



EMPLOYMENT TRIBUNALS

Claimant: Mrs. R China

Respondent: The Highfield Medical Centre

Heard at: Leeds

On: 2-3 October 2018
13 November 2018

Deliberations

Before: Employment Judge Rogerson

Representation

Claimant: Mr. A Sugarman (counsel)

Respondent: Mrs. L Amartey (counsel)

RESERVED JUDGMENT

1. The complaints of wrongful dismissal and unfair dismissal fail and are dismissed.

REASONS

1. The claimant brought complaints of wrongful dismissal and unfair dismissal following her dismissal on 28 December 2018, without notice or pay in lieu of notice. The 'reason' for dismissal the respondent relies upon is the claimant's alleged misconduct in misusing her smartcard, by allowing someone else to use it, which was treated as gross misconduct entitling the respondent to dismiss summarily. The claimant accepts the reason is a potentially fair reason for dismissal but contends that the respondent acted unreasonably in dismissing her and that she was entitled to notice pay.
2. I heard evidence on behalf of the respondent from Mr. Methven Forbes (partner and dismissing officer) and from Dr. Mark Fuller (partner and appeals officer) and for the claimant, from the claimant.
3. I was also shown documents from an agreed bundle of documents. From the evidence I saw and heard I made the following findings of fact:

Findings of Fact.

4. The claimant was employed by the respondent as a practice manager from 1 July 1989 until her summary dismissal on 28th of December 2017. Prior to her dismissal she had 28 years of service and an unblemished record of service.
5. The respondent is a GP practice situated in Bramley, Leeds. Until 21 November 2017, the practice was owned by Dr. H Singh and Dr. Kripal (a husband and wife partnership). After 21st November 2017, ownership of the practice transferred to the current partners Dr. Fuller and Mr. Forbes.
6. The claimant's contract of employment entitles the respondent to terminate her contract of employment without notice in cases of gross misconduct but does not identify the type of conduct that will be treated as 'gross' misconduct.
7. The Leeds Clinical Commissioning Group (CCG) is responsible for commissioning primary care services including GP services which are then regulated and inspected by the Care Quality Commission (CQC).
8. On 31 August 2017, the practice failed an inspection by the CQC and was placed under 'special measures'. The claimant as practice manager had direct knowledge of this failure and the surrounding circumstances. She describes how the practice was in a 'mess' and at serious risk of closure. She says if the practice had not transferred to the new owners in November 2017 it would have closed.
9. After that inspection the claimant knew it was only a matter of time before the practice was going to be inspected again when it would be required to demonstrate how it was meeting the required standards following the failed inspection. It was under closer scrutiny because of the failure.
10. As the practice manager, the claimant managed the practice in conjunction with Dr. H Singh and Dr. Kripal. She was responsible for ensuring that she put in place all the relevant policies and procedures for the effective running of the practice and much of the policy documentation in the bundle originates from the claimant.
11. The claimant's job description identifies specific responsibility for 'personnel and training' which includes '*ensuring the practices employment policies and procedures are comprehensive and up to date*' and for 'information technology' requiring the claimant to '*ensure compliance with Data Protection legislation*'.
12. After the failed inspection in August 2017, the CCG had provided the practice, with the services of a pharmacist PP, to assist with one area of concern identified which was the need to have good procedures in place for the use of 'Amber' drugs (drugs that carry for various reasons a higher risk to patients). PP was visiting the practice once every two weeks to help the practice achieve the required standards.
13. The claimant knew that the actions identified in the CQC report were time critical. If the practice did not show sufficient improvement at the next inspection there was a risk that the practice could be closed and "*it was vitally important that the required actions were progressed*". She was

concerned about the lack of progress and raised her concerns with Dr. Kripal who arranged for a locum pharmacist 'BS', a Senior Clinician Pharmacist to attend the practice weekly to carry out the medication reviews required following the CQC report.

14. The Practice uses a system "SystemOne" which is commonly used across NHS England by all GPs and other health care providers to access and hold electronic patient records. To use this system an individual has to apply for a 'smartcard' which is issued personally with their photo ID on the card. Each time the card is issued the user agrees to the terms and conditions of use. Detailed rules govern the use of the smart card which the claimant was familiar with and understood. She has identified the applicable rules at pages 128 133-134 of the bundle (see paragraph 35 of her witness statement).
15. Additionally, the claimant was an 'approved smartcard ID checker and sponsor' with delegated responsibility for assigning users the correct profiles on the smartcard so that they could get access to the right level of information for the role performed. For example, a receptionist performing a non-clinical role might be required to make appointments for a patient and would have less access rights to a patient's electronic records than a pharmacist performing a clinical role who might need to access the patient records to review/amend/issue prescriptions for that patient.
16. The claimant was also familiar with the smart card registration authority policy. She acknowledges that smart cards are 'personal' to the user and must not be shared. The rules on usage provide that:

"never share your smartcard. All transactions made when your smartcard is in use are recorded for audit purposes. Access is audited and you will be held accountable for any inappropriate transactions made using your smartcard whether you are responsible for them or not"

"if your card is used by someone else you have to inform the registration authority and change your pass code immediately".

Security and Confidentiality

"your smartcard provides you with the appropriate level of access to the healthcare information that you need in order to carry out your role. Your smartcard is a token of your identity and any access to patient data using the card will be auditable to you. You should treat your smartcard as you would a credit or debit card and never share your pass code. Never allow anyone else to use your smartcard and never leave your smartcard in a smartcard reader when you are not actively using it" (highlighted text my emphasis).

17. Every time the smartcard is placed into the smartcard reader the user is required to login to the system using their unique password and is required to confirm acceptance of the terms and conditions of use. In fact, on each occasion the computer reminds the user of the responsibilities and obligations for use which includes not sharing the card. A message appears on each occasion warning of the need to comply with the terms and conditions and states that "action may be taken against an individual attempting inappropriate activity".

18. Additionally, and importantly, the claimant accepted that as the sponsor and practice manager she completed the 'RAO1' form on behalf of the practice confirming that she was ensuring proper usage of the smart card in the practice as part of her 'information governance' role.
19. The terms and conditions make it clear that the user agrees to "keep their smartcard private and secure and that they will not permit anybody else to use it". The user also acknowledges that if they breach that agreement "this may be brought to the attention of the employer who may take appropriate action including disciplinary proceedings and/or criminal prosecution".
20. The claimant had also completed the respondent's information governance toolkit for 2016, as part of an annual compliance requirement. The tool kit was something the claimant had asked the practice to purchase because she understood the importance of information governance and data protection compliance for the practice and to her role. With-in those documents she was asserting (on the respondent's behalf) that the practice had monitoring and enforcement processes in place ensuring that use of the smartcard complied with the national terms and conditions of usage.
21. That document identifies that breaches of the smartcard terms and conditions should be linked to disciplinary measures and that it was/is essential that everyone using the smartcard is aware of and complies with the terms of usage. It also requires the practice to ensure that any failure to comply with those requirements was treated as a "serious disciplinary matter".
22. All the evidence confirms that the claimant was aware of and understood how the smart card should be used and that she had specific responsibility to ensure compliance with data management rules and principles, which were necessarily more onerous in a GP practice because of the sensitive data held in patient records.
23. That background is relevant to the events that led to the claimant's dismissal on 18 September 2017.
24. The claimant describes how on that day she was very busy dealing with patient complaints managing the front desk and responding to several requests made by Dr. Kripal. In the morning BS had told the claimant that she was not able to use a particular reporting suite within the system one software. BS had previously emailed the claimant to ensure the correct access rights were in place for her to carry out that task but that access had not been sorted out before the 18 September 2017.
25. As an existing smartcard holder and pharmacist BS, was authorised to access patient records. As a clinician she had the correct level of access rights so that she could fulfil the task she was asked to carry out by the practice. She had the rights to access patient records to review medications and make amendments to those records, once she was satisfied they needed changing. She could then update the records and update the system.
26. The claimant understood that BS was able to cancel old repeat prescriptions requests by going into each patient record one by one to delete them.

However, this was time-consuming and BS wanted to be able to delete prescriptions that were over a year old by running a report into the system which was available for her to use but could not be set up properly on the user profile she was using at the practice.

27. BS came to the claimant's room. The claimant's smartcard was already in her computer so the system recognised the claimant as the user not BS. BS sat down at the claimant's computer and accessed the system to start the bulk report deletion. The claimant sat next to BS who proceeded to use the claimant's computer telling the claimant what she was doing. The claimant describes them both performing "the task together".
28. By mistake BS had put in the date of deletion of 'from 18 September 2017' instead of '18 September 2016'. Although the claimant realised this mistake at the time, BS had already pressed 'enter' deleting 400 repeat medication patient records affecting 75 patients.
29. It is clear from the claimant account (paragraphs 46 to 49) that she accepts a mistake was made which she describes as 'a clinical incident' which had to be reported immediately in a 'clinical incident report' because one of the consequences was that patients might not receive the medication they needed until the records that had been deleted were corrected. She accepted at the time that the issue was 'very serious'.
30. As a result of that report, CCG visited the practice on 7 November 2017 to meet with the claimant. The claimant told them about the incident and gave her account of events. Following that meeting a report was produced by the CCG dated 21 November 2017 which is at pages 268 to 269 the bundle and is not disputed (see paragraph 63 of her witness statement).
31. Although the claimant accepts the background to and the authenticity of that report, Mr. Sugarman has questioned the respondent's motive for using that report in the course of the disciplinary process that led to the claimant's dismissal.
32. I accepted that the CCG report was produced because it was a 'clinical incident' and because of the serious consequences it had on patient care. That then resulted in an investigation by CCG and a report dated 21 November 2017, which was then shared with the new owners of the practice, as it should have been, given the seriousness of the incident. This was also a practice in special measures which the new owners also had to address. The CCG requested that they investigate the matter.
33. Dr. Forbes and Mr. Fuller acted in good faith when they received that report by acting upon it. The fact that the previous owners had not done so does not mean it was unreasonable or improper for the new owners to take the steps they were required to take by investigating what had happened on that day.
34. The CCG report records that:

*"the practice manager stated that **rather than sort out a new smartcard for this task it would be easier to let the pharmacist use***

her smartcard and password that had extensive access to the systems reporting function”.

*“in this incident it was explained that the process for issuing smartcards was **bypassed by practice manager, who had direct responsibility for managing this process on behalf of the practice.** The warnings on the system were intentionally overridden by the pharmacist”*

35. The CCG report identifies that a breach of principle 7 of the Data Protection Act had occurred as a result of this incident. The report recommends further investigation by the practice and identifies the effect on patients that *“as far as we know 75 patients have been affected by this incident, repeated prescriptions were cancelled **due to a failure to adhere to adequate security measures put in place to protect patients**”.*
36. The claimant says that the previous owners did not hold her accountable so that should have been the end of the matter as far as the new owners were concerned but that is not right. The new owners once made aware of the position were entitled to and obliged to investigate the matter further irrespective of the action/inaction of the previous owners.
37. Furthermore, although a letter dated October 2017, which was signed by the previous owners was produced at the end of the claimant’s disciplinary hearing in December 2017 that letter makes no reference to this specific incident and does not say the claimant was not accountable. The message the previous owners gave when the business transferred in December 2017 was clear they did not want to get involved in any way in the disciplinary process.

Investigation and Suspension

38. On 22 November 2017, the claimant was suspended pending a disciplinary investigation. The letter of suspension is at page 252 in the bundle. At this stage in the process the respondent had been unable to locate any written disciplinary policies or procedures. Although it was the claimant’s responsibility as practice manager to produce these policies she could not provide them or locate them for the respondent when the business transferred.
39. In those circumstances Mr. Forbes and Dr. Fuller sought legal advice about how they should proceed. With that advice they sent the letter of suspension. The letter makes it clear that the suspension did not constitute disciplinary action or make any assumption of guilt. The claimant would be paid in the normal way during the period of suspension and the suspension would be kept under review to make sure it was not longer than necessary. If the claimant had any questions about the suspension she was informed that she could contact Dr. Fuller. There was no evidence to support the claimant’s assertion that she was suspended to save money. She was fully paid while suspended and there was no evidence that the process followed was a ‘sham’.
40. The letter sets out the allegations which primarily relate to the 18th September 2017 incident and the breach of the data protection principle 7. The letter confirms these allegations had come to light when Dr. Fuller saw

the CCG investigation report. The 3 allegations arising from that incident and the report received were that the claimant:

- a. shared her smart card with the pharmacist. By doing so had bypassed the process that must be adhered to when issuing smartcard administration rights.
- b. No written contract or agreement was in place.
- c. There is no evidence of instruction from the practice to the pharmacist that detailed what activity had been requested. The pharmacist had not received any of the IG policies or training prior to accessing patient records.

41. Other allegations which were also identified from the CCG report regarding failures in relation to information governance policies, staff training and storage of payroll details were included in the letter but these were not relied upon or found proven at the disciplinary hearing. No findings of fact are made in relation to those matters which were not relevant to the dismissal decision.
42. The allegations relied upon were potentially very serious allegations which the claimant accepted was the case at the time of the incident and during the CCG visit on 7 November 2017. There was a real risk the practice could be closed. That was why she suggested that Dr. Kripal and Dr. Singh try and find someone to take over the practice which is how the respondent came to take over the business on the 21 November 2017.
43. It is in these circumstances that I found the letter written by Dr. Singh dated 2 October 2017, which the claimant produced at the end of the disciplinary hearing, quite odd.
44. In that letter Dr. Singh confirms the issues in the practice were the responsibility of the partners not the claimant and refers to the 28 years of unblemished dedicated service the claimant had provided. He also expresses his wish for that relationship to continue in the future giving the impression of a continuing practice. The letter was not provided to the respondent when they took over the business and Dr. Singh and Dr. Kripal told Dr. Fuller that they wanted no involvement in the business or in the claimant's disciplinary. The only concern they expressed was about their son who worked in the practice and whether he would continue to be employed after the transfer.
45. Dr. Fuller did seek further information from them about the letter without success. They have not provided any witness evidence for the claimant in support of these proceedings which include a wrongful dismissal complaint.
46. Their only other involvement in this matter after the transfer of the business was to provide to Dr. Fuller a proposed resignation letter on behalf of the claimant which I will come to later in the findings.
47. As there were only 2 partners in the practice it was agreed that Mr. Forbes would deal with the disciplinary hearing and Dr. Fuller the Appeal. The claimant was invited to a disciplinary hearing by letter dated 12 December 2017. The letter provides the claimant with all the evidence that had been gathered in the investigation which included the CCG report, the Claimant's statement and BS's statement of the events of 18 September 2017.

48. The invitation letter warns the claimant that the allegations if proven could result in her summary dismissal for gross misconduct with no right to any pay in lieu of notice. It informs the claimant of her right to be accompanied and she arranged for her union representative to attend.
49. In response to the disciplinary allegations and the evidence provided the claimant provided a detailed written response. Notably she did not challenge the CCG report or assert that the report did not accurately reflect what she had told the CCG when she was interviewed by them on 7 November 2017.
50. In her written response she states: "*BS came to the surgery on 18/9/2017 due to BS not having access rights for the repeat medication templates the **only way forward** was to carry out this task with me being present so that the work carried out by BS was carefully observed by myself, although I have not been given training for specific reporting*".
51. It was clear from the answers the claimant gave at this hearing that letting BS use the claimant's smartcard was not the only way forward there were other alternatives. It was also clear that the task of reviewing patient medical records to review the medications on repeat prescription and deleting any record was a clinical task that only the pharmacist was qualified to do. The claimant as practice manager could not/did not have any input into that task whatsoever, which is why she could do/did do nothing but watch the pharmacist perform this task using her smart card.
52. Despite clear evidence to that effect at this hearing the claimant has continued (in submissions) to maintain the case that she carried out this task 'together' with the pharmacist. Although she agrees BS did not change the date which caused the error that deleted the wrong patient records. She does not accept what she did was wrong or that by allowing BS to use her smartcard she was 'sharing' her smartcard in breach of the smart card rules.
53. At the time, however the claimant did offer her resignation (page 303) by a letter handed to Dr. Fuller by Dr. Singh on her behalf. Notably the claimant makes no reference to this letter in her evidence to offer any explanation for it. In the letter she offers her resignation on 31.12.17 if the allegations are withdrawn and if she is provided a good reference from Dr. Fuller and her record makes no reference to disciplinaries, warnings or suspensions.
54. By an email to the claimant dated 19 December 2017 Dr. Fuller acknowledges the letter but confirms that he cannot withdraw the allegations until the disciplinary process is complete. He does agree to a termination date of 31.12.2017 and agrees to provide a standard factual reference in response to any request. The claimant did not respond to that email and instead continued with the disciplinary process.
55. Before the disciplinary hearing the claimant requested some documents and further information, and she was provided with all the information that could be located and the facility to attend the practice to locate information herself.

Disciplinary Hearing

56. On the 28 December 2017, the disciplinary hearing took place with Mr. Forbes, the claimant and her union representative. The hearing had been postponed to this date at the claimant's request and unfortunately on this postponed date no minute taker was available so the hearing was recorded. A transcript of that hearing was produced which the claimant could have challenged but did not challenge and is an accurate record of the meeting.
57. The claimant read out her written response. Mr. Forbes confirmed the main issue of concern was the 18/9/2017 incident. He asked the claimant to clarify what she meant when she said that she and the pharmacist were doing the task together. The claimant's recorded response was "*we wasn't sharing it (smart card) we was doing it together*".
58. She accepted she was not trained or capable of performing this 'clinical task' which the pharmacist was required to perform. Mr. Forbes explored the claimant's answer further and the claimant explained that "*it was BS who was typing inputting into system*". The notes show that the claimant was given the opportunity to put her case and that Mr. Forbes thoroughly explored areas where the claimant's account needed further clarification.
59. At the end of the disciplinary hearing the claimant handed Mr. Forbes the October 2017 letter from Dr. Singh. Her union representative asked the claimant to explain the background to the letter. The claimant's reply is "*Dr. Singh is clearly stating that it is the GP communication problems that has led to the practice being so dysfunctional it is not my fault at all*".
60. As previously recorded the letter was quite odd in that it makes no reference to the incident under investigation and the claimant did not suggest it did at the hearing. In cross examination Mr. Forbes explained his view was that the letter did not absolve the claimant from responsibility for using her smart card inappropriately.
61. On the same day, the claimant was sent an outcome letter confirming her dismissal. The letter states:
- "the reason for dismissal is that on 18 September you allowed unauthorised access your smartcard. This led to a breach of the Data Protection Act 1998, Principle 7, which states appropriate technical and organisational measures shall be taken against unauthorised or unknown unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data. The incident also breached the registration and smartcard management procedure as applied by NHS England Principle 5 which involves card security. This states that each time a staff member uses their smartcard they are accepting an agreement to abide by the Terms and Conditions regarding the correct use of the card. In particular you agree not to permit anyone else to use your card. The incident that occurred on 18 September led to the deletion of over 400 repeat prescriptions thereby endangering patient care at the surgery"***
62. I accepted those were the reasons for dismissal. The letter also informed the claimant of her right of appeal and confirmed the dismissal was effective immediately. It does not refer to the claimant's 28 years of service and

previous unblemished record but I accepted Mr. Forbes evidence that he considered the claimant's record and length of service. He found that did not mitigate the conduct because the claimant was an experienced practice manager that should have known better than to permit someone else to use her card. He was aware of the fact the claimant was under pressure that day but did not feel that excused her actions in sharing her smart card. Her failure to show any insight into the misuse was a cause of concern for him because of the risk of repetition in the future. He assumed she knew what was and what was not permitted use of your personal smart card and had assumed knowledge because the claimant had never said that she did not know what she was expected to do. He also identified the simple alternative steps that the claimant could have taken that day of sorting out access for BS by enhancing her access rights which she could do as sponsor, or contacting the NHS helpline for assistance. He found the claimant chose to bypass those alternatives and to share her smart card instead.

63. In cross examination it was put to Mr. Forbes that the claimant was clearly informing him that she did not regard or perceive what she had done as 'sharing' her smartcard. His response was that the rules were clear the claimant's smart should not have been used by the pharmacist or anyone else. It was within the claimant's gift to allow BS to use her smartcard and she knew or ought to have known that it was wrong. There was no basis or rationale that would make allowing someone else to use your smartcard acceptable.
64. This black and white interpretation of the use of the smart card was also confirmed by the claimant during her cross examination. She accepted there are no exceptions to the rule you cannot share your card 'in anyway shape or form'. That is what the terms and conditions of usage state but she maintains that she did not share her card because she was working together with BS. A position that is unsupported by my findings of fact.

Appeal

65. By letter dated 7 February 2018, the claimant appealed. She was invited to an appeal hearing which was conducted by Dr. Fuller on 20 February 2018. That hearing was recorded and the transcript was an accurate record of that meeting. The claimant admitted that BS had used her smartcard to run the report that accidentally deleted the records. She said that it was common practice for people to use other people's smart cards and the GP's were aware this.
66. When Dr. Fuller explored this explanation with the claimant in the context of what had happened on the 18 September 2017. The claimant said that she had 'supervised' the use of her smartcard because she did not give BS her card 'unsupervised at any time'.
67. At this hearing I explored the claimant understanding of 'supervision' in the context of the clinical task performed by pharmacist which the claimant accepted was a task she was not qualified or trained to do. It was possible to see how the claimant might supervise a receptionist in an administrative task but not easy to see how a pharmacist performing a clinical role could be supervised by the claimant. The claimant accepted that in the context of the incident on 18 September 2017 she was not supervising the Pharmacist

and she had no input into the task carried out. She was letting BS use her card to carry out a clinical task.

68. On 27 February 2018, Dr. Fuller sent the claimant the outcome of the appeal hearing confirming the dismissal decision. He refers to the representations made. He was satisfied the claimant has been provided with information about the process and all the evidence. He was satisfied that proper consideration of matters had been given at the disciplinary hearing. He concludes that:

“by allowing someone else to access patient data using your own smart card is in breach of the procedure applied by NHS England which states you agree not to permit anyone else to use your card. You should have been aware of this and the seriousness of breaching this rule,... I do not feel that this is mitigated by you attributing errors to the practice pharmacist.

We were notified of this incident prior to assuming control of Highfield Medical Center by Leeds West CCG who had already conducted their own investigation into the matter.

*I consider the fact that you had a clean disciplinary record and whether a lesser sanction would be appropriate. However, **I felt that the offence committed was so serious that summary dismissal was the appropriate sanction.** Please be assured that our decision was based on your conduct alone and was unrelated to any recent changes in the running of the practice.”*

The Applicable Law.

69. The applicable law is set out in sections 98(1) (2) and 98(4) of the Employment Rights Act 1996. Section 98(1) and (2) provides that “it is for the employer to show the reason for the dismissal and that it is a potentially fair reason”. A reason ‘relating to the conduct of the employee’ is a potentially fair reason (98(2)(c)).
70. The reason for dismissal is a set of facts known to the employer or beliefs held by him which cause him to dismiss the employee Abernethy-v- Mott, Hay and Anderson 1974 IRLR 213 CA.
71. Both counsel have referred to the applicable case law in conduct related dismissals which is set out in British Home Stores Ltd -v- Burchell 1978 IRLR 379 EAT where the respondent must show a) it believed the employee guilty of misconduct b) it had reasonable grounds upon which to sustain that belief and on a neutral burden of proof that c) at the stage at which that belief was formed on those grounds it has carried out as much investigation into the matter as was reasonable in the circumstances.
72. Section 98(4) deals with the ‘reasonableness’ of the dismissal and provides that:
- “where the employer has fulfilled the requirements of subsection 1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-*

- a) *Depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking), and*
- b) *Shall be determined in accordance with equity and the substantial merits of the case.*

73. In Iceland Frozen Foods Ltd-v- Jones1982 IRLR 439 EAT guidance has been by the employment appeal tribunal as to the correct approach for an employment tribunal to adopt in answering the question posed by (the predecessor to) section 98(4) which is as follows:

- 1) *The starting point should always be the words of s98(4) themselves:*
- 2) *In applying the section an employment tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal considers the dismissal unfair.*
- 3) *In judging the reasonableness of the employer's conduct an employment tribunal must not substitute its decision as to what was the right course to adopt for that of the employer:*
- 4) *In many (though not all) cases there is a band of reasonable responses to the employees conduct within which one employer might reasonably take one view, another quite reasonably take another:*
- 5) *The function of the employment tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair"*

74. The band of reasonable responses test is also to be applied by the ET to the investigation carried out by the employer. It is the whole disciplinary process including the appeal that needs to be considered in deciding fairness. The question is whether the overall process is fair notwithstanding any deficiencies in the earlier stages (Taylor-v- OCS Group Ltd 2006 IRLR 613 CA).

75. Both counsel have referred to specific cases of unfair dismissal to support the submission that is made. I must decide the reasonableness of the claimant's dismissal based on the facts as found in this case. Decisions made in other cases based on other facts specific to those cases does not assist me with that task.

76. There is also a wrongful dismissal complaint so I will I have to determine whether I am satisfied on the balance of probabilities that the claimant's misconduct viewed objectively based on all the information available at this hearing was sufficiently serious (a repudiatory breach) to entitle the respondent to dismiss without notice pay.

Conclusions

77. Dealing firstly with the unfair dismissal complaint. It is for the employer to show the reason for dismissal. The reason for dismissal was clear and was the reason identified in Mr. Forbes dismissal letter and Dr. Fuller's

appeal outcome letter. It was the claimant's conduct on 18 September 2018 when she allowed someone else to use her smart card to access data which breached data protection and led to the deletion of 400 repeat prescriptions putting at risk the care of 72 patients. By allowing that access by BS the claimant had breached the procedures for smart card use which prohibit employees from permitting anyone else to use their smart card. The words used are 'Never Share. Never Permit anyone else to use your smartcard'. The claimant knew and understood the rules and the seriousness of breaching those rules. She deliberately bypassed those rules when she had alternative options which would have enabled BS to carry out the task without using the claimant's card.

78. I was satisfied (and it was not disputed) that the reason for dismissal was 'conduct related' and a potentially fair reason in accordance with 98(2)(b) ERA 1996.
79. The claimant's challenge was the reasonableness of the dismissal for that conduct related reason. In his closing submissions Mr. Sugarman attacks all 3 strands of the Burchell test and submits that there was no genuine belief in guilt based on a reasonable investigation and no reasonable grounds for dismissal.
80. Dealing firstly with whether Mr. Forbes at the dismissal stage and Dr. Fuller at the Appeal Stage had formed a genuine belief that the claimant was guilty of the misconduct? Here it was admitted misconduct that the claimant had permitted someone else (the pharmacist) to use her smart card which resulted in the accidental deletion of 400 patient records affecting 72 patients. I agreed with Mrs. Amartey's submission that the fact that the claimant does not agree with the belief formed by the respondent does not mean that belief was not a genuinely held belief. In fact the claimant's evidence was consistent with the respondent's belief that the rules were clear permitting someone else to use your card was unacceptable in 'any way shape or form'. I was satisfied that Mr. Forbes and Dr. Fuller genuinely believed the claimant was guilty of the misconduct.
81. Turning next to the reasonableness of that belief and the reasonableness of the investigation. I agree the level of investigation must be assessed in the light of the admission made by the claimant that she had permitted/shared her smartcard with BS on 18 September 2017. That account was corroborated by BS in the disciplinary investigation. The admission was confirmed to the CCG by the claimant on 7 November. The claimant admitted that she had bypassed the process for arranging smart card access because it was too onerous and it was quicker to let BS use her card. At the disciplinary and appeal hearings the claimant did not challenge the CCG report and the findings made. At the disciplinary she referred to 'doing it (the task) together' and that explanation was explored with her at the hearing with the mitigation she presented. At the Appeal hearing she refers to sharing the task in the context of supervision and that mitigation/explanation for the conduct was explored with her at the hearing.
82. Mr. Sugarman submits the investigation was wholly inadequate and outside the band of reasonable responses because he says that "*whilst*

a number of the core facts in relation to what happened on 18.9 are not in dispute, even if R was entitled to take the view C had breached the provisions relating to smartcards it was essential to properly investigate whether and to what extent C had knowingly misconducted herself and if so to assess why she had done so and how serious that was in the surrounding circumstances". He submits the respondent singularly failed to do this and adopted a stance that a breach of the smartcard policy was so serious it justified dismissal without more.

83. I do not agree this was a dismissal without more. Both Mr. Forbes and Mr. Fuller explored the claimant's admitted conduct on 18 September 2017 and her explanation for that conduct in the context of the surrounding circumstances. They disclosed the CCG report to the claimant and did not hide the fact that it was the report that had prompted their investigation. They obtained the accounts of the 2 individuals involved in that incident on 18 September 2017. They did not go further in questioning other individuals because they concluded that was not necessary. It was reasonable for them to reach that conclusion because of the admission made by the claimant to them and to the CCG. That did not prevent the claimant from putting her case to the respondent at the hearing. She clearly understood the allegations and the evidence relied upon and provided a detailed written report in response.
84. She also understood the seriousness of the alleged misconduct at the time of the disciplinary because she sought to resign with agreed terms. Why would the claimant seek such an agreement if the allegations were not very serious and she felt her conduct could easily be explained? The claimant's offer to resign undermined her argument that this case did not even meet the threshold of 'misconduct' let alone gross misconduct. Her failure to mention this resignation at all in her witness statement also served to undermine her credibility at this hearing.
85. I found the investigation conducted was reasonable the respondent did assume knowledge in circumstances that it was entitled to do so. The claimant as an experienced practice manager knew and understood the rules relating to smart card usage. During the disciplinary process, the claimant never said that she did not understand the rules for smart card usage. She also confirmed her knowledge and understanding of the rules at this hearing and agreed with the respondent that there was an absolute prohibition in sharing/permitting someone else to use your smartcard. This confirms that the assumption made by the respondent at the time of dismissal was reasonable and correct.
86. At the disciplinary and appeal hearings the claimant's explanation and mitigation were explored with her further to better understand her case and the surrounding circumstances. The respondent found that her explanation did not mitigate or excuse the misconduct that was found proven. She deliberately bypassed the rules when she had alternatives. The very serious effect of that admitted misconduct was the deletion (albeit accidentally) of 400 records affecting the repeat prescriptions of 72 patients which had to be corrected by another pharmacist before repeat prescriptions could be issued and breached the Data Protection Act and Principle 7 which applies to all care providers like the Respondent.

87. The rules make it clear that if your card is used by someone else you are held accountable for the consequences whether you are responsible for them or not. It is also clear that any breach should be linked to a disciplinary process and is to be treated as a serious matter. The smartcard is 'personal' to the user like a debit or credit card and must be kept secure because of the confidential nature of the data on the system that the card allows you access to. Usage will always be audited back to the card user traced back to the login using the password which is unique to that individual. Warnings are displayed as a reminder of the rules each time you log on to the system.
88. The respondent had reasonable grounds to conclude that the claimant was guilty of sufficiently serious (gross) misconduct in permitting someone else to use her smartcard. In relation to the sanction of dismissal Mr. Forbes confirmed that he had considered alternatives to dismissal but did not believe a lesser sanction was appropriate given the claimant's knowledge, her experience and her lack of insight or acknowledgment of wrongdoing. At this hearing the claimant has also demonstrated a lack of insight into her actions that day and maintains that she has not done anything wrong.
89. The claimant has a very long and unblemished record of service, which was considered but did not mitigate the misconduct or persuade the respondent that an alternative sanction should be imposed. The claimant was an experienced practice manager, with delegated responsibility for information governance and was expected to follow and police the system properly for herself and others. She was expected to lead by example. The practice was already in special measures for not meeting the required standards in record keeping for prescriptions and under close scrutiny awaiting a further inspection. There were other alternatives the claimant could have pursued which would have enabled BS to carry out the task she was required to do without using the claimant's smart card. The claimant's lack of insight into her own behavior and her reluctance to accept any wrongdoing did not help her to persuade the respondent that they should continue to have confidence in her as a practice manager, going forward.
90. In terms of the procedure the respondent followed I agree the outcome letter should have addressed this mitigation put forward expressly but I found that mitigation was considered before dismissal by Mr. Forbes. Mitigation was also considered at the appeal and was expressly dealt with by Dr. Fuller in his outcome letter. The whole disciplinary process including the appeal must be considered when deciding the fairness of the dismissal.
91. The size and resources of the employer are also relevant as well as equity and the substantial merits of the case. This was a GP practice with 2 new partners taking over a practice already in special measures at risk of closure and having to deal with a disciplinary investigation following receipt of a CQC report on the day of transfer. The process and procedure that was followed was reasonable. The process made clear the allegations to be considered provided the evidence gathered and gave the claimant full opportunity to put forward her case before a decision was made.

92. Although I have great sympathy for the claimant, who has been a long serving hardworking employee, it is regrettable that on that day she bypassed the system. She chose to permit someone else to use her smartcard to carry out a clinical task that the pharmacist was engaged to perform and was accountable for. The claimant did not do the task together with the pharmacist and she could not supervise the pharmacist. She had no input in a task that could only be performed by the pharmacist. The records that were deleted had to be rectified by another pharmacist. There were other alternatives to that course of action which would have protected the claimant from the consequences but she bypassed those alternatives because they were too onerous and time consuming. Her decisions on that day did have very serious consequences and given the nature and effect of that misconduct I was satisfied that whilst it was harsh it was fair and falls within the band of reasonable responses. In all the circumstances the dismissal was a fair sanction and the complaint of unfair dismissal fails.
93. For the same reasons as the respondent found which I have referred to above, I also found based on the evidence before me, that the claimant was guilty of a repudiatory breach of contract by her conduct which was sufficiently serious to entitle the respondent to dismiss without notice.

Employment Judge Rogerson
Date 26 November 2018