims of unfair dismissal, breach of contract and that the respondent had made unlawful deductions from her wages. She also brought a claim that she had not received her statement of terms and conditions as required by sections 1 and 4 of the Employment Rights Act 1996 ("the ERA").

2. Employment Judge Warren held a case management hearing on 27 May 2020. The parties had agreed a List of Issues which she annexed to her case management order from that hearing. That agreed List of Issues is attached as an Annex to these reasons.

Preliminary matters

3. At the case management hearing on 27 May 2020 Employment Judge Warren ordered that there should be a second preliminary hearing on 2 October 2020. The issues to be determined were whether the Tribunal had jurisdiction to hear the claim brought by the claimant against a second respondent (Lucas Asset Management Limited) or whether that claim should be struck out. The second issue was whether all or any of the "without prejudice" negotiations and correspondence in the case should be accepted as evidence during the main hearing.

4. At the preliminary hearing on 2 October 2020 Employment Judge Benson dismissed the claim against Lucas Asset Management Limited because the claimant had failed to comply with the early conciliation requirements in relation to that company.

5. So far as the "without prejudice" correspondence was concerned, Employment Judge Benson decided that the letter dated 21 August 2019 sent by the respondent's solicitors, Gorvins, and the subsequent discussions and correspondence relating to potential settlement were not protected by "without prejudice" privilege. However, she decided that that same correspondence ("the Gorvins correspondence") was protected by virtue of section 111A of the ERA in relation to the unfair dismissal proceedings.

6. As a result of that, Employment Judge Benson amended the Case Management Orders made by Employment Judge Warren in May 2020 to provide that there should be two bundles of documents for the final hearing, one for the claim of unfair dismissal and one for all other claims. She also directed there should be written statements for every person giving evidence in the unfair dismissal claim and a separate written statement from every person giving evidence in relation to all other claims. Those directions were given so that no evidence relating to the Gorvins correspondence would be referred to in the bundle or witness statements for the unfair dismissal claim.

7. On 6 April 2021 Ms Grand wrote to the Tribunal to apply for a review of Employment Judge Benson's order. Her application was to vary the order so that the Gorvins correspondence would be allowed in evidence for the purpose of the

unfair dismissal claim as well as all the other claims. I heard that application at the start of the final hearing and decided that it was not in the interests of justice to vary Employment Judge Benson's order. I gave oral reasons and they were not requested in writing. I based my decision on the fact that there had been no material change of circumstances since Employment Judge Benson's decision, and that the lateness of the application also meant it was not in the interests of justice to vary the order.

8. After hearing submissions from the parties, I decided that the appropriate way to proceed was to first hear the unfair dismissal claim (from which the Gorvins correspondence was excluded) and then having given my decision on that claim, to proceed to hear the other claims (breach of contract, unlawful deductions and failure to provide a written statement of terms and conditions of employment). In effect, the three-day final hearing was split into two "mini" hearings, one on the unfair dismissal claim and one in relation to the other claims. For shorthand I will in these reasons refer to the issues dealt with at that second mini-trial as "the Breach of Contract Claims".

9. On the morning of the third day of the hearing I gave judgment and oral reasons why the claimant's unfair dismissal claim failed. I then heard the evidence and submissions in the Breach of Contract Claims. I indicated to the parties that if, in deciding the Breach of Contract Claims I made findings (not based on the Gorvins correspondence) which could lead to a different conclusion on the unfair dismissal claim, I would reconsider the unfair dismissal judgment.

10. At the end of the third day of the hearing, I gave judgment and oral reasons why the Breach of Contract Claims failed. I did find that the respondent failed to provide the claimant with a statement of her terms and conditions as required by s.1 of the ERA but could not award the claimant compensation for that failure under s.38 of the Employment Act 2002 because none of the claimant's other claims succeeded. Compensation for such a failure can only be awarded where a claim set out in Schedule 5 of that Act has succeeded. I decided that there were no findings from that second "mini trial" which required a reconsideration of my judgment on the unfair dismissal claim.

11. The claimant requested written reasons for my judgment(s). Although it means there is some repetition, I have decided that the best way to set out these written reasons is to divide the reasons into two parts. Part One (paras 12 to 129) sets out my reasons for dismissing the unfair dismissal claim (including the evidence, findings of fact, relevant law and discussion and conclusions). Part Two (paras 130 to 170) sets out my reasons for dismissing the claimant's Breach of Contract claims (including the relevant evidence, findings of fact, relevant law and discussion and conclusions). I have not repeated all the findings of fact from Part One in Part Two, only those relevant to the claims discussed in that part. That means the background facts and full narrative of the claim are set out in the findings of fact in Part One.

Part One – The Unfair Dismissal Claim

Evidence

12. The parties had agreed a bundle consisting of 188 pages for the unfair dismissal claim. References in this Part of the Judgment to page numbers are references to pages in the agreed unfair dismissal bundle ("the UD Bundle").

13. There were witness statements from five witnesses. They were the claimant, her former husband, Mr Gavin Alcock ("Mr Alcock"), and Steven Galloway Walsh ("Mr Walsh"), the claimant's current partner. At the start of the hearing Ms Grand confirmed that the claimant would not be calling Mr Walsh and I therefore did not read his written statement. For the respondent, there were written statements from Mr Edward Jackson, the director and sole shareholder of the respondent, and from Emma Fay ("Ms Fay") who made the decision to dismiss. Ms Fay is a Director of HR Department, which is in effect an outsourced HR Department providing services to companies.

14. The witness statement bundle included two witness statements for each of the claimant and Mr Jackson. One was for the unfair dismissal claim and the other for the Breach of Contract Claims (referred to in the Witness Statement bundle as the "Breach of Contract" statement). I did not read those Breach of Contract statements until after I had given judgment on the unfair dismissal claim.

15. On the afternoon of the first day of the hearing I heard evidence from Ms Fay and from Mr Jackson, who were cross examined by Ms Grand and answered questions from me. On the morning of the second day I heard evidence from the claimant and Mr Alcock and they were cross examined by Miss Quigley and answered my questions.

16. I found Ms Fay a credible witness and her evidence reliable. The claimant and Mr Jackson disagreed on the facts of the case. The claimant tended to contradict herself in her evidence, at one point asserting for the first time in these proceedings that the insurance certificate for pool cars (p.87 of the UD Bundle) had been fabricated. I found her evidence less reliable than Mr Jackson's and so prefer his version of events where there was a dispute between them as to the facts.

Findings of Fact

17. The claimant and Mr Jackson are siblings. Mr Jackson is the sole shareholder and director of the respondent company which provides building services. The claimant was employed by the respondent from 6 April 2013. It is agreed that she was initially employed as an administrator. The parties agree that there were changes to her job title and pay and benefits. Those issues are relevant to the claimant's claims of breach of contract and unlawful deductions form wages, so I have dealt with them in Part Two of this judgment headed "the Breach of Contract Claims".

18. The case is complicated by the personal and familial relationships between a number of the key players. In addition to Mr Jackson and the claimant there is a third sibling, Chellce Adams Jackson ("Chellce"). The claimant and her current

partner, Mr Walsh, at times fell out with Chellce and her partner. Mr Jackson did not like Mr Walsh.

Events prior to July 2019

19. In July 2018, Mr Jackson suspended the claimant for falsifying timesheets and for using a company credit card to buy her personal shopping. Mr Jackson explained that even though the claimant was salaried, she preferred to be paid by the hour so that she could be paid extra for any additional hours that she worked. The claimant was suspended because Mr Jackson believed that she had been claiming for hours that she had not actually worked. The claimant accepted that she had paid for shopping using the company credit card because she had forgotten her personal credit card. Her evidence was that she repaid it immediately.

20. Although suspended, no further disciplinary action was taken. Instead, Mr Jackson attempted to "incentivise" the claimant by agreeing what he referred to as "revised terms of employment". I deal with what those terms and conditions were at para 139 in Part Two of these reasons. I find that Mr Jackson took that approach because the claimant was his sister as well as being an employee. I find he was concerned that she had, in his words, "gone off the rails" following the breakdown of her marriage to Mr Alcock in 2017. Mr Jackson's evidence was that from around that time the claimant's work ethic deteriorated, she would have extended pub lunches and her behaviour in relation to some clients was inappropriate. I accept that evidence reflects his genuinely held view. I find that his actions in July 2018 were an attempt to help the claimant to, as he saw it, "get back on track".

21. In a letter dated 6 July 2018 (pages 74-75) Mr Jackson confirmed that the period of suspension had been concluded and that the claimant should return to work on Monday 9 July 2018.

22. The respondent owned a number of company vehicles. The insurance policy for those vehicles was in the respondent's name. It provided that those entitled to drive the vehicles were "Any person who is driving on the order or with the permission of the Policyholder" (p.87). The claimant accepted under cross-examination that Mr Jackson as the respondent's sole shareholder and director was entitled to decide who had permission to drive the vehicles.

23. In March 2019 Mr Jackson was made aware that Mr Walsh had been driving one of the company vehicles. Mr Jackson made it clear to the claimant that he did not want Mr Walsh driving any of the respondent's vehicles. The claimant's evidence was that Mr Jackson had told her that it was ok for Mr Walsh to drive the company vehicle outside the Romiley area. However, I prefer Mr Jackson's evidence that he told the claimant that Mr Walsh was not to drive any of the company vehicles at all. I find that the claimant understood that it was a serious matter if someone did drive the vehicles without Mr Jackson's permission because that meant they were not covered by the respondent's insurance policy and would therefore be driving without insurance.

18 July to 28 August 2019-the claimant's suspension and the disciplinary investigation

24. On Monday 15 July 2019, the claimant and Mr Jackson spent some time together in Manchester because that date would have been their late mother's birthday. Over the following days there was a falling out between family members which included text message exchanges between Mr Walsh and Chellce's partner during which threats of violence were made.

25. On 18 July 2019, Mr Jackson suspended the claimant. The letter of suspension (page 76) said that the suspension was "pending an allegation of the misuse of company vehicle resulting in a speeding fine and driving whilst under the influence on several occasions". The letter confirmed that during the period of suspension the claimant would continue to be paid but must not discuss the fact of her suspension with anyone in or connected with the respondent. The letter confirmed that the employment continued but that she was not required to carry out any duties and should not attend the workplace. She was required to cooperate with the investigation and might be required to attend meetings on and off site. I find that the claimant collected her belongings from the respondent's office on the 18th July. I accept Mr Jackson's evidence (disputed by the claimant) that this included the "personnel file" relating to the claimant which included her contract of employment.

26. I find that the suspension was triggered by a number of incidents. They were the claimant receiving a speeding ticket while driving a company vehicle; Mr Jackson's receiving information from Chellce that the claimant had been drink driving; and information from a number of sources that Mr Walsh had been seen driving a company vehicle despite not having Mr Jackson's permission to do so. I accept Mr Jackson's evidence that his decision to suspend the claimant (rather than, for example, allowing her to continue to work but not drive company vehicles) was influenced by two factors. The first was that the claimant did not have a vehicle of her own and would be likely to have continued to use company vehicles if she had remained in work. Mr Jackson considered that that was inappropriate given the nature of the allegations against her. The second factor was that Mr Walsh had threatened Mr Jackson and his family. That contributed to the decision to suspend the claimant because Mr Jackson was concerned that Mr Walsh was "volatile" and might come to the workplace and threaten or put him or his staff in danger.

27. Between 18 July 2019 and 28 August 2019 Mr Jackson carried out an investigation. His evidence was that he spoke to a "host of people" about the claimant's behaviour. Based on that investigation, Mr Jackson prepared a "Disciplinary Report" dated 28 August 2019 (pages 83-86 of the UD Bundle).

28. In that report Mr Jackson explained he had decided to focus on two features of the allegations "impacting on [the claimant's] employment position", namely:

> "(1) [the claimant] allowing a third party to drive a company vehicle (without authority or insurance cover); and
>
> (2) [the claimant] engaging with the company's insurance broker for her own personal reasons outside of those for business".

29. The first allegation related to the claimant allowing Mr Walsh to drive a company vehicle in breach of Mr Jackson's prohibition on him doing so. The second related to an incident which happened while the claimant was suspended. The

claimant accepted that on or around 25 July 2019 she contacted the respondent's insurance brokers to ask for a copy of the respondent's car insurance policy. She asked for the copy to be emailed to her personal email address rather than her work email. Because this was out of the ordinary and the claimant was not able to give a clear explanation of why she needed the copy the insurance brokers refused to provide it and alerted Mr Jackson to what had happened.

30. The Disciplinary Report summarised the evidence in support of each allegation and Mr Jackson's conclusion based on that evidence.

31. In relation to the first allegation, Mr Jackson summarised evidence from Paul Williams ("Mr Williams") a friend and respondent's IT specialist, from Chellce and from Tony Healey ("Mr Healey"), an employee who all said they had seen Mr Walsh driving a Ford Ranger owned by the respondent on dates in July 2019. The evidence was that the claimant had been present on at least some of those occasions. Based on that evidence, Mr Jackson's conclusion was that Mr Walsh had been driving a company vehicle without authority while the vehicle was under the claimant's control and that was sufficient to justify disciplinary action against the claimant.

32. In relation to the second allegation, Mr Jackson set out what he had been told by the insurance broker. In his conclusions he accepted the "evidence and implications associated with [the claimant's] conduct in connection with this second allegation are somewhat sketchier and not as clear cut and overtly serious as the first [allegation], however, I still consider that her conduct requires further scrutiny and explanation". That was partly because the claimant was suspended at the relevant time and contacting the respondent's broker was not consistent with that. It was partly because the claimant had acted "behind [Mr Jackson's] back". Mr Jackson also viewed the claimant's action as suspicious when seen in the light of the first allegation and his view that she was using the company vehicles to suit herself while disregarding the implications for the respondent.

33. Mr Jackson did not speak to the claimant during his investigation nor did he hold an investigatory meeting with her. On 20 August 2019 he wrote to the claimant to update her. He said that the investigation relating to her conduct had taken longer than anticipated and because the initial enquiries had given rise to additional areas of concern about her conduct (along with it coinciding with a peak holiday season, as a number of witnesses were away) there had been a delay for which he apologised. He said that he anticipated being in a position to conclude whether there was a disciplinary case to answer by the end of that week (pages 78-79).

34. The claimant placed significance on a text message sent by Mr Jackson to Mr Alcock during this period. On 4 August 2019 Mr Alcock had texted Mr Jackson to ask "What's the latest with [the claimant]" and about "the drink driving thing". Mr Jackson's response was "it's gone legal so I can't really talk about it, but we are trying to terminate her employment".

<u>28 August to 4 September 2019 – invitation to and postponement of the disciplinary meeting</u>

35. By 28 August 2019 Mr Jackson had completed the Disciplinary Report. By that date Ms Fay had via Gorvins (the respondent's solicitors) been appointed to

hear the disciplinary meeting. Ms Fay was provided with a copy of Mr Jackson's Disciplinary Report.

36. On 28 August 2019 Mr Jackson wrote to the claimant for and on behalf of the respondent inviting her to a disciplinary meeting to be held at Gorvins' premises on Wednesday 4 September 2019 (pages 80-86). The letter set out the 2 allegations (para 28 above) and included a copy of the Disciplinary Report. It said that there had been "a whole host of allegations and issues relating to your recent conduct" but that Mr Jackson had decided to focus on these two allegations in order to make the disciplinary process "more focussed and straightforward". He said that he would "of course notify [her] in due course should [he] be in a position to progress any action in relation to any other such issues or allegations" depending on the outcome of the process invoked by that letter.

37. The letter also confirmed that "both on account of our relationship, and my involvement in collating the relevant supporting evidence and my inexperience at handling formal procedures of this type" Mr Jackson had arranged for an independent HR professional (i.e. Ms Fay) to chair the meeting. He assured the claimant that Ms Fay was approaching matters with an open mind but warned that given the seriousness of the allegations a possible outcome of the meeting could be dismissal (without notice or pay in lieu of notice) on the grounds of gross misconduct and/or a fundamental breach of the duty of trust and confidence.

38. The letter confirmed that the claimant's paid suspension continued and confirmed that she was entitled to be accompanied at the meeting by a work colleague or trade union rep. It said that if the proposed arrangements caused her any difficulty, she should let Mr Jackson know as soon as possible. It also asked her to send any written statement or other documentation on which she wished to rely at the meeting as soon as possible.

39. On 2 September 2019 Ms Jackson emailed the respondent to say that "for personal reasons" she was unable to attend the meeting 4 September. She also asked that in the absence of a colleague or trade union representative a companion of hers, Helen Ogden ("Ms Ogden") be allowed to attend the meeting with her (page 89).

40. Mr Jackson responded by email at 3 p.m. on 3 September (pages 90-90a). He said that the claimant was currently suspended on full pay and that the terms of that suspension required her to co-operate with the investigation and attend meetings. He asked for the specific reasons why the claimant was unable to attend, stating that requesting a postponement "due to personal reasons" was inadequate. He said that if the claimant insisted on moving the meeting the respondent would do so but that her pay would be stopped from the following day on the basis of her non-attendance at the meeting without good reason. Mr Jackson in his email agreed that Ms Ogden could accompany the claimant to the meeting. However, as she was neither a work colleague nor a trade union rep he said that he understood her input would be limited to providing moral support. He added that roles and remits at the meeting would ultimately be decided by Ms Fay. He demanded that the claimant confirm by 5.30 p.m. that day whether she would be attending the meeting.

41. At 5.30 that same day the claimant responded by email (page 90). She gave three reasons for needing to postpone the disciplinary meeting. First, she said that the respondent had had 6 weeks to prepare for the hearing (i.e. since the start of her suspension) and she felt that her being given one week was unreasonable to gather the information she required. Second, her son was enrolling for his first day at college on 4 September 2019, so she needed to be present for that. Finally, she said Ms Ogden was on holiday until Thursday 5 September 2019. The claimant had not requested the 4 September 2019 as annual leave to attend her son's enrolment.

42. On 4 September at 7.40am Mr Jackson emailed to confirm that the disciplinary meeting would be postponed (pages 91-92). He said he did so very reluctantly because it would "mess about" the external third parties such as Ms Fay. He pointed out that at least some of the reasons given for the postponement request would have been known to the claimant from 28 August 2019 and suggested that the additional reasons given were "a thinly veiled attempt to dilute the source of the original proposal not to attend for purely 'personal reasons", i.e. to attend her son's college on his first day As a result, Mr Jackson said, "I'm fully entitled to take the line of treating your suspension from today as being without pay" until the disciplinary process resumed. He told the claimant that that would not be before the 16 September 2019.

43. The claimant's pay was stopped for one week. The respondent has since repaid that week's deducted pay. By an email on 6 September 2019, Mr Jackson invited the claimant to attend the rearranged meeting on Monday 16 September 2019 with the same agenda and participants and at the same venue.

<u>9 September to 16 September 2019 – the claimant's statement, respondent's response and the disciplinary meeting</u>

44. On 9 September the claimant wrote to Mr Jackson in response to the allegations made against her (pages 95-96). She enclosed her witness statement for the disciplinary proceedings (pages 97-100). In her letter she alleged that the procedure followed was not ACAS compliant and she also requested further documents by 13 September 2019. They were copies of the signed witness statements from Mr Williams, Chellce and Mr Healey and any other evidence or statements on which the respondent relied. She also asked for copies of the respondent's disciplinary procedure, its grievance procedure and company car policy. She asked for confirmation of whether the witnesses named were being called given that it was a disciplinary hearing. She sent copies of documents relevant to her case including Mr Walsh's own insurance policy. The claimant emailed that same information to Ms Fay on 10 September 2019 (page 101).

45. In the summary at the end of her statement (page 100) the claimant said that Mr Jackson had been "looking for an excuse to terminate my contract for some time for whatever his reasons". She said that she believed his actions had been personally and family motivated and not related to her conduct at work. She said that the way she had been treated had created a breach of trust and confidence in the working relationship and "my position has now become untenable". She said, "it would be difficult for me to return to the workplace given the fact that [Mr Jackson] has made my situation common knowledge and the amount of people discussing my employment situation. From the way in which my disciplinary has been handled to

date I also believe that the outcome has been predetermined from the start and engineered to create a vacancy for someone else".

46. The claimant set out her response to the 2 specific allegations made against her in her personal statement.

47. In relation to the first allegation she said she had not let Mr Walsh drive any of the respondent's vehicles after March 2019. She suggested that Mr Williams and Mr Healey were confused as to dates and had seen Mr Walsh drive the Ford Ranger before March 2019. She said that Chellce's evidence should not be relied on because she had a vendetta against the claimant. She also said that other third parties had been allowed to drive the respondent's vehicles and that Chellce had driven such a vehicle while aged under 25 which meant she was not covered by the policy.

48. In relation to the second allegation, the claimant explained that she had had a road traffic accident in the early hours of the 18th July 2019. She had been driving Mr Walsh's car. She said she had contacted the respondent's insurance broker because she needed to supply confirmation she was insured in her own right when she drove Mr Walsh's car. She said she had not felt able to contact Mr Jackson about the matter (i.e. to ask for permission to approach the broker) given the situation between them at that point.

49. On 13 September 2019 Mr Jackson emailed a "Statement/Response" to the claimant and Ms Fay (pages 107a-g). It set out a detailed response to the points made in the claimant's statement about the allegations against her. In his introduction to the response he said he did so because the claimant in her statement had referred to points he had not addressed in his Disciplinary Report.

50. As to the first allegation, he accepted that others had been allowed to drive the respondent's vehicles but never without his permission. He agreed that the claimant had raised the issue of Chellce being under 25 and he had asked her to check it with the broker. The claimant had never come to back to him and so he had assumed that it was resolved.

51. As to the second allegation, Mr Jackson said that, as the claimant was aware, the respondent's car insurance policy only covered the respondent's vehicles. It would not have covered the claimant when driving a third party's vehicle. He suggested that the claimant could only have been contacting the broker with a view to extending cover for her retrospectively to the 18th July when she was driving Mr Walsh's car and had the accident. He also queried whether the claimant and Mr Walsh had been honest in terms of what they had told Mr Walsh's insurers about the accident.

52. In his "conclusion" section (pages 107f-g) Mr Jackson denied that there was any appetite on his part to dispense with the claimant's services. He described that as a "trivial attempt on her part to divert attention away from the fact that she was not prepared to take responsibility for her own actions and responsibility for having brought the current process upon herself".

53. Referring to the claimant's comment that her position had become untenable, Mr Jackson said that he was not sure what she meant by this, and:

> "I would confirm that I have not otherwise received notice of her intention to resign and bring the employment relationship to an end. This is perhaps something that should be explored/clarified further through the disciplinary hearing. From my side and sibling relationships aside, I have to say that I struggle to see where the employment relationship can go from here, based on the case that has been presented against the claimant and in turn the contents of the statement that she has submitted in response. However, I think I would like to hear how the claimant conducts herself through the disciplinary hearing and understand exactly what she has to say about the allegations in question before expressing my view as to whether I believe the relationship is retrievable. I will therefore hold my peace and reserve the right to express any definitive view about the future of the relationship, pending the outcome of the disciplinary hearing. The conclusion of this process remains undecided and contrary to what the claimant has said, no judgment or finding is predetermined, which I have deliberately placed in the hands of an independent HR expert [i.e. Ms Fay] who will make her own determination on the case".

54. The disciplinary meeting went ahead on 16 September as arranged. It was attended by the claimant and Ms Ogden, Ms Fay and a notetaker from Gorvins. Mr Jackson did not attend the meeting. The typed-up notes of the meeting were at pages 109-116. It was not suggested that they did not reflect what happened at the meeting.

55. Despite what Mr Jackson had said about Ms Ogden's role being limited to providing moral support it is clear that at the meeting Ms Fay allowed her to actively participate in the meeting and make points on the claimant's behalf. She and the claimant raised concerns about the process and the evidence against the claimant. The claimant asked why there had not been an investigatory meeting and asked Ms Fay to clarify the process. She confirmed that one outcome of the meeting would be that she would seek further information. The claimant said that she would like to interview the witnesses and Ms Fay responded by saying that she might well suggest interviewing the witnesses but "she will see how it goes".

56. In relation to the first allegation, when asked by Ms Fay whether the claimant was aware of anybody who had borrowed the company vehicle without Mr Jackson's authority, the claimant responded "no, not that he wasn't aware of". The claimant accepted that there had been a conversation with Mr Jackson in March 2019 when he had told her Mr Walsh was not to drive the company vehicles. Her position was that Mr Walsh did not drive the vehicle after March. She confirmed that she knew that Chellce was under age (i.e. under 25) when she drove the truck and should not have therefore been driving it. The claimant's view was that Mr Jackson had a problem with Mr Walsh because there was an age difference between the claimant and Mr Walsh. The claimant said that this was all due to Mr Jackson's personal dislike of Mr Walsh - other people's partners had been allowed to drive company vehicles. Ms Ogden said that there was no evidence to support the first allegation other than hearsay evidence provided by Mr Jackson's friends and family.

57. In relation to the second allegation, the claimant repeated what she had said in her written statement of 9 September. She had had a road traffic accident on 18 July 2019 when she was driving Mr Walsh's car. She was concerned that she did not have her own car insurance and only cover under the respondent's fleet insurance. She had not wanted to add any car to the respondent's insurance policy, she was simply wanting a copy of the insurance certificate. She denied that she was in some way acting fraudulently when she contacted the respondent's brokers.

58. The claimant told Ms Fay that she was not being paid her full pay. She said her normal pay was £2,500 per month but she was only being paid £1200. Ms Ogden also raised the fact that the claimant had not received any pay for a week during her suspension. Ms Fay was not aware of that and agreed to look into it.

59. It was during the meeting that Ms Fay first formed the view that the employment relationship between the claimant and Mr Jackson had broken down to such an extent that it was irretrievable. During the meeting the claimant had asked how she could go back to work: "I look ridiculous" (page 113). Ms Fay put it to the claimant (page 114) that in her statement she had said that her position was "untenable". The claimant repeated, "how could I go back to work now and work for him?". She said that "she was sure that Mr Jackson would find it difficult too for me to come back to work".

60. At the end of the meeting Ms Ogden set out the claimant's case, reiterating the flaws she saw in the procedure followed including the claimant not being allowed to interview witnesses and the failure to hold an investigatory meeting. Ms Fay said she would need to consider what an appropriate sanction would be. The spectrum of outcomes went from dismissal at one end to, at the other end of the scale, the allegations being dropped and the claimant being reinstated. Ms Ogden asked what would happen if the claimant could not accept reinstatement – would there be some kind of settlement agreement if there had to be a parting of the ways? Ms Fay said that she could not make that decision on behalf of the respondent.

61. I find that the meeting was conducted in a professional and courteous manner by Ms Fay. Ms Ogden thanked her for the way she conducted the meeting. There was no suggestion that the claimant was not allowed to put her case at the meeting.

<u>23 September to 14 October 2019 – post disciplinary meeting actions and outcome</u>

62. On 23 September 2019 Ms Fay followed up the meeting by telephoning Mr Williams to check his evidence about the first allegation (page 116). He confirmed that he knew Mr Walsh and recognised the Ford Ranger vehicle because it has the respondent's logos on its side. He also confirmed that he "absolutely, without a doubt" saw Mr Walsh driving the particular vehicle on 15 July 2019. He said that he could not tell for certain whether he had seen Mr Walsh driving the pickup on other dates, but 15 July stuck in his mind because of the significance of the date, it being Mr Jackson and the claimant's mother's birthday. He confirmed he had spoken to Mr Jackson that day to check he was ok because he knew Mr Jackson found it a difficult day.

63. On the following day at 2.30pm Ms Fay rang Mr Jackson (page 117). Ms Fay asked Mr Jackson his thoughts on the employment relationship between himself and

the claimant in light of the ongoing disciplinary and the apparent problems with their relationship. Mr Jackson's response was that he felt that too much had gone on (not only with regard to the disciplinary) and that he would have concerns about the claimant going back into the workplace. He said that the atmosphere at work had been better whilst the claimant had been suspended and it had come to light that other employees had struggled to be as open with Mr Jackson while the claimant was working there. When asked by Ms Fay what he felt the best way forward was Mr Jackson said he believed it was best that they parted ways because the trust had completely gone as a result of the things that had happened, and he did not think there was another way forward.

64. Ms Fay sent her outcome letter to the claimant on 7 October 2019 (pages 121-127). There is a dispute about whether it was received or not. The claimant had written to Mr Jackson on that same day to ask about the outcome (page 120), and the letter was then emailed by Ms Fay at 3.19pm on 7 October (page 127a). On 14 October the claimant sent a message to Ms Fay asking about the outcome letter because she said she had not received it. Ms Fay responded by forwarding the email from 7 October (page 127a). The claimant's position is that the letter was not received until 14 October 2019. I find that the letter was emailed by Ms Fay on the 7 October 2019 to the correct email address for the claimant and the notice took effect on that date.

65. I find that the outcome letter was sent to Mr Jackson on 7 October 2019 and that he had not seen or approved it before it was sent to the claimant.

66. The letter is detailed and comprehensive. In relation to the first allegation, Ms Fay concluded that the claimant had indeed been responsible for allowing a third party to drive a company vehicle without authority, and that the evidence supported Mr Walsh having driven the vehicle after March 2019. She considered that the case for the sanction of summary dismissal was strong given that there appeared to be action contrary to a specific direction from the respondent which exposed the business to risk. However, rather than imposing the sanction of dismissal for gross misconduct Ms Fay said "I will strictly reserve the issue of the consequences and sanction flowing from this finding before me until the conclusion of this letter and the section headed 'Outcome'".

67. In relation to the second allegation, her conclusion was that the allegation was made out but did not believe that such a finding easily led to any obvious level of disciplinary sanction or outcome. However, she said, "ultimately with regard to the necessity of me drawing a specific conclusion and imposing a specific sanction, I don't feel as though I need to do this, not least given the comments I've made within the outcome section".

68. In that "outcome" section Ms Fay referred to the fact that the claimant and Mr Jackson had both said that the relationship had broken down and in those circumstances she felt that the appropriate way forward was to dismiss for that reason rather than for misconduct. She pointed out that the claimant herself had said at the disciplinary meeting that her ongoing position with the respondent was untenable. Given the small and tightknit working environment and leaving aside the family connection Ms Fay's view was that it was unrealistic to think that the employment relationship could be retrieved. Given the size of the respondent finding

alternative employment within it for the claimant was not an option. Her conclusion was that the claimant should be dismissed on the basis that the employment relationship had broken down irretrievably but that the respondent should honour her notice period by paying her in lieu of notice. Ms Fay calculated that to be 6 weeks' notice.

69. I accept that having carried out his investigation and prepared his Disciplinary Report Mr Jackson handed over the decision on what disciplinary or other action to take in the case to Ms Fay. I find that the decision set out in Ms Fay's letter of 7 October 2019 was hers and hers alone.

70. The claimant responded on the 14 October 2019 (page 127c). She said that she had no contract of employment and was entitled to 8 weeks' notice having been employed since 2011. She said she had not received the letter giving notice of dismissal until 14 October 2019 so should be paid up to that date not to the 7th. For the same reason she also requested that the time limit for appealing (7 days) should run from the 14th October rather than the 7th October.

17 October to 28 October 2019 – appeal and relevant post-dismissal facts

71. On 18 October 2019 the claimant emailed Ms Fay (page 135b) a letter of appeal dated 17 October (pages 128-130). It challenged the fairness of the disciplinary process both because it was said not to be in accordance with the ACAS guidance and because Ms Fay was said to have taken everything Mr Jackson said at face value because she was employed by him and acting on his instructions. It repeated the allegation that Mr Jackson had wanted to dismiss the claimant because he already had someone in mind to replace her. The majority of the appeal grounds set out in the letter approached the dismissal as if it had been a misconduct dismissal. So far as the breakdown of the employment relationship was concerned, point 10 in the appeal said that the breakdown in the relationship had been caused by Mr Jackson by suspending the claimant for so long. The claimant said the relationship could have been repaired but, in her view, Mr Jackson did not want it repaired.

72. On 22 October 2019 Ms Fay replied to ask the claimant how she thought her appeal was best dealt with given the reservations her appeal letter raised about the role of any external HR person appointed by the respondent (page 135a). The claimant responded on 28 October 2019 (page 138) to say that Ms Fay as the HR expert should be deciding how any appeal should be conducted. That letter stated the claimant's view that Ms Fay had decided to rely on the breakdown of the relationship as the reason for dismissal rather than misconduct because she knew the process followed was not ACAS complaint and, in essence, that any dismissal based on it would be unfair.

73. In the meantime, on 25 October 2019, Ms Fay had written to the claimant to say that having reviewed the grounds of appeal she did not see any basis for a successful appeal (pages 136-137). That was because the appeal had not addressed the reason given for dismissal. The claimant did not in the appeal suggest that Ms Fay was wrong to conclude that the relationship had broken down irretrievably. Instead, Ms Fay suggested, the claimant's actual complaint was that the respondent had refused to enter into a settlement agreement. She pointed out the

respondent had no obligation to do so. She concluded the letter by saying she would now be handing the matter back to the respondent and that the claimant should direct any future correspondence to it because her involvement was at an end.

74. I make one final finding of fact. The claimant alleged that she had been dismissed to make room for someone Mr Jackson wanted to replace her with. The claimant confirmed in cross examination that she did not know whether anyone had been recruited in her place. Mr Jackson's evidence, which I accept, was that no-one had been, with the claimant's workload now being dealt with by Julie Etchells increasing her hours from part-time to full-time.

Relevant Law

75. Section 94 of the ERA gives an employee a right not to be unfairly dismissed by their employer. To qualify for that right an employee usually needs two years' continuous service at the time they are dismissed, which the claimant had in this case.

76. In determining whether a dismissal is unfair, it is for the employer to show that the reason (or if more than one the principal reason) for dismissal is one of the potentially fair reasons set out in s.98(2) of ERA or "some other substantial reason justifying dismissal" ("SOSR"). A dismissal following a breakdown in the employment relationship can be a dismissal for SOSR (**Ezsias v North Glamorgan NHS Trust 2011 IRLR 550, EAT**).

77. If the employer shows a potentially fair reason or dismissal then whether the dismissal is fair (having regard to that reason) will depend 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 sufficient reason for dismissing the employee and shall be determined in accordance with equity and substantial merits of the case (s.98(4) ERA).

78. In terms of what constitutes a fair process where the reason for dismissal is the breakdown of the employment relationship, it is clear from **Phoenix House Ltd v Stockman 2017 ICR 84, EAT**, that the ACAS Code does not apply to dismissals for some other substantial reasons in the sense that it does not set out a specific process which an employer needs to follow to dismiss for that reason.

79. There is a seeming conflict between the EAT decisions in **Phoenix** and in **Lund v St Edmund's School, Canterbury2013 ICR D26, EAT**. I accept that the Code does not apply to set out a procedure to be followed in a "some other substantial reason" dismissal. However, where, as here the process started out as a conduct dismissal following a disciplinary process, it does seem to me that the Code applies. I base that on the analysis in **Lund**, that in deciding whether it does apply, matters should be viewed from the start rather than the outcome of the process. In this case matters started as a misconduct dismissal and so I find that the ACAS Code applied to the disciplinary process carried out, and was not then disapplied retrospectively because the ultimate reason for dismissal changed to some other substantial reason.

80. In this case, it was part of the claimant's case that the way the respondent conducted the disciplinary process relating to her alleged misconduct was itself the cause of the employment breakdown. For that reason, I heard submissions about the fairness of the disciplinary process followed.

81. When it comes to misconduct dismissals, the test to be applied is set out in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal which was subsequently approved in a number of decisions of the Court of Appeal. Since **Burchell** was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

82. The "**Burchell** test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?

83. If a genuine belief is established, the band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.** The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

84. The circumstances relevant to assessing whether an employer acted reasonably in its investigations include the gravity of the allegations, and the potential effect on the employee: **A v B [2003] IRLR 405**.

85. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").

86. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

87. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee (instead of imposing a lesser sanction) was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

88. In this case I heard submissions about two specific aspects of the investigatory and disciplinary process. The first was whether an investigatory meeting must be held in a misconduct case and the second was whether an employee is entitled to cross-examine witnesses.

89. As to whether there has to be an investigation meeting, in the case of **Sunshine Hotel Limited t/a Palm Court Hotel v Goddard EAT 0154/19** the

Employment Appeal Tribunal held that neither the ACAS Code nor case law make it a basic employment right that there should be an investigation hearing in every case distinct from a disciplinary hearing. The ACAS Code paragraph 5, under the heading "Establish the facts of each case" says this:

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

90. In **Ilea v Gravett [1988] IRLR 497** the Employment Appeal Tribunal said:

> "There will no doubt come a moment when the employer will need to face the employee with the information which the employer has. This may be during an investigation prior to a decision that there is insufficient evidence upon which to form a view, or it may at the initial disciplinary hearing."

91. As to whether someone facing a disciplinary process has to be given the right to cross examine witnesses, in **Santamera v Express Cargo Forwarding [2003] IRLR 273** the Employment Appeal Tribunal stated that cross examination will be an exception in employment disciplinary proceedings.

92. The rules on fairness in section 98(4) do not require an employer to carry out what it called "a forensic or quasi judicial investigation". However, it does not follow that an employer will never be obliged to allow an employee to cross examine his or her accusers during disciplinary proceedings. The EAT in **Santamera** emphasised that in each case the Tribunal must decide with reference to the facts before it whether the employer's procedure had been fair and reasonable.

Discussion and Conclusion

93. I have set out my conclusions below by reference to the questions in the List of Issues.

> (1) Was the claimant's dismissal for a potentially fair reason in accordance with section 98 (1) (a) of ERA 1996 and / or section 98(2) ERA 1996?

94. The first question I need to decide is whether the respondent has shown a fair reason for dismissal. It says the reason was "some other substantial reason", namely the breakdown in the relationship between the claimant and the respondent in the person of Mr Jackson.

95. In law the reason for dismissal is a set of facts which operated on the mind of the employer when dismissing the employee. The employer knows better than anyone else in the world why it dismissed the claimant, and it is for the employer to show that it had a reason for the dismissal, that the reason was, as it asserted, a potentially fair one, and to show that it was not some other reason.

96. I agree with Miss Quigley's submission that the first thing I have to decide is: who made the decision to dismiss? I find that that was Ms Fay. I accept that it was she was she and she alone who made the decision to dismiss. I have found that the instructions to Ms Fay came via Gorvins, the respondent's solicitors, rather than direct from Mr Jackson. I do accept that Mr Jackson played a part in the process, both as investigating officer and subsequently when he was contacted by Ms Fay after the disciplinary hearing. I find that the conversation after the disciplinary hearing was by way of Ms Fay gathering further evidence as to whether the relationship between the claimant and the respondent had broken down. I also accept Ms Fay and Mr Jackson's evidence that he did not see or in any way "approve" her decision as set out in her decision letter dated 7 October 2019. It was emailed to him at the same time as it was emailed to the claimant.

97. The claimant suggested that Ms Fay was not independent because she was being paid by the respondent and that the real decision maker was Mr Jackson. I do not accept that. I do accept of course that the respondent paid Ms Fay, but given the size of the organisation and the need to engage some external expert to deal with the disciplinary, there was really no option other than to pay someone. That fact in itself is not enough to cast doubt on Ms Fay's independence when it came to reaching her decision.

98. The claimant did not put forward any evidence to support the suggestion that Ms Fay had colluded with Mr Jackson, and specifically that she had changed the reason for dismissal from misconduct to a breakdown of the employment relationship because of concerns that the procedure followed had not been **Burchell** compliant.

99. The claimant also relied on a text message sent from Mr Jackson to Mr Alcock on 4 August 2019 as evidence that the dismissal was predetermined. In that text message Mr Jackson said, "It's gone legal so I can't really talk about it but we are trying to terminate her employment". I accept Mr Jackson's point made in cross examination evidence that the wording of any text message has to be interpreted with caution given the throwaway nature of such communications. In this case the reference to "terminating her employment" could equally refer to termination by agreement as to a predetermined decision to dismiss. The reference to "we" seems to me to suggest the latter rather than being a reference to Mr Jackson having already made up his mind to dismiss come what may. In any event, my finding is that whatever Mr Jackson thought it was Ms Fay who made the ultimate decision to dismiss. Even if Mr Jackson's view was that dismissal was the right course of action, I am not satisfied that that influenced Ms Fay in reaching her decision.

100. There was also no evidence put forward to support the claimant's assertion that Mr Jackson had wanted the claimant out so he could appoint someone else in her place. The evidence pointed to the contrary-i.e. that no one else has been taken on to replace the claimant.

(2) Was the claimant's dismissal fair having regard to section 98(4) of the ERA 1996 and therefore considering:

(a) Whether in the circumstances (including size and administrative resources) the respondent acted reasonably in dismissing the claimant; and

(b) Equity and the substantial merits of the case?

(c) Whether in the circumstances the respondent acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissal.

(d) Whether the dismissal met the Burchell test and was within the range of reasonable responses.

101. The first issue, it seems to me is whether there was a reasonable basis for Ms Fay's conclusion that the relationship had broken down irretrievably?

102. I find that at the latest by 24 September 2019 when she spoke to Mr Jackson there was clear evidence from which Ms Fay could conclude that the relationship between the claimant and Mr Jackson had irretrievably broken down. First of all, there was evidence for it in the claimant's disciplinary statement dated 9 September 2019 in which she said that she thought her position was now untenable. That was reinforced by what the claimant told Ms Fay at the disciplinary meeting on 16 September 2019 (para 59 above). When Ms Fay spoke to Mr Jackson on 24 September 2019 he was of the same view (para 63), and I find that Ms Fay genuinely formed the view that the employment relationship had broken down, and that that was a view shared by the claimant and Mr Jackson.

103. As to whether there were alternatives to dismissal, the size of the respondent's business and the respective roles of the claimant and Mr Jackson meant that inevitably the claimant would have seen her brother on a day-to-day basis had she continued in employment. There was no other role she could have been moved into to avoid that happening. In those circumstances, it does seem to me that it was reasonable for the respondent to treat the breakdown in the relationship as a sufficient reason for dismissal.

104. I deal with the question of compliance with the Burchell test at paras 109-125 below. This is not a misconduct dismissal so the test is not strictly applicable. However, as I have explained below, it does seem to me that the reasonableness of the disciplinary process followed is relevant. That is because it is part of the claimant's case that the breakdown in the employment relationship was caused by the way the disciplinary process was carried out.

(3) Did the respondent follow a fair procedure?

105. In considering the process adopted, I need to make decisions about two separate issues. The first is whether, given that there was evidence from which Ms Fay could conclude that there had been an irretrievable breakdown in the relationship, she followed a fair process in deciding to dismiss for that reason. As I have said, the second is whether in conducting the disciplinary process the respondent followed a fair process. The reason for that second issue is that it is the claimant's case that it was the way the respondent conducted the disciplinary process which led to the relationship breakdown. The claimant says it could not be

fair or reasonable for them to dismiss her because the breakdown of the relationship was the result of its own action.

106. As to the first issue, for the claimant Ms Grand relied on the EAT's decision in **Phoenix House Ltd v Stockman**. She said that was authority for the proposition that a dismissal is not fair where the employer has put the onus on the employee to show that the relationship has not irretrievably broken down. She said that that is what happened in this case. Miss Quigley submitted that **Phoenix House** involved a very different set of circumstances to this case. I agree. In **Phoenix House** the employee was saying that the employment relationship had not broken down and that she wanted to return to work. She told her employer that she and the colleague concerned "got along on a day-to-day basis and were still on speaking terms". In those circumstances the Employment Appeal Tribunal upheld the Tribunal's decision that an objective reasonable employer would not have concluded that the employment relationship was beyond repair. Those facts are very different to the ones in the present case, where both the claimant and Mr Jackson told Ms Fay the relationship was beyond repair.

107. As I have said, it was the claimant who first stated that her position was untenable in her disciplinary statement of 9 September, and she maintained that position during the disciplinary hearing. Even though in her appeal letter the claimant suggested that she "did not say I did not want my job back", she did confirm that she said, "I could not go back due to the relationship issue". I find this was not a case of putting the onus on the claimant to show the relationship had not broken down: her clear position was that it had. Given that, it does not seem to me that there were further steps which the respondent could take to try and resolve the matter. Ms Grand suggested that mediation might have been suggested, but I do not think given the evidence about the deep-rooted nature of the breakdown that it was unreasonable for the respondent to conclude that that would not be likely to resolve matters.

108. In those circumstances I find that the respondent did follow a fair procedure when deciding to dismiss for some other substantial reason in this case.

109. Moving on to whether the disciplinary process caused the breakdown rendering the dismissal unfair.

110. Ms Grand submitted that the disciplinary process to which the claimant was subjected was not compliant with the ACAS Code and triggered the breakdown in relationship. As I understand it, the submission is that it could not be a reasonable response for the respondent to treat the breakdown in relationship as a reason justifying dismissal if it had caused the breakdown by its own behaviour.

111. The question then is whether the respondent's behaviour did cause the breakdown. In one sense it obviously did contribute to it, because had there been no disciplinary proceedings the relationship would not have deteriorated to the extent it did. The evidence was that on 15 July 2019 the relationship between the claimant and Mr Jackson was a relatively good one at least to the extent of their having breakfast together on the anniversary of their mother's birthday. As I have noted, there had been problems between them before and Mr Jackson did have concerns

about the claimant's commitment to her work. However, it seems to me the correct question is whether the respondent acted in what, viewed objectively, was an unreasonable way such as to cause the breakdown.

112. I acknowledge that the context for the disciplinary process was what had become a bitter family fracture. Mr Jackson did not like the claimant's partner, Mr Walsh. Although Mr Jackson was happy for others to use the respondent's pool cars he had made it clear in March 2019 that he did not want Mr Walsh doing so. The claimant accepted in evidence that Mr Jackson as the policy holder was entitled to tell her that Mr Walsh did not have permission to drive the company vehicles. It was a serious matter if someone did drive the cars without his permission because, as the claimant knew, that meant they were not covered by the respondent's insurance policy and would therefore be driving without insurance.

113. I have found that Mr Jackson had made it clear in March 2019 that Mr Walsh did not have permission to drive the respondent's company vehicles. When therefore on or around 15 July 2019 Mr Jackson heard from Mr Williams and others that Mr Walsh had been driving the company truck, along with other allegations related to the claimant such as her driving while intoxicated, he was entitled, it seems to me, to treat it as a matter which required investigation as a potential disciplinary matter. Had the employee concerned not been his sister I cannot see how there would have been any doubt about that. It was a serious matter because if true, it meant one of the respondent's vehicles had been driven by someone who was uninsured by its car insurance policy. It does not seem to me that the taking of disciplinary action in itself was unreasonable or sufficient to fix the blame for the breakdown of the employment relationship on the respondent.

114. However, Ms Grand also submitted that the <u>way</u> the disciplinary process had been handled led to the breakdown. In summary, her criticisms related to the length of the suspension, the failure to hold an investigatory meeting with the claimant, Ms Fay having a conflict of interest as carrying out a dual role and the failure to allow cross examination of witnesses. I will deal with each of those in turn.

115. I have set out above (at paras 81-92) the relevant legal principles when it comes to disciplinary processes in misconduct cases. Those principles are important in assessing whether there is substance in Ms Grand's argument that the way the disciplinary process was carried caused the breakdown in relationship. They are also relevant in assessing whether, if the dismissal was unfair, the respondent could nonetheless have fairly dismissed the claimant for misconduct leading to a reduction in compensation on the **Polkey** basis.

116. I remind myself in particular that the overarching principle is that because this is an unfair dismissal case then (as set out in **Sainsburys PLC v Hitt)** the range of reasonable responses test applies as much to the question of whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason. That means it is not for me to decide how I would have conducted the disciplinary and investigation process in this case, but it is for me to decide whether the way it was conducted was within that range of reasonable responses.

117. Turning then to the criticisms made by Ms Grand of the process in this case. First of all the length of suspension. Ms Grand said the suspension was 12½ weeks. I find that is not accurate. The initial suspension was from 18 July 2019 to 4 September 2019, which is when the disciplinary meeting was due to take place. That is some six and a half weeks. It was the claimant who requested, and was eventually granted, the postponement of that hearing to the 16 September 2019. During that initial 6-7 week period the respondent contacted the claimant twice. The first was on 20 August 2019 when Mr Jackson wrote to apologise for the delay in the investigation and explained it. The second time was a week later, on 28 August when the claimant was sent the disciplinary meeting invitation and the supporting documents. By that time Mr Jackson had, through Gorvins, instructed Ms Fay to deal with the matter. Following the postponement, the hearing was rearranged for 16 September. Ms Fay had conversations with Mr Williams and Mr Jackson on 23 and 24 September and I have found that she sent her outcome letter by email to the claimant and Mr Jackson on 7 October 2019.

118. While acknowledging that the ACAS Code requires matters to be dealt with promptly and that any suspension should be as brief as possible it does not seem to me, given the size and resources of the respondent, that that length of time for concluding the disciplinary process was beyond the band of reasonableness.

119. Moving on to the failure to hold an investigatory meeting with the claimant. As the **Sunshine Hotel** case emphasises, holding a separate investigatory meeting is not necessarily required. In this case the respondent had carried out an investigation and the claimant had had an opportunity to put her version of events, with supporting documents, both in writing on 9 September and at the meeting on 16 September. The claimant raised no criticism of the way Ms Fay had conducted the meeting and there was no suggestion that the claimant was prevented or inhibited from putting her case. On that basis I do not find the failure to hold an investigatory meeting in this case took the process outside the band of reasonable responses.

120. The next criticism was that Ms Fay had a conflict of interest because she was carrying out a dual role. By that I understand Ms Grand to mean that she was acting, effectively, as the prosecutor and the judge in the case because she was putting the respondent's case to the claimant. However, the evidence does not support that. Having read the transcript of the meeting I am satisfied that Ms Fay's role was to conduct the disciplinary meeting. She did put the matters in the respondent's Disciplinary Report to the claimant, but she had to do that to understand the claimant's response and make her decision about the case. I do not find that when doing so she was acting as prosecutor and Judge. There was no conflict in her role which could take the process outside the band of reasonable responses.

121. The next criticism is of the failure to allow cross examination of witnesses by the claimant. As **Santamera** makes clear, there is no right to cross examination per se. In this case the claimant knew clearly what the allegations against her were. The respondent was not required to carry out a quasi judicial enquiry. I find there was no requirement for Mr Jackson to attend because his investigation report to which the claimant had already responded in depth set out very clearly what the allegations and supporting evidence were. In fact Ms Fay did follow up with Mr

Williams, the key witness, to check his evidence after the disciplinary hearing. I do not find in this case that the failure to allow cross examination meant the process was unfair or outside the band of reasonable responses.

122. A further criticism made by Ms Grand was that there was a lack of factual evidence against the claimant. Ms Grand said that the evidence was hearsay and there were no facts proven. The difficulty, it seems to me, was that this was a case where the only evidence was witness evidence, and that is often the case. That does not mean that a disciplinary allegation cannot be substantiated. If an employer can reasonably conclude that misconduct has taken place because they prefer the evidence of one witness over another, that is enough. The absence of corroboration in the form of documents or photographic evidence does not prevent such a conclusion being reasonable.

123. Stepping back and viewing the process as a whole, the question for me is whether with reference to the facts before it the employer's procedure had been fair and reasonable. Overall I find it was. There were things that the respondent got wrong. It should not have initially suspended the claimant without pay when she refused to attend the meeting on 4 September. I accept that she should have been in a position to attend that meeting, having not booked holiday on that day and therefore being obliged to attend if required. The respondent rectified its error by repaying the pay. I therefore find that that is not sufficient to render the process unfair.

124. I have also considered whether the respondent acted fairly and reasonably in suspending the claimant in the first place. Mr Jackson's evidence was he did so partly because of the nature of the allegations but also partly because of the concern about how Mr Walsh would react and whether that could put Mr Jackson or his staff at risk. He referred to Mr Walsh as being a "volatile character". It did seem to me that there was a risk that Mr Jackson's dislike of Mr Walsh tainted his decision to suspend the claimant with unreasonableness. Ultimately, I have decided that it did not. Given the nature of the allegations, misuse of company property and driving while intoxicated, and the clear warning about allowing Mr Walsh to use the car given in March, it does seem to me that a suspension was within the band of reasonable responses in this case.

125. My conclusion is that it cannot be said that the way the respondent conducted the disciplinary process was outside the band of reasonable responses. Is that enough to exonerate it from blame for the breakdown in the relationship? Should, for example, Mr Jackson have treated the claimant differently because she was his sister as well as his employee? I find it clear that in this context he was acting as her employer. Arguable he had shown leniency in the past by not taking action when another employer might well have done so, or he might well have done so in relation to another employee. By that I refer to the incidents in July 2018 and in March 2019. Given that context, I do not think given the information received in July 2019 was such that it was unreasonable for the respondent to take disciplinary action. Nor do I find that the way the disciplinary process was conducted was such as to make it unreasonable for the respondent to rely on the breakdown of the employment relationship as some other substantial reason justifying dismissing the claimant.

(4) If not, would any procedural unfairness have made any difference in accordance with the principles in Polkey v AE Dayton Services Limited [1988] ICR 142?

(5) If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct?

126. If I am wrong that the respondent fairly dismissed the claimant for SOSE I would have found that the respondent would have been entitled to dismiss the claimant for gross misconduct in relation to the first allegation, namely allowing Mr Walsh to drive the company vehicle knowing there was no permission for him to do so. Even were the dismissal unfair procedurally I would have reduced the compensatory award to zero under the **Polkey** principle.

(6) Did the respondent comply with the ACAS Code of Practice on Disciplinary Procedures?

127. I heard submissions about whether the ACAS Code applied to this case such that I should increase any compensation by 25% under section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 had I found the dismissal to be unfair. As is apparent from my findings, I did not find that the respondent unreasonably failed to comply with the ACAS Code.

Remedy

128. These issues (at 10-11 of the List of Issues) do not arise because I have found the claimant was not unfairly dismissed. I have dealt with the **Polkey** issue under question 4 above.

Concluding Summary

129. The claimant was fairly dismissed for some other substantial reason, namely the breakdown of the relationship between her and Mr Jackson, and that her unfair dismissal claim fails.

Part Two – the Breach of Contract Claims

Evidence

130. The parties had agreed a bundle consisting of 125 pages for the Breach of Contract Claims ("the BOC Bundle"). The BOC Bundle was a separate, stand-alone bundle to the UD Bundle rather than an addition to it. That meant there was duplication between the two. The BOC Bundle included the Gorvins correspondence excluded from the UD Bundle.

131. For the Breach of Contract Claims there were witness statements from the claimant and from Mr Jackson. On the third day of the hearing I heard evidence from them.

132. References in this part of the Judgment to page numbers are references to pages in the BOC Bundle.

Findings of Fact

133. There was a dispute about whether the claimant had a written contract of employment and about the status of payments which she received. As I have said in Part One of this judgment, where there was a dispute of fact between the claimant and Mr Jackson, I preferred his evidence.

The terms of the claimant's contract of employment

134. The starting point for my decision is whether or not there was a contract of employment in this case. There has been a dispute about that. There was a copy of a contract of employment in the BOC Bundle (pages 64-72) but the claimant's position was that she had never seen that or signed it. Mr Jackson's evidence was that there was a signed version of the contract in the bundle but that that had been removed by the claimant when she took her "personnel file" with her when she left the office on her suspension on 18 July 2019.

135. I find on balance that that the contract of employment in the bundle was the claimant's contract of employment. The reason I say that is that it seems to be more consistent with the other documentation which the claimant accepted she had received, albeit not signed, including the letter of revised terms of employment dated 8 July 2018 (pages 73-74).

136. In terms of what the contract says, it does not refer to any entitlement to a company car. It also states that the claimant's basic salary was £18,000. It does include a clause allowing the respondent to make a payment in lieu of notice (page 70).

Payments made to the claimant

137. The claimant disputes that that stated salary was still her salary after she returned from suspension in July 2018 (see paras 19-21).

138. The claimant's evidence was that when the suspension in July 2018 came to an end she and Mr Jackson had a meeting at which they agreed that Mr Jackson would top up her salary to the round figure of £3,000 per month so she would know where she was financially every month. This was to help her to be on a sound financial footing after the breakup of her marriage to Mr Alcock.

139. Mr Jackson's letter dated 6 July 2018 (pages 73-74) confirmed that the period of suspension had been concluded and that the claimant should return to work on Monday 9 July 2018. The letter set out what her role was, confirming it as Office Manager accountable to the Managing Director, i.e. Mr Jackson. It set out her responsibilities and also set out that her salary was "as agreed". The letter did not specify what the agreed salary was. However, it confirmed that by way of incentives, the claimant was to be paid an additional 10% for any new business secured, and another 25% for any savings achieved. The copy of that letter in the bundle was

unsigned and the claimant denied having received it but I prefer Mr Jackson's evidence that she did and that it formed part of her updated terms and conditions.

140. The claimant says that from July 2018 to June 2019 her salary was £2,597.59 per month. For the respondent, Mr Jackson said that the payments made to the claimant from July 2018 onwards was accurately reflected in the letter he sent the claimant on 7 November 2019 following her dismissal (page 103). That showed the claimant's gross salary as £1,500 per month (i.e. £18,000 per annum) but that payment being topped up by Mr Jackson on a monthly basis. The amount of the top up varied from month to month, for example in July 2019 the top up was £1,246.56 whereas in December 2018 it was £664.48. The claimant's payslips in the bundle give her salary as £1,500 gross per month and her P60s for the years ending April 2017-April 2019 (pages 123-125) are consistent with that.

141. It does seem to me on balance that the way that the payments were made is more consistent with Mr Jackson's version of events, which is that he received a dividend from the respondent, deducted various payments that he had to make and then passed on the balance to his sister to help her out. In other words, it was something done as a sibling rather than as an employer. That seems to me consistent, as I say, with the varying amounts involved, but also consistent with the evidence which I have found, that the personal relationship between them was relatively good up until July 2019.

142. The claimant's bank statements in the bundle from January 2019 (pages 110-122) generally showed three payments into the claimant's bank account per month. I find that the table in the letter at page 103 accurately summarises the first two of those payments.

143. The first payment was shown as "salary" from the respondent and was for the net equivalent of £1500 per month but with the addition of the variable "top up" payment.

144. The second (not received every month) was a payment of £500 per month from Lucas Asset Management. There was a dispute as to what the status of those payments were. I accept Mr Jackson's evidence that they were payments for consultancy work done by the claimant and that they were paid on the back of invoices submitted by the claimant, which is why those payments stopped from July 2019 and also why they were irregular before then (not being received, for example, in January 2019 or in April 2019). Lucas Asset Management is no longer a party to these proceedings.

145. The third payment (not shown on the table at page 103) was a payment of around £500 per month marked "Evie Alcock Salary". Evie Alcock is the claimant's daughter. I found the claimant's evidence as to this payment unclear. She said that those payments was salary payable to her daughter in relation to an apprenticeship but also said they were paid to her as a benefit. In looking through her bank statements it seems that although that payment came into her bank account there were then subsequent payments out during various months which were marked "wages". I find that more consistent with Mr Jackson's evidence that what was happening was that Evie Alcock's salary was being paid into the claimant's account

for Evie Alcock, and that the claimant would then pay it out to her daughter in £100 instalments.

146. In summary, I find that the claimant's basic salary was £18,000 per annum which equated to £1500 per month gross. I find that Mr Jackson "topped up" those wages each month. I also find that some months the claimant would be paid £500 by Lucas Asset Management for consultancy services, paid when invoiced. I find that the payments for Evie Alcock were payment of her salary not a benefit paid to the claimant.

Relevant Law

Unlawful deductions from wages

147. In relation to a claim for deduction from wages, s.13(1) of the ERA says:

"(1) An employer shall not make a deduction from the wages of a worker employed by him unless-

(a) the deduction is required or authorised to be made by virtue of a statutory provision of a relevant provision of the worker's contract, or

(b) **the worker has previously signified in writing his agreement or consent to the making of the deduction."**

148. S.27(1) of ERA says:

"(1) In this Part 'wages', in relation to a worker, means any sums payable to the worker in connection with his employment, including-

(a) Any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise"

149. S.13(3) of ERA says:

"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

150. in **New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA** the majority of the Court of Appeal held that a worker would have to show an actual legal, although not necessarily contractual, entitlement to the payment in question in order for it to fall within the definition of "wages".

Breach of Contract

151. Under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623 the Tribunal has jurisdiction to hear a contractual claim brought by an employee if it arises or is outstanding on the termination of the employee's employment. The claim must seek one of the following:

a. damages for breach of a contract of employment or any other contract connected with employment

b. the recovery of a sum due under such a contract, or

c. the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract.

152. The claim must be one that a civil court in England or Wales would have jurisdiction to hear and determine. Certain kinds of claim (not relevant to the claimant's claim in this case) are excluded.

153. When it comes to the relevant test for deciding the terms of a contract, Lord Clarke explained the relevant principles in this way in **RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH [2010] UKSC 14; [2010] 1 WLR 753**, para 45:

> "The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. "

154. In ***Blue v Ashley*** **[2017] EWHC 1928** Leggatt J noted that where the court is concerned with an oral agreement, the test remains objective but evidence of the subjective understanding of the parties is admissible in so far as it tends to show whether, objectively, an agreement was reached and, if so, what its terms were and whether it was intended to be legally binding. Evidence of subsequent conduct is admissible on the same basis.

155. When it comes to implied terms, the courts will not imply a term simply because it is a reasonable one. Nor will they imply a term because the agreement would be unreasonable or unfair without it. A term can only be implied if the court can presume that it would have been the intention of the parties to include it in the agreement at the time the contract was made. In order to make such a presumption, the court must be satisfied that:

a. the term is necessary in order to give the contract business efficacy: In **Ali v Petroleum Co of Trinidad and Tobago 2017 ICR 531, PC**, Lord Hughes explained that: "A term is to be implied only if it is necessary to make the contract work, and this it may be if…..it is necessary to give the contract business efficacy.……The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient precondition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement."

b. it is the normal custom and practice to include such a term in contracts of that particular kind: the custom in question must be reasonable, notorious and certain (see, for example, **Devonald v Rosser and Sons 1906 2 KB 728, CA**, and **Sagar v H Ridehalgh and Son Ltd 1931 1 Ch 310, CA)**. This means

that the custom must be fair and not arbitrary or capricious; that it must be generally established and well known; and that it must be clear cut. But it should be borne in mind that neither custom and practice nor any of the other legal bases for implying terms into a contract permits the courts to displace specific express terms that deal fully with the same subject matter as that on which a party is seeking to imply a term.

c. an intention to include the term is demonstrated by the way in which the parties have operated the contract in practice, including all the surrounding facts and circumstances. This approach may demonstrate that the contract has been performed in such a way as to suggest that a particular term exists, even though the parties have not expressly agreed it, see **Mears v Safecar Security Ltd 1982 ICR 626, CA**.

d. the term is so obvious that the parties must have intended it (known as the 'officious bystander' test). In **Shirlaw v Southern Foundries (1926) Ltd 1939 2 KB 206, CA**, **affirmed by the House of Lords in Southern Foundries 1926 Ltd v Shirlaw 1940 AC 701, HL** held that a term could be implied in a situation where 'if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common "oh, of course"'. In practice, this means that a term will be implied if it can be said that it is so obvious that it goes without saying.

156. In **Horkulak v Cantor Fitzgerald International 2005 ICR 402, CA,** the Court of Appeal held that where under the terms of a contract one party was empowered to exercise a discretion the court would read into the contract an implied term that there would be a genuine and rational exercise of that discretion.

Statement of Terms and Conditions of Employment

157. At the time relevant to the claimant's claim, section 1 of the ERA required an employer to give an employee a written statement of particulars of employment not later than 2 months after the start of the employment. Where an employer fails to comply with that requirement, s.38 of the Employment Act 2002 states:

"(1) This section applies to proceedings before an employment tribunal relating to a claim by a worker under any of the jurisdictions listed in Schedule 5….

(3) If in the case of proceedings to which this section applies—

(a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 …,

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3)—

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable."

158. The right to compensation under s.38 is not a free-standing right and compensation can only be granted if the claimant succeeds with a claim of the kind listed in Schedule 5 to the 2002 Act. By virtue of schedule 5, s.38 applies to claims for unauthorised deductions, to claims of unfair dismissal and to breach of contract claims.

Discussion and Conclusion

Unlawful deduction from wages

(7) Did the claimant suffer an unlawful deduction from wages, contrary to section 13 ERA 1996?

(8) The claimant is claiming the following:

- Deductions from pay during suspension (paid half pay during August and September)
- Deductions from notice pay (paid half pay for 6 weeks' notice period)
- Deduction of one weeks worked salary (8th to 14th October 2019 inc).

Breach of Contract

(9) The claimant is claiming the following:

- No written Statement of Employment Particulars or Contract of Employment
- Not paid full pay and benefits during 12.5 week suspension. Payment of £2,500 per month was custom and practice and non-payment was in breach of an implied term.
- Paid in Lieu of notice rather than allowing me to work my notice when there was no Contractual right to pay in lieu.
- Breach of implied duty of care

159. When it comes to the claims of not being paid "full pay" during her suspension and in her notice pay the fundamental question for me to have to decide is whether the payments referred to at page 103 as "top up payments" and as Lucas Asset Management Consultancy payments were in fact part of the claimant's salary to which she was contractually entitled both during her suspension and also during her notice pay period. If they did not then the claimant's entitlement was to the salary in her contract, i.e. £18000 per annum which is what she was paid during her suspension and in her payment in lieu of notice.

160. It does seem to me on balance that the way that the payments were made is more consistent with Mr Jackson's version of events, which is that he received a dividend from the company, deducted various payments that he had to make and then passed on the balance to his sister to help her out. In other words, it was something done as a gift from a sibling rather than as a payment as an employer. That seems to me consistent, as I say, with the varying amounts involved, but also consistent with the evidence which I have found, that the relationship between them as siblings was relatively good up until July 2019.

161. The claimant argued that in the absence of an express agreement that the top up payments formed part of her salary, such a term was to be implied from custom and practice. In terms of the case law as to custom and practice, the wording used is "notorious and certain". One of the points I note in this case is that the amount of payment made varied from month to month. There was no suggestion on the claimant's part that she had complained about the variations in the amounts being paid because of those variations. It does not seem to me that the length of time for which the payments were made (coupled with the variation in amounts) is sufficient to imply a term based on custom and practice.

162. On balance, therefore, my decision is that on the evidence the payments made in excess of the £18,000 per annum were not payments to which the claimant was contractually entitled. They were payments made by Mr Jackson at his discretion, albeit using the vehicle of various companies of which he was the main shareholder. That being the case then what I find is that there was no breach of contract in relation to the failure to pay that full rate (i.e. salary plus top up) during the suspension period and the notice pay period, and also no unlawful deduction from wages.

163. When it comes to the company car, I accept the respondent's submission that all the evidence pointed to the company cars being owned by the respondent and being pool cars rather than cars which were attributed to any particular individual as a benefit. That again is consistent with the P60 forms for the claimant which do not reflect that benefit in terms of a company car and with her contract of employment, which does not refer to such a benefit.

164. The claimant also claimed that she was entitled to be paid for the week 7-14 October 2019 because the notice of dismissal (i.e. Ms Fay's letter) was not received until 14 October 2019. I have found, however, that it was sent and received on 7 October 2019 (para 64) and reject this claim.

165. The claimant claimed that it was a breach of contract to pay her in lieu of notice. I have found, however (para 136) that her contract did include a clause allowing the respondent to pay in lieu of notice so that claim also fails.

166. When it comes to the "breach of a duty of care" this was not a matter on which Ms Grand made specific submissions. To the extent that the claim was based on the respondent's conduct amounting to a breach of the implied term of trust and confidence I reject that claim. As I have set out in Part One of these reasons, I did

not find that the respondent acted unreasonably in deciding to initiate disciplinary proceedings against the claimant nor in the way they were conducted.

167. When it comes to the failure to provide terms and conditions, I do accept Ms Grand's submission that on balance it is the case that the claimant would not have been supplied with terms and conditions when she initially started work for the respondent in 2013. That does amount to a breach of the ERA. However, the Tribunal can only award a remedy for a breach of section 1 where it is also awarding a remedy for a breach of another right, for example the right not to have unlawful deductions made.

168. In this case what I have found is that there was no unlawful deduction and no breach of contract. That being so I cannot award compensation for the failure to provide a statement of terms and conditions at the inception of the claimant's employment with the respondent.

Concluding Summary

169. In summary, therefore, I find that the claims that there was a breach of contract or unlawful deductions from wages fail, and that although the claim of a failure to provide a statement of terms and conditions does succeed, there is no remedy to be awarded because of the way that the legislation is structured.

_____

Employment Judge McDonald

Date: 15 July 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

ANNEX

Unfair Dismissal

1. Was the claimant's dismissal for a potentially fair reason in accordance with section 98 (1) (a) of ERA 1996 and / or section 98(2) ERA 1996?

2. Was the claimant's dismissal fair having regard to section 98(4) of the ERA 1996 and therefore considering:

   (e) Whether in the circumstances (including size and administrative resources) the respondent acted reasonably in dismissing the claimant; and

   (f) Equity and the substantial merits of the case?

   (g) Whether in the circumstances the respondent acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissal.

   (h) Whether the dismissal met the Burchell test and was within the range of reasonable responses.

3. Did the respondent follow a fair procedure?

4. If not, would any procedural unfairness have made any difference in accordance with the principles in Polkey v AE Dayton Services Limited [1988] ICR 142?

5. If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct?

6. Did the respondent comply with the ACAS Code of Practice on Disciplinary Procedures?

Unlawful deduction from wages

7. Did the claimant suffer an unlawful deduction from wages, contrary to section 13 ERA 1996?

   [Claimant to confirm which payments she is claiming for if different to those stated on her claim form]

8. The claimant is claiming the following:

   - Deductions from pay during suspension (paid half pay during August and September)

- Deductions from notice pay (paid half pay for 6 weeks' notice period)
- Deduction of one weeks worked salary (8th to 14th October 2019 inc).

Breach of Contract

9. The claimant is claiming the following:

   - No written Statement of Employment Particulars or Contract of Employment
   - Not paid full pay and benefits during 12.5 week suspension. Payment of £2,500 per month was custom and practice and non-payment was in breach of an implied term.
   - Paid in Lieu of notice rather than allowing me to work my notice when there was no Contractual right to pay in lieu.
   - Breach of implied duty of care

Remedy

10. If any of the claimant's complaints are well founded, what compensation is she entitled to receive in particular after having regard to (where appropriate):

    a. Polkey?

    b. The claimant's contributory conduct?

    c. The duty upon the claimant to mitigate her losses?

    d. Such amount that it is just and equitable for the claimant to receive?

11. Should any compensatory award be reduced or uplifted on account of either party's failure to comply with the ACAS code?