EMPLOYMENT TRIBUNALS

Claimant: **Mrs Jasumati Patel**

Respondent: **Department for Work and Pensions**

Heard at: **Leicester**

On: **5 and 6 April 2017**

Before: **Employment Judge Vernon (sitting alone)**

Representatives
Claimant: **Mr Bidnell-Edwards (Counsel)**
Respondent: **Mr Lyons (Counsel)**

JUDGMENT

1. The Claimant was unfairly dismissed.

2. The Claimant is entitled to a basic award of £2,012.81.

3. The Claimant is entitled to a compensatory award of £294.26 including an uplift of 10% to reflect a breach of the ACAS Code of Practice.

4. The Respondent shall pay to the Claimant the further sum of £1,200 as repayment of the Issue Fee and Hearing Fee paid by the Claimant.

5. All sums due to the Claimant shall be paid by no later than 4 May 2017.

6. In the event that the recoupment provisions apply to the compensatory award, the period to which the compensatory award applies is 1 August 2016 to 29 August 2016.

7. The Claimant's claim of breach of contract is dismissed upon withdrawal.

REASONS

Background

1. The Claimant presented an ET1 on 2 November 2016. In it she made claims of unfair dismissal and breach of contract, the breach of contract claim taking the form of a claim for notice pay.

2. In summary, the Claimant alleges that she was dismissed for alleged breaches of the Respondent's information security policy but a) that the Respondent did not have reasonable grounds to believe she was guilty of

the misconduct in question, b) that it failed to carry out a reasonable investigation before dismissing her, c) that it failed to follow a fair procedure, including a failure to comply with the ACAS Code of Practice and d) that it dismissed her in circumstances where dismissal fell outside of the range of reasonable responses open to the Respondent.

3. The Respondent's ET3 was received on 3 January 2017. The Respondent denies liability for the Claimant's claims. The Respondent says that the Claimant was dismissed for repeatedly accessing electronic records pertaining to a) her daughter, b) her husband and c) another person when there was no legitimate business reason for her to do so.

4. The Respondent says that that conduct amounts to a clear breach of its policies on information security and is gross misconduct for which dismissal is a reasonable sanction.

Evidence

5. The Tribunal was provided with a hearing bundle which ran from pages 1 to 259.

6. The Tribunal was also provided with written witness statements from the Claimant and, on behalf of the Respondent:

   6.1 Diane Williamson (formerly known as Diane Groves) who was formerly employed by the Respondent for 33 years, latterly as a Higher Executive Officer;

   6.2 Tracy Matthews, who is employed by the Respondent as a Higher Executive Officer; and

   6.3 Anne Danvers, who is employed by the Respondent as a Grade 7 District Operations Leader.

7. The Tribunal heard oral evidence from all of those witnesses and, in addition, heard oral submissions from the representatives of both parties.

8. The Tribunal was also provided with written submissions from the Claimant's representative and has considered all of those matters in coming to a conclusion.

Issues

9. At the outset of the hearing, the Claimant's representative confirmed that the Claimant was no longer pursuing the claim of breach of contract i.e. the claim for notice pay. That claim has therefore been dismissed upon withdrawal by the Claimant.

10. It follows that the only claim that the Tribunal has considered is the claim of unfair dismissal. Both representatives had provided the Tribunal with a proposed list of issues. Following discussion with the representatives, the issues to be determined were clarified.

11. The Claimant accepted that the Respondent had a potentially fair reason for dismissing her, namely a reason related to her conduct.

12. The Claimant did not seek to challenge the Respondent's case that there was a genuine belief in the Claimant's guilt of the misconduct for which she was dismissed.

13. The issues for the Tribunal to consider in order to determine the liability issues arising from the Claimant's claim were therefore identified as follows:

    13.1 Did the Respondent have reasonable grounds for the belief in the Claimant's guilt of the misconduct?

    13.2 At the time the Respondent formed its belief in the Claimant's guilt on those grounds, had it carried out as much investigation as was reasonable in the circumstances?

    13.3 Did the Respondent follow a fair procedure in dismissing the Claimant?

    13.4 Was the sanction of dismissal within the range of reasonable responses open to a reasonable employer in the circumstances?

14. I indicated to the parties that I intended to focus on the issues of liability initially as part of the hearing, with a view to considering issues of remedy if they became relevant. It was agreed that issues of **Polkey** and contributory conduct would, however, be considered as part of the liability decision.

Applicable Law

15. The Claimant enjoys the right not to be unfairly dismissed provided by Section 94 of the Employment Rights Act 1996.

16. There is no dispute that she was dismissed by the Respondent.

17. Unfair dismissal claims are governed by Section 98 of the same act. The first stage of consideration is for the Respondent to show a potentially fair reason for dismissing the Claimant. It is not in dispute that the Respondent had a potentially fair reason for dismissing the Claimant.

18. The second stage is then to consider, in accordance with Section 98(4) ERA 1996, whether the Respondent acted reasonably or unreasonably in treating that reason as a sufficient reason to dismiss the Claimant taking into account all the circumstances of the case, including the size and administrative resources of the Respondent, equity and the substantial merits of the case.

19. As the Respondent relies on conduct as the potentially fair reason, I have also had regard to the principles set out in the case of **BHS v Burchell [1980] ICR 303, EAT**, namely:

    19.1 Did the Respondent have a genuine belief in the Claimant's guilt?

    19.2 Did the Respondent have reasonable grounds for that belief?

and

19.3 Did the Respondent carry out as much investigation as was reasonable in the circumstances?

20. I have also considered the case of **Sakharkar v Northern Foods Grocery Group Limited trading as Fox's Biscuits UKEAT0042/10** and paragraph 34 of the judgment in that case in which I am reminded of the following, namely that "*the **Burchell** case remains, in circumstances akin to those which were under consideration, a most useful and helpful guideline; but it can never replace the soundness of an appraisal for all the circumstances of each particular case viewed in the round way that* [Section 98(4)] *requires them to be viewed*".

21. I also note paragraph 35 of the decision in **Sakharkar** which indicates that the **Burchell** test tends to focus attention on the decision maker, and that "*this is entirely appropriate for many cases, including the vast majority of conduct cases*" and that "*Section 98(4) is a statutory direction to take into account the employer's administrative resources*".

22. In terms of other important principles, I have also had regard to the following:

22.1 that in assessing the fairness or unfairness of a dismissal I must consider what the Respondent did and consider whether it was reasonable;

22.2 that in order to determine whether the Respondent acted reasonably or unreasonably in dismissing the Claimant I must consider whether what the Respondent did was within a range of reasonable responses open to a reasonable employer;

22.3 the range of reasonable responses test applies not only to the decision to dismiss but also to the procedure followed in arriving at the decision; and

22.4 the Tribunal is not entitled to substitute its own view for that of the Respondent i.e. the Tribunal cannot say a dismissal is unfair simply because the Tribunal would have done something different in the circumstances. On that issue, I have also considered the authority of **Tayeh v Barchester Healthcare Limited [2013] EWCA Civ 29** and, in particular, paragraph 49 of the judgment from that case which says:

"*In applying the band of reasonable responses approach, it will not be a condition of an ET's decision that the employer's decision fell outside such band that the ET must conclude that the employer's decision was perverse. The task of the ET, sitting as an industrial jury, is simply to assess the reasonableness of the decision to dismiss against the objective standards of the hypothetical reasonable employer, measured by reference to the band of reasonable responses.*"

Findings of Fact

23. The Respondent is a very large employer. It is described in the ET3 as

the largest Government department in the United Kingdom. It employs more than 1,000 people, a significant number of whom are employed at the site where the Claimant was employed. The Respondent is responsible for the benefits, pensions and child maintenance payments of members of the public. As such the Respondent holds a significant quantity of personal, confidential information for members of the public, including national insurance numbers, bank account details, dates of birth, addresses and telephone numbers.

24. The Claimant was employed by the Respondent as an Administrative Officer working at the Respondent's premises in Wellington Street, Leicester. She commenced employment in 1985 and was employed continuously from that time until her dismissal without notice, effective from 31 July 2016.

25. In the early part of 2016 an audit was carried out of the Respondent's data by the Respondent's Audit Trail Analysis Team. The audit trail analysis that was conducted showed that:

    25.1 On a number of occasions in 2009, the Claimant had accessed records relating to her daughter and had accessed them again on one occasion in 2015;

    25.2 On one occasion in May 2016, she had accessed the records of her husband; and

    25.3 On 8 separate occasions between 14 December 2015 and 25 May 2016, the Claimant had accessed the records of a third person described as person C, including having accessed them 6 times in one day on 17 May 2016.

26. As a result of that analysis and its findings, the Claimant was invited to attend an investigation meeting. The invitation letter appears at page 129 of the bundle. The letter informed the Claimant that the Respondent was investigating a breach of information security. It referred to the Claimant having accessed or browsed customer records without a legitimate business reason or authorisation in 2009, 2015 and 2016. The letter gave no further details of the matters to be investigated other than that. The letter went on to say that the matter was being treated as no less serious than serious or gross misconduct and that the Claimant was invited to attend an interview with Diane Groves (as she was then known) on 13 June 2016.

27. The Claimant attended the interview with Diane Groves on 13 June and was accompanied by Carol Edson. A note taker was present and the notes appear at pages 132 to 138. The Claimant's comments during that interview included the following:

    27.1 She accepted that each time she logs on to the computer system a message appears in relation to unauthorised use of the system. A copy of that message appears at page 142 of the bundle. The message indicates that use of the computer would constitute acceptance by the Claimant of the electronic media policy, that the policy should be read if it had not already been read, and that inappropriate use of the computer system may lead to disciplinary

action or legal proceedings;

27.2 She confirmed that she had completed her security and resilience e-learning;

27.3 She said that she had never left her smart card unattended in a PC or let another colleague use it with her permission;

27.4 She confirmed that she had accessed her daughter's account in 2009 as a result of a query from another member of staff. She could not recall why she had accessed it in 2015;

27.5 She did a lot of queries and thought the enquiries in 2009 would have been by telephone;

27.6 She thought that she was given her daughter's national insurance number to conduct an enquiry but would not have recognised it;

27.7 She said she may have allowed a colleague who was having trouble with their computer to use her terminal;

27.8 She was unclear whether she had told anyone that she had accessed her daughter's account but thought that she may have done so;

27.9 She also confirmed that she had accessed her husband's account in May 2016. She said that she did not realise that the record was her husband's. She said that the request had come via other colleagues and she gave names of a number of those from whom the request may have come, including Andy or Peter at the front of house, Kal Begum, or others who were on work experience at the time;

27.10 As for person C's record, the Claimant said that she didn't know who person C was. She said that she would have used a date of birth to check person C's records if the National Insurance number she had been given did not bring up the appropriate record;

27.11 She further said that she would be asked by colleagues to check records that she otherwise would not have needed to check for approximately 90% of her working time.

28. It was accepted by Diane Williamson that she did not carry out any further enquiries in relation to anything that the Claimant had said during the meeting before referring the matter on to a decision maker.

29. She decided that there was a disciplinary case to answer in relation to the Claimant. She completed a manager's template which appears at pages 151 to 152. In it, she summarised the case as the Claimant having breached the Respondent's information security on various dates in 2009, 2015 and 2016 by accessing records with no legitimate business reason for doing so. She noted that two of the records accessed related to her family members, namely the Claimant's husband and daughter. The template also indicated that sanctions which were potentially being

considered as appropriate were a final written warning or dismissal.

30. The matter was then referred to Tracy Matthews who was identified as the disciplinary decision maker. She wrote to the Claimant on 6 July 2016 inviting the Claimant to a disciplinary meeting on 18 July. That letter said that the meeting was to consider the allegation that the Claimant had breached information security by accessing her husband's account on 5 May 2016, accessing her daughter's account on various dates between June and August 2009 and again on 18 June 2015 and accessing a third account from December 2015 to May 2016. The letter informed the Claimant that the matters may be considered to be gross misconduct and that the meeting may result in the Claimant's dismissal.

31. The meeting was subsequently rescheduled and eventually took place on 21 July 2016. The Claimant attended and was again accompanied. A note taker was again present and the notes are at pages 164 to 165. During that meeting the Claimant said the following:

    31.1 She did not notice that she had accessed her family's records immediately as it was difficult to tell because of the name being a common name;

    31.2 She could not recall who she had told about having accessed her daughter's record despite giving the matter a lot of thought;

    31.3 She continued to say that she did not know person C;

    31.4 She said that the multiple accesses on the one day of person C's records may be explained by "interruptions" and the need to go back into the record a number of times. She said that that may happen if the detail she had been given were not clear. She said such activity was quite normal.

32. Following that meeting, Tracy Matthews decided that the Claimant should be dismissed without notice having concluded that the Claimant was guilty of gross misconduct.

33. Mrs Matthews concluded that the accessing of family records was completely forbidden by the Respondent. She concluded that she was not satisfied that there was any legitimate business reason for the Claimant accessing any of the records in question and that therefore the actions of the Claimant were suspicious. She considered the Respondent's policy on how to deal with breaches of information security and applied the "Information Security Scenario Matrix" set out within that policy. She concluded that the Claimant's case fell within Section 1.2 of that matrix. Section 1.2 of the matrix reads as follows:

    "*An employee accesses or browses through multiple customer records or makes multiple accesses to the same record, their own record, or those of their family, friends or celebrities without a legitimate business reason or appropriate authorisation. The access, browsing or searches may happen on the same day or over a period of time.*"

34. The matrix contains guidance as to the appropriate sanction for such a breach. In the second column of the matrix headed "Gross misconduct",

the policy reads as follows:

"*When determining the appropriate level of penalty, the manager will consider the motive of the employee in accessing the records, the amount of records accessed and any resulting impacts.*"

35. The third column of the matrix, entitled "Possible outcome" contains two possible outcomes, namely dismissal and final written warning. Under dismissal, the policy states:

"*This will be appropriate if the manager has good reason to believe the actions to be suspicious or malicious and/or the employee can provide no legitimate reason or reasonable justification for accessing the records.*"

36. Against final written warning, the policy says:

"*This may be appropriate if the employee can provide some reasonable explanation as to why they may have accessed the records or some other relevant mitigation.*"

37. I pause to note at this stage that there is no dispute in this case that advertently or deliberately accessing the records of family members is absolutely forbidden by the Respondent and that the Claimant was aware of that. Further, there is no dispute that if such a record was accessed inadvertently, that a member of staff was required to inform their manager so that a record could be made of that inadvertent access.

38. For all of those reasons, Mrs Matthews concluded that dismissal was the appropriate sanction. In coming to that decision, it is accepted that Tracy Matthews did not consider that the length of service of the Claimant or the fact that the Claimant had a clean disciplinary record altered her decision.

39. The decision to dismiss was confirmed in a letter to the Claimant dated 27 July 2016. The letter informed the Claimant that her dismissal would be effective from 31 July 2016. The letter referred to the records which had been accessed and concluded that, although there was no apparent malicious intent on the Claimant's part, her actions were suspicious and as she could provide no legitimate reason or justification for accessing the records she was guilty of gross misconduct and would be dismissed.

40. The Claimant subsequently appealed in writing on 8 August 2016. A copy of that letter appears at page 176 to 178. The appeal letter made largely the same points that the Claimant had made during the disciplinary meeting.

41. The Claimant was invited to an appeal meeting with Anne Danvers on 30 August 2016. The Claimant attended and was again accompanied. A note taker was again present and the notes are at pages 181 to 182.

42. Mrs Danvers conducted the appeal hearing having considered the Respondent's policy on the role of an appeal manager. That policy indicated that the role was to focus on the grounds of appeal, rather than to reconsider the case as a whole from start to finish.

43. During the appeal meeting, the Claimant really repeated what she had said before, namely that she had not accessed the records deliberately and that she felt it was unfair to be looking at events dating back to 2009. She said nothing more to add to what she had said before and that which she had set out in her appeal letter.

44. In considering the appeal Mrs Danvers took the approach that unless there was something new to rebut or undermine the conclusions reached by the decision maker, the decision maker's decision would stand. Mrs Danvers gave evidence at the Tribunal that in coming to her decision she was aware of the Claimant's long service and clean record and would have taken those matters into account when coming to her decision.

45. After hearing the appeal, Mrs Danvers decided that the decision to dismiss taken by Mrs Matthews should be upheld. Confirmation of that decision was sent to the Claimant in writing on 7 September 2016. The letter is best described as brief but it confirmed Mrs Danvers' view that because the Claimant had offered no additional information or mitigation to that provided to Mrs Matthews, the decision made to dismiss would be upheld.

Analysis and Conclusions

46. It is not in dispute that the Claimant was dismissed or that the Respondent had a potentially fair reason for dismissing her.

47. In general terms, the only issue in this case as to liability is the reasonableness of the Respondent's decision to dismiss. I have borne in mind the test in Section 98(4) of the Employment Rights Act 1996 and also the test set out in the case of **Burchell** when coming to my conclusions which are as follows.

48. There is no dispute that the decision maker in the Claimant's case had a genuine belief that she was guilty of the misconduct in question.

49. The question which is next to be asked is: were there reasonable grounds for that belief?

50. In my judgment, the evidence that was available to Mrs Matthews (who was the decision maker at the disciplinary stage) from the audit analysis team could reasonably have been considered to establish the following matters:

    50.1 That records of the Claimant's daughter, husband and another person had been accessed on multiple occasions (save for the husband's records which had only been accessed once) between 2009 and 2016;

    50.2 That accessing records of family members was absolutely forbidden by the Respondent and that the Claimant was aware of that;

    50.3 That if there was any inadvertent access, particularly of family records, then that matter should be reported;

50.4 That there was no documentary evidence to show that the Claimant had reported any inadvertent access and the Claimant was vague as to whether she had done so.

51. Therefore, in the absence of any legitimate business reason for accessing those records, or any reasonable justification for having done so, in my judgment it was reasonably open to the Respondent to conclude that such activity was at least suspicious and that it called into question the Claimant's trustworthiness in performing her role.

52. I also consider that it was reasonably open to the Respondent to conclude that there was no legitimate business reason for the Claimant to access the records of family members given the absolute prohibition on doing so.

53. Therefore, in the absence of further evidence as to a legitimate business reason for accessing the records of person C, or any reasonable explanation for accessing the records of her husband and daughter, the Respondent was reasonably entitled to find that the Claimant's activity was at least suspicious.

54. The Claimant offered explanations for how it was that she may have accessed the records, namely either by requests being made of her which resulted in her making checks or through inadvertence or through not realising that she had accessed records which she shouldn't have accessed.

55. On the evidence that was available to the Respondent at the time it was reasonable for the Respondent to conclude that those explanations were not corroborated and were not reasonable, and therefore to find against the Claimant.

56. On that basis, I am satisfied that the Respondent had a genuine belief in the Claimant's guilt based upon reasonable grounds on the evidence that was available to it at that time.

57. I am also satisfied that the Respondent followed a fair procedure which included all of the normal stages which one would expect to see in a misconduct procedure. The procedure included invitations to and attendance at fact finding, disciplinary and appeal meetings. Those meetings provided the Claimant with an opportunity to state her case, particularly at the disciplinary meeting.

58. There was also an opportunity for the Claimant to state her case at the appeal, subject to the confines of the Respondent's appeal process. I find there to be nothing unreasonable in the approach taken by the Respondent in this case at the appeal stage, namely limiting the appeal to anything new which might cast doubt on the original decision and reviewing the procedure followed prior to the dismissal decision. In my judgment, appeals can reasonably take the form of a review of matters and that is what happened in this case.

59. I am also satisfied that, on the basis of what the Respondent reasonably believed at the time, the decision to dismiss the Claimant fell within the range of reasonable responses open to it. In coming to that decision, I

have considered the following matters.

60. The accessing of records of family members was absolutely forbidden by the Respondent, particularly if done so deliberately.

61. The Claimant asserts that dismissal was not permitted by the Respondent's policy on a reading of Section 1.2 of the scenario matrix at page 223 of the bundle. I do not accept that submission for these reasons:

    61.1 The policy requires the decision maker to consider a number of issues including motive, the number of records accessed and any impact;

    61.2 I conclude that each one of those issues was considered. The number of records accessed was clearly considered and was a material consideration. Any impact was also considered and while the Respondent did not find any evidence of any external impact, it does appear to have concluded that there was an impact on the trust and confidence it had in the Claimant. That was a view which in my judgment was reasonably held and which did not offend the policy. The Respondent also considered the motive of the Claimant and in fact appears to have concluded that no view could be reached on motive. However, in my judgment that does not mean that the decision to dismiss was not in accordance with the policy.

    61.3 The policy provides that dismissal will be appropriate if the manager has good reason to believe the actions of the employee to be suspicious or malicious and/or the employee can provide no legitimate reason or reasonable justification for accessing the records. It was reasonable of the Respondent to consider that only one of those criteria needed to be satisfied in order to come to the view that dismissal was the appropriate sanction. It did not have to find more than one of those criteria to be satisfied before it could reasonably come to that view.

    61.4 Further, and even if my view of that had been different, I also accept the Respondent's submission that I am still entitled to look at matters in the round considering the terms of the policy as one factor and consider if dismissal was a sanction within the range of reasonable responses, bearing in mind the nature of the Respondent's business, the role of the Claimant, the sensitive nature of the information held by the Respondent, the number of records accessed, the period of time over which they were accessed and the fact that the activity was reasonably considered to be at least suspicious.

62. For all of those reasons, I conclude that dismissal was within the range of reasonable responses.

63. I also consider that the length of the Claimant's service and the fact that she enjoyed a clear disciplinary record do not reasonably alter that position. It is not unreasonable to dismiss an employee, even of long, exemplary service if the conduct for which they are dismissed is particularly serious and particularly if it is reasonably seen as impacting

upon the trust that the Respondent has in the Claimant. For reasons I have already set out, I have come to the view that the Respondent was reasonably entitled to take the view that that was the position here.

64. I also reject the Claimant's submission that the Respondent failed to raise matters with her promptly. Whilst it is true that some of the matters investigated dated back to 2009 and to 2015, and that the disciplinary investigation did not commence until the middle of 2016, I accept the Respondent's submission that assessing the promptness of the Respondent's actions must be done from the date at which the Respondent knew of the matters concerned. The analogy given in submissions by the Respondent was of a theft having been committed a number of years previously but which only comes to the attention of an employer some years later. That analogy is one which I had in fact considered prior to it being made to me in submission. I accept that it is an appropriate analogy. If a serious act of misconduct is committed many years before the Respondent employer becomes aware of it, in my judgment it does not amount to a failure to deal with matters promptly if an investigation commences within a prompt period of time following the date on which the employer has knowledge of the misconduct in question.

65. However, in my judgment the age of the conduct for which the Claimant was dismissed does have some significance to this case and the significance in my judgment is this. It has a bearing upon the need to carry out a reasonable investigation before dismissing the Claimant.

66. The Claimant had been employed as an Administrative Officer for over 30 years. She had a clear disciplinary record. The evidence establishes that she fields many, many enquiries every day and as many as 300 to 400 per week.

67. She was being asked as part of the disciplinary investigation to recall the reasons why she may have accessed certain records in some cases months before, in other cases years before. It is understandable in such circumstances that she may have struggled to recall the circumstances in which she had accessed those records.

68. In my judgment, it is imperative in those circumstances that the Respondent carries out a thorough and detailed investigation. That investigation should include investigation into matters raised by the Claimant but also into any other evidence which may assist with understanding what had happened and how it had happened.

69. It is right to say that the Claimant offered various explanations for how the events may have occurred. It is also right to say the Respondent considered many of them to be implausible. I pause to note at this stage that, of course, implausible events may nevertheless be true.

70. The underlying point is that the Respondent did not carry out any investigation beyond looking at the report of the audit team and speaking to the Claimant. It made no further enquires of any other member of the Claimant's team, any of her managers or any of the front of house staff as to the particular events, or even generally in order to assess the likelihood of the Claimant having behaved in the manner that she was

found to have behaved.

71. In my judgment, a fair investigation requires an employer to act in an even handed and a balanced way. It requires an employer to look for evidence against a Claimant but also evidence in the Claimant's favour and it is that latter step that, in my judgment, was not done in this case. I consider that to be unreasonable.

72. I also consider it to be contrary to Paragraph 4 of the ACAS Code of Practice which requires employers to carry out any necessary investigations to establish the facts of the case in question.

73. In coming to that view, I also bear in mind the size and administrative resources of the Respondent. It is a very large employer. It has multiple tiers of management. It has a dedicated HR advice service. All of those factors make it all the more reasonable to expect the Respondent to conduct a reasonable investigation.

74. In those circumstances, I conclude that the dismissal of the Claimant in this case was unfair on the basis that the Respondent had not carried out as much investigation as was reasonable in the circumstances at the time the Claimant was dismissed.

75. Having come to that conclusion, I must go on to consider what would have happened if a reasonable investigation had been carried out. In my judgment, on the basis of the evidence I have heard and read, it is likely that little further evidence would have been added to the position. That is due to the age of the allegations and the large volume of work done by the team, meaning that any other person would have found it difficult to recall the events, in the same way that the Claimant had found it difficult.

76. The Claimant's submission is that, in those circumstances, any fair employer would have given the Claimant the benefit of the doubt and that she would therefore not have been dismissed. I do not accept that submission. In my judgment, the position would have been as it was when the Respondent decided to dismiss the Claimant. The only factors which would have led to the Respondent giving the Claimant the benefit of the doubt were, in reality, her length of service and her clean disciplinary record. In a case where the Respondent would have reasonably come to the view that the Claimant behaved at least suspiciously, in my judgment it would have still been reasonably open to the Respondent to dismiss the Claimant once a reasonable investigation had been carried out and in fact, in the circumstances as existed here, I consider that it would have done so.

77. The length of time which it would have taken for the Respondent to carry out that investigation cannot be known with any specificity, but would in my view have been a period of approximately 4 weeks. In my judgment that period is consistent with the evidence of Mrs Williamson as to the time scale that she was working to in conducting her investigation.

78. Finally, I have also considered the issue of contributory conduct and in doing so I have to assess whether the conduct of the Claimant is culpable or blameworthy in some way. At this stage of deliberation, it is for the Tribunal to make findings on the balance of probabilities as to

whether the Claimant behaved in a manner which was culpable or blameworthy and in doing so caused or contributed to her own dismissal.

79. In coming to my decision on this issue I have considered the Claimant's length of service and her clean record as matters being relevant to whether or not the Claimant acted in a culpable or blameworthy manner or not. I have also considered the explanations she has given during the disciplinary process and in her evidence to the Tribunal.

80. Having done so, in my view the evidence demonstrates, on the balance of probabilities (and bearing in mind that such evidence does not appear to be materially disputed by the Claimant), that records of two of the Claimant's family members were accessed using her smart card and that in such circumstances it is likely that those records were accessed by the Claimant. The daughter's records were accessed on multiple occasions. The husband's were accessed on one occasion. On the balance of probabilities, on all but one occasion, the Claimant failed to inform anyone of those matters. On the balance of probabilities, it is unlikely that the Claimant would have failed to realise on that many occasions what she had done and that she was looking at family members' records.

81. Therefore, on the basis of the evidence I have seen and heard, I am not able, as the Respondent was not able, to say that the Claimant acted maliciously or dishonestly but I am in a position to say that the Claimant had accessed records in a manner which was at least suspicious.

82. In the circumstances, I conclude that the Claimant is culpable and blameworthy in the sense of having contributed to her own dismissal and I find that the culpability of the Claimant should be assessed at 75%.

Remedy

83. On the basis of my findings on liability above, there was no dispute between the parties that:

    83.1 the uplift applicable as a result of the breach of the ACAS Code of Practice should be assessed at 10%;

    83.2 the basic award to which the Claimant is entitled should be assessed in the sum of £2,012.81;

    83.3 the compensatory award should be assessed in the sum of £294.26;

    83.4 therefore, the total award for unfair dismissal due to the Claimant is £2,307.07.

Tribunal Fees

84. I then heard brief submissions in relation to whether or not I should order that the Claimant be repaid the Tribunal fees which she has paid in order to pursue her claim.

85. The Respondent submitted that she should not, bearing in mind that she had only succeeded on one issue and that there had been a

considerable reduction in her award to reflect a considerable finding of contributory fault.

86. The Claimant submitted that she had succeeded in her claim and that fees should really follow the event.

87. Having considered those brief submissions, I determine that the Claimant should be awarded a sum of £1,200 as full repayment of her Tribunal fees. In coming to that conclusion, I have taken into account the fact that, notwithstanding the fact that she has only succeeded on one aspect and has had a considerable contributory fault finding made against her, the Claimant has nevertheless had to pursue her claim to trial in order to secure a finding that she was unfairly dismissed together with the awards as set out above.

88. Accordingly, I make a fee award in full. That makes the total amount payable to the Claimant £3,507.07.

89. I acceded to the Respondent's request to be given 28 days to pay.

_____

Employment Judge Vernon

Date 15 May 2017

JUDGMENT SENT TO THE PARTIES ON
20 May 2017

.....

S. Cresswell

.....

FOR THE TRIBUNAL OFFICE