



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100215/2022

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Held in Glasgow on 23, 24 and 24 May 2022

Employment Judge L Doherty

10 **Ms Yvonne Welsh**

**Claimant
Represented by:
Ms Ismail -
Counsel**

15 **South Lanarkshire Council**

**Respondent
Represented by:
Mr Cox -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that;

- (1) the claim of unfair dismissal under Section 94 of the Employment Rights act 1996 (the ERA) is well founded;
- 25 (2) the claim of breach of contract is well founded;
- and a hearing to determine Remedy will now be fixed.

REASONS

The Claim

1. The claimant presented a claim of unfair dismissal and breach of contract on
30 14 January 2022. The respondents admit dismissing the claimant; their position is that she was dismissed for gross misconduct, and was fair. Further, they deny breach of contract; their position is that summary dismissal was justified.

2. The reason for dismissal is not accepted. The issues for the tribunal identified at the outset of the Hearing were whether misconduct was reason for dismissal; if so, whether that reason justified dismissal; and whether in summarily dismissing the claimant the respondents acted in breach of her contract.

The Hearing

3. An in-person hearing took place over three days. The claimant was represented by Ms Ismail, Council and respondents by Mr Cox, Solicitor.
4. At the outset of the hearing it became apparent that there were issues of specification of loss of earnings and pension loss, and that further the claimant was not in yet in receipt of medical evidence which had been requested to support her position as to her ongoing fitness for work, and it was agreed that this hearing would consider the question of merits only.
5. For the respondent evidence was given by Ms McCrea, the dismissing officer, and Ms Murray, the investigating officer. The claimant gave evidence on her own behalf. The parties lodged a joint bundle of documents.

Findings in Fact

The Respondents/ Policies

6. The respondents are a local authority with responsibility for the provision of social care for young people, alongside other matters.
7. The respondents have policies and procedures in place for the management of staff. These include a Social Work Recourses Code Of Conduct (The Resource Code) (page 143) and a Code of Conduct for Employees (the Code) (page152). Employees joining the respondent's workforce are given access to these documents, but they are not referred to in their contracts of employment.
8. The introduction to the Code provides that while a breach of the Code may result in disciplinary action, it is designed to provide guidance.

9. Under *personal conduct* the Code provides that an employee charged or convicted of a criminal offense must advise their Executive Director immediately.
10. Members of staff engaged by the respondents in employment which is regulated by the SSSC, are bound by the SSSC code of conduct.
11. In terms of the SSSC code of conduct, an employee who is charged with a criminal offence has an obligation to advise the SSSC that that has occurred. The respondents have an obligation to advise the SSSC of disciplinary investigations which are initiated in respect of regulated staff members, which includes when such a staff member is charged with a criminal offence.,
12. The respondents provide the SSSC with the information they ingather during a disciplinary process and of its outcome. The respondents are not bound by the SSSC procedure, nor are the SSSC bound by the outcome of the respondents' procedures.
13. The SSSC can issue a regulated member of staff working in childcare with a Temporary Suspension Order (TSO) which temporarily suspends the workers registration in the Register for Child Care workers. The purpose of this is to allow the SSSC to carry out an investigation into the workers fitness to practice.
14. An employee receiving notification of a proposed TSO, can refuse to accept it, in which case their refusal to accept it goes to an appeal.

The Claimant

15. The claimant, whose date of birth is 22 April 1964, was engaged by the respondents as a residential care worker in a Children's Unit from 17 January 2005. She worked night shift alongside one other member of staff.
16. The claimant was bound by the SSSC Code and required to maintain her registration with the SSSC.
17. In October 2015 the claimant was dismissed from the respondent's employment following allegations of inappropriate restraint. The claimant

5 appealed against that decision and her appeal was upheld. The decision to dismiss was overturned and a final warning of one year's duration, effective from 20 November 2015 was substituted (page 108). It was a condition of this disposal that a robust programme of supervision was put in place for the claimant.

18. The police were involved in the 2015 incident; however, the claimant was unaware of that at that at that time. Management, not the claimant, reported the matter to the SSSC in 2015.

10 19. Between 12 June 2020 and 13 August 2020, the claimant was absent from work with anxiety.

Events/Disciplinary Proceedings 2020/21

A - Investigation

20. On 2 November 2020 a service user made an allegation that the claimant had assaulted them.

15 21. The claimant was suspended on full pay in the 5th of November to enable an investigation to take place concerning the allegation that she had assaulted a service user.

20 22. In line with the respondent's procedures a Fact Finder, Caroline Murray, a personnel officer, was appointed, as was a 'Nominated Manager', Mr Davis, an Operations Manager. The investigation commenced on 5 November 2020 with Ms Murray and Mr Davis meeting to discuss the terms of reference for the investigation.

25 23. Ms Murray's task was to investigate and present the facts she had found. It was the task of the Nominated Manager to decide upon review of the information presented, what allegations or charges, if any, would proceed to disciplinary action and to recommend the disciplinary sanction. '

24. An average length of time for an investigation to be completed is 4 months, however this is contingent on a number of variables.

25. On 1 December 2020 the claimant was interviewed by the police and charged with assault. A report was submitted to the Procurator Fiscal. The claimant was extremely distressed about this, and these events had a very bad effect on her mental health. She did not think to contract the SSSC to advise them
5 of what had occurred. She had not done so in 2015 but was aware that management had contacted them then.
26. On 16 December 2020 the respondents contacted the SSSC to advise that the claimant had been charged by the police.
27. On 17 December the respondents wrote to the claimant to advise that her
10 suspension had been removed and she would be temporarily relocated to an alternative workplace, carrying out restricted duties with no service user contract.
28. The claimant was certified as unfit to work and did not take up this employment.
- 15 29. The SSSC notified the claimant of a TSO effective from 16 December 2021 until 16 February 2021. The claimant agreed to the TSO in order to allow the SSC to carry out an investigation, having sought advice on the matter from her TU representative. She thought that doing so would allow the SSSC to carry out their job of investigating the allegation.
- 20 30. Ms Murry carried out a lengthy investigation, which included interviewing a number of potential witness and interviewing the claimant, who was accompanied by her Trade Union representative, Mr Scott.
31. Ms Murray interviewed the claimant on 4 February 2021. During the course of that interview she asked the claimant why there was no record of the
25 incident on the Daily Recording sheet? The claimant answered that it was busy, and they were short staffed, and her perception of the incident was that it was nothing out of the ordinary. She was asked if it would not normally be recorded, and answered, yes, but her perception was that it was something out of nothing and was not significant enough to record (page 75)

32. Ms Murray asked the claimant if she had notified the SSSC of the investigation and police investigation and subsequent charge? The claimant responded no, but that the SSSC had been in touch with her subsequently. She was asked if she was aware of the need to notify the SSSC and responded no, she thought management did that.
33. On the 1 of April Ms Murray emailed the claimant asking if she was aware of the respondents Social Work Resources Code and Code of Conduct and if she had received copies of these. She also asked if the claimant was familiar with Section 2., 3 and 5.2 of the Code of Conduct and Section A1, A3 A6 A11 C2 C3 and D1 of the Social Work Resource Code, the text of which was contained in the email. The claimant was asked if she thought she had breached the codes in respect of the allegations against her (page 78).
34. The claimant responded by email the same day stating she did not think she had breached the codes (page 79).
35. Upon completion of her investigation Ms Murray met with Mr Davis who decided to frame disciplinary charges against the claimant as follows:
- "Assaulted a service user on 2 of November 2020.*
- Charged with assaulting a service user.*
- Failed to declare the charge of assault to the Scottish Social Services Council (SSSC)."*
36. These charges were included in the report completed by Ms Murray 1 April 2021.
37. The claimant was asked to attend a disciplinary hearing on 17 June in a letter dated 26 May 2021 . The letter advised that the reasons for the hearing were:
- "1. On 2 December 2020 charged with assaulting a service user 2 November 2020.
2. You inappropriately restrained a young person (PM) when positioned on the floor of 2 November 2020.

3. *You failed to notify the SSSC that you have been charged with a criminal offence.*
 4. *You've you have been issued with Temporary Suspension Order from SSSC which is resulted in you not being able to fulfil your duties from*
5 *17 February 2021.*
 5. *Your actions are in breach of South Lanarkshire Councils Code of Conduct, section 18, three and five.*
 6. *Your actions are in breach of Social Work, Resources Code of conduct, sections A1, A3. A6.C11, C2 C3 D 1”*
- 10 38. The claimant was advised that the potential sanction was dismissal. She was provided with a copy of the investigation report and Appendices prior to the disciplinary hearing, and she was accompanied at the hearing by Mr Scott .
39. The disciplinary hearing was conducted by Ms McCrea. Ms Murray presented the management case and the claimant and Mr Scott were given an
15 opportunity to respond. Ms McCrea also asked questions.
40. In the course of the disciplinary hearing Mr Scott raised as an issue that the claimant has not received robust supervision following the 2015 incident. Ms McCrea decided to continue the disciplinary hearing to allow for the enquiry into this to be carried out. Ms Murray carried out further investigation and
20 produced a further report dealing with this, which was considered that reconvened disciplinary hearing which took place in August.
41. In the course of the disciplinary hearing Mr Scott stated that with regard to notifying the SSSC , the claimant was not aware she had to do this, as on the last occasion the organisation had informed the SSSC of the allegations and
25 it was taken out of her control.
42. An outcome meeting was held on 23 August at which Ms McCrea delivered her decision, which is noted as part of the minute of the disciplinary hearing notes.

43. Of the 6 grounds in the disciplinary letter invite, Ms McCrea did not find grounds 1 and 2 to be upheld. She upheld grounds 3,4,5 and 6. Her minutes records her decision and reasoning on these grounds as follows:

Disposal ground 3 and 4

5 *In terms of ground 3 and 4 have been found given that you failed to notify the SSSC of the charges and that because of the charges you have received a temporary suspension. This suspension has had an impact on your ability to carry out your duties as a Residential Social Care Worker I will continue to do so until February 2022.*

10 ***Disposal grounds 5 and 6***

Your actions in relation to the allegations constitute a breach of South Lanarkshire Council's Code of Conduct as follows:

- 15 • *Section 2 Code of Good Governance, states you should observe the code of conduct by behaving with integrity, demonstrating strong commitment to ethical values, and respecting the rule of law.*
- *Section 3 Personal Conduct, states employees should be aware that the way they behave reflects the image of the Council and under the Code of Good Governance employees are expected to take responsibility for the decisions that they may take as part of their*
- 20 *employment.*

Your actions in relation to the allegations are in breach of Social Work Resources Code of Conduct, Sections A1, A3, A6, C2 and D1.

25 *Section A1 Interests of Service Users states the interests of service users should be paramount and above personal considerations of employees or agencies.*

- *Section A3 Honesty, states openness and honesty should characterise all interactions between Social Work Resources and employees and service users. Section A6 Competence states Social Work employees are competent to perform the tasks required of them.*

- *Section C2 Taking professional responsibility, states employees work within the policies, procedures, protocols and guidelines of their employing agency while discharging their professional responsibility towards delivering and developing service which work in the interest of the service user.*
- *Section D Personal standards, states employees uphold their professional integrity both within and out with the workplace and promote a positive public image of council employees.*

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Therefore, in coming to my decision I have taken into account everything that was presented by you and your Trade Union and although I have not found on allegation 2 I cannot ignore the fact that you have been charged with assaulting a young person and as a result you have received a temporary suspension of your SSSC registration. This suspension prevents you from carrying out your contractual obligations of your employment until at least February 2022 and at which point there is no guarantee that your registration will be reinstated. This prevents the organization being able to provide you with alternative duties indefinitely.

20 .

By being charged with assaulting a young person and not notifying the SSSC breaches Social Work Resources Code of Conduct Section A1 Interests of Service Users, Section A3 Honesty, Section A6 Competence,. Section C2 Taking professional responsibility and Section D, Personal Standards upholding professional integrity.

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In addition, I cannot ignore the reputational damage of South Lanarkshire Council that a charge of this nature could incur.

Your actions have also breached South Lanarkshire's Council's Code of Conduct section 2 Code of Good Governance and Section 3 Employee Conduct.

Your position as a Residential Worker has a unique position of trust within the Council and towards the highly vulnerable young people that you are charged

with caring for and by breaching the above Codes of Conduct that trust has been breached.

Therefore, I have found the above allegations to amount to gross misconduct and therefore you will be dismissed from your post effectively immediately.

5 *You have the right to appeal this decision. This appeal should be submitted to Corporate Appeals Panel, Personnel Services. Appeals should be submitted in writing via a trade union representative within 14 days of receipt of the outcome letter if you believe the disposal to be unfair in the circumstances. You should detail the full grounds for your appeal completing*
10 *form PER-DCP-2-09.”*

44. In reaching the conclusion that the claimant was guilty of gross misconduct, Ms McCrea considered grounds 3 to 6 cumulatively. She did not consider one ground to be more important than another and she considered they all had equal weight. Ms McCrea considered all the grounds together were the
15 reason for dismissal. Ms McCrea considered that the gravity and seriousness of the allegation (that a child had been assaulted) meant that it was reasonable to regard the grounds cumulatively as amounting to gross misconduct. In considering her disposal, she does not consider imposing any sanction other than dismissal.

20 45. In reaching her conclusion Ms McCrea took into account that ground 2 was not found as the evidence was mostly circumstantial. She considered however that it was reasonable in reaching her conclusion to take into account that something significant did occur. She considered that the fact (of something occurring) was not proven, but it was reasonable to conclude that
25 something significant happened. She had regard to the fact that the incident had not been recorded in the Daily Recording sheets.

46. Ms McCrea was aware of the claimant's length of service (16 years) and she was aware of the effect that the allegation had had on the claimant.

47. The claimant did not exercise her right of appeal against the decision. She did not do so as she had lost trust and confidence in the respondents and she felt she was a 'broken person' as a result of what had happened to her.

5 48. On 1 December 2021 the SSSC revoked the TSO. They concluded that the claimant's fitness to practice was not impaired.

49. On 28 January 2022 the claimant received confirmation that the criminal charge administered by the police would not proceed further.

Note on Evidence

10 50. There was not a great deal of conflict in the evidence which the tribunal had to resolve in this case. No issue was taken about the fairness of the procedure, and there were no credibility issues around steps taken by Ms Murray in carrying out the investigation. Nor were there credibility issues in relation to the procedural aspects of the disciplinary proceedings.

15 51. The tribunal formed the impression that in the main all the witnesses were credible and reliable, and it did not form the impression that any witness sought to deliberately mislead the Tribunal.

20 52. There was however one point in relation to Ms McCrea's evidence which the Tribunal considered did raise an issue of credibility or reliability. That was in relation to her evidence as to what disposals she considered. Her evidence in chief was that she did not consider any sanction other than dismissal. In cross examination she departed from this, suggesting she has had considered other sanctions. Ms McCrea accepted that the exercise she conducted in doing this was not reflected in the disciplinary minute but said the respondents had a significant level of templates available to them, and she took these into
25 account.

30 53. On balance, while it did not conclude that Ms McCrea was deliberately trying to mislead, the Tribunal was not satisfied that she had considered any sanction other than dismissal for what she deemed gross misconduct on the part of the claimant. In reaching this conclusion the Tribunal takes into account Ms McCrea's unequivocal evidence in chief on this point, which was

inconsistent with her position cross examination. She said in cross examination that the respondents had a significant level of templates to help them, but she did not explain how she was assisted in deciding what which sanction to impose by these templates.

5 54. Mr Cox submitted that it was not necessary that all of the decision-makers thought processes were part of the minute of the disciplinary meeting, and the tribunal took account of that. The fact that the minute did not reflect that Ms McCrea had considered a sanction short of dismissal, but rejected it, was not of itself sufficient to lead to the conclusion that she had not done so. The fact
10 that the minute did not reflect any consideration of a disposal other than dismissal was however, an adminicle of evidence taken alongside the inconsistency and lack of explanation referred to above, which caused the tribunal to conclude on balance that she had not considered any sanctions other than dismissal.

15 55. The Tribunal found the claimant to be a credible and reliable witness. She gave her evidence in a straightforward manner and there were not material inconsistencies in it Mr Cox drew the Tribunal's attention to what he said was a difference in the reasons given by the claimant as to why she did not notify the SSSC that she had been charged by the Police. The tribunal did not
20 consider anything adverse to the claimant's credibility was to be drawn from the fact that when asked during the disciplinary hearing if she was aware she had to notify the SSSC, the claimant responded she was not she aware had to notify them because management had done it in the last occasion. This was a different point to her explaining in the course of the Tribunal Hearing
25 had not thought to notify them because she was in a state of distress and didn't think to do so.

Submissions

56. Both parties helpfully produced written submissions, which in the interests of brevity the Tribunal has not reproduced here. Where relevant the parties'
30 submissions are dealt with below.

Deliberation

Preliminary matter - application to amend

57. At the conclusion of the evidence and at the point of Submissions, Mr Cox made the following written submission:

5 *It is also worth noting that **section 98(1)(b)** also indicates that dismissal,..if*
not for 'gross misconduct'. ..can be for 'some other substantial reason'. If my
principal submission above relating to gross misconduct is not upheld, then
as an alternative, I would submit there was certainly 'some other substantial
reason' made out here. Even if there had been no misconduct (which is not
accepted) , the potential risk to the Respondents if they continued to employ
10 *a person charged with such an allegation If they then later convicted, posed*
a risk of reputational damage and harm to service users, given the
seriousness of the charge, making 'some other substantial reason' a fair
reason for dismissal.

58. Mr Cox confirmed that he was making a formal motion to amend the
15 respondent's case to include this alternative basis of defence. He confirmed
that the basis of his application was contained in his written submission.

59. This application was strongly opposed by Ms Ismail. She submitted that the
claimant was dismissed for gross misconduct and had been subjected to all
the consequences that flowed from that being the reason for dismissal.

20 60. The respondent's case had been pleaded from the outset on the basis of
gross misconduct. The respondents had had the benefit of legal
representation from at least when the ET3 was lodged. No other reason for
dismissal was identified and it was clearly said that the charges cumulatively
amounted to gross misconduct. Ms Ismail had provided the respondents with
25 a list of issues prior to the commencement of the hearing based on a gross
misconduct dismissal and she had discussed this with the respondent's
representative. No issue was taken by the respondents with that list. At the
commencement of the hearing, during the discussion of the issues, the
respondents did not identify any alternative defence.

61. It had been open to the respondents to seek to amend their pleadings at an earlier stage so that both parties could properly be aware of and understand the case they were required to meet. If the application were allowed the case will be decided potentially against the claimant on the ground did not know she had to meet.

62. Ms Ismail referred to the case of *Chandhock v Tirkey 2015 EAT IRLR 195* for authority for the proposition that the issues in the case should not be based on shifting sands and a party is entitled to know the case they are going to meet.

63. Ms Ismail submitted that even if the Tribunal was not satisfied on that the application should be rejected for these reasons, then the charges are said to be cumulative in nature, and the SOSR is not pleaded properly in law and on that basis.

Consideration of Application to Amend

64. In exercising its discretion to allow an amendment the Tribunal must have regard to all the relevant circumstances including the nature of the amendment, the timing of the application and any injustice or hardship which would result in the amendment being allowed or refusal to allow it.

65. The Tribunal considered if the amendment sought simply to change the label to facts already pleaded. It was not satisfied that it fell into that category and was only a change in nomenclature. The SOSR, which is advanced is reputational risk and potential future harm to service users if the claimant was convicted. There is a brief reference to the reputational risk a charge of this nature could incur in the reasons for dismissal, but nothing beyond that. Reputational risk or potential harm to a service user if the claimant was convicted, was not identified in the ET3 as a matter relied upon in dismissing the claimant or a factor which was taken into account in reaching the decision to dismiss.

66. The Tribunal also consider the timing and manner of the application. While it is open to parties to make an application to amend until the date of final

judgement, the application is made very late, coming after the evidence has concluded. The consequence of that is that the claimant was unaware of the case against her which the respondents now seek to make when evidence was being heard.

5 67. The Tribunal considered the balance of hardship to the parties in granting or
refusing the application. If the application is granted, then the effect of this is
that the claimant when giving her evidence and cross-examining the
respondents' witnesses was unaware of the case that she would now have to
meet in connection with the SOSR. It was not therefore open to her to give
10 evidence on matters which may be relevant, or to cross examine the
respondents witnesses on these matters. The SOSR which is advanced
would potentially open up lines of enquiry as to the fairness the dismissal, for
example the reasonableness of taking the decision to dismiss when charges
were outstanding, but the criminal proceedings had not concluded, which
15 were not pursued. That, it appears to the Tribunal, constituted significant
prejudice to the claimant

68. The respondents had the benefit of legal advice from the outset of this case;
they had an opportunity to consider their position at the point when the
claimant provided a list of issues, and at the outset of the hearing when the
20 issues were discussed. Any prejudice to the respondents is mitigated in that
it has been open to them to defend the claim, and they chose to do so on the
grounds that dismissal was for gross misconduct.

69. Balancing these factors together, the Tribunal was satisfied that the prejudice
to the claimant in allowing amendment was greater than that to the
25 respondents in refusing it, and accordingly the application is refused.

Unfair Dismissal

70. Section 98 of the ERA provides:

(1) *In determining for the purposes of this Part whether the dismissal of
an employee is fair or unfair, it is for the employer to show —*

(a) *the reason (or, if more than one, the principal reason) for the dismissal, and*

(b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(2) *A reason falls within this subsection if it*

(b) *relates to the conduct of the employee,*

.....

(4) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —*

(a) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

(b) *shall be determined in accordance with equity and the substantial merits of the case.*

71. The burden of proof rests on the employer the first instance to establish the reason for dismissal. Thereafter, in considering the reasonableness of the dismissal burden is neutral.

72. The Tribunal also took into account the guidance in the well-known case of *British Home Stores v Burchill* 1980 ICR 303, referred to by both parties and to the principles summarised in *Graham v Secretary of State for Works and Pensions* (2021) EWCA Civ 903 referred to by Ms Ismail, as follows:

“Once it is established that employer's reason for dismissing the employee was a “valid” reason within the statute, the ET has to consider three aspects of the employer's conduct. First, 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 and, thirdly, did the employer have reasonable grounds for that belief.

5 *If the answer to each of those questions is “yes”, the ET must then decide on the reasonableness of the response by the employer. In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET’s own subjective views, whether the employer has acted within a “band or range of reasonable*
 10 *responses” to the particular misconduct found of the particular employee. If the employer has so acted, then the employer’s decision to dismiss will be reasonable.*

The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to
 15 *adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which “a reasonable employer might have adopted”.*

An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process)
 20 *and not on whether in fact the employee has suffered an injustice.*

73. The tribunal began by considering whether the respondents had established the reason for dismissal.

74. The four charges which were upheld against the claimant are set out in the findings in fact. Ms McCrea was clear that she regarded these charges
 25 commutatively as amounting to the reason for dismissal and that each charge was as significant as the other-they all attracted equal weight. This position was echoed in Mr Cox’s submissions to the effect that:

“In relation to ... the question of whether gross misconduct had been established, given all the adminicles of evidence which were placed before
 30 *the Decision Maker, it is my submission that these, all taken together, were*

enough to amount to gross misconduct, involving as they did, a criminal charge ; a potential assault upon a young person where it was the Decision-Maker's view that 'something significant' had happened; and the breaches of the SSSC requirements(necessary for the Claimant's continued registration with SSSC and therefore an implied condition of her employment); and of the Codes of Conduct (again, potentially, an implied term of the Claimant's employment with the Respondents); in which regard, I would also observe that the heads of charge regarding the Code were inevitably and irrevocably linked with the other heads of charge; and that, as long as the Decision-Maker held a reasonable belief in these amounting in Cumulo to gross misconduct, then the Codes had similarly been breached."

75. Ms Ismail submitted that the respondents had failed to establish the reason for dismissal. She referred to *Tayeh v Barchester Healthcare Limited 2013 EWCA Civ 29* as authority for the proposition that if the charges were cumulative and they collectively formed the principal reason for dismissal, it would be fatal to the fairness of the dismissal if any significant charge had been taken into account without reasonable grounds.

76. Ms Ismail also referred to *Broecker v Metroline Travel Ltd UKEAT/01 24/1 6/DM*, paragraph 71 where the EAT that stated in relation to four instances of misconduct that were inextricably linked:

"On the basis of the EJ's findings, there was no material on which he could have based a conclusion that the Claimant was dismissed for four single, equally important, pieces of misconduct. The findings of the ET show that the Respondent's reason for dismissal included all four. The EJ having found that the Respondent did not act reasonably in treating two of those as a sufficient reason for dismissing the Claimant, the finding that the dismissal was not unfair cannot stand. "

IT. Ms Ismail submitted that Ms McCrea accepted that the claimant was dismissed on cumulative grounds and stated that none of the grounds were more important than others. She submitted if the Tribunal finds the respondent did not have reasonable, genuine belief in misconduct in regard

to one of the grounds, the cumulative grounds cannot amount to gross misconduct. In such case, the defence must fail in view of the fact the principal reason for dismissal has not been proved and so the requirements of s 98(1) ERA 1996 have not been satisfied.

- 5 78. Section 98(1) requires the respondents to establish the reason, or of more than one reason the principal reason for dismissal.
79. The burden on the respondents to establish the reason for dismissal is not a heavy one; the tribunal has to be satisfied they established they had genuine belief in the misconduct for which the claimant was dismissed. Whether that
10 belief was based on reasonable grounds, and the effect on the fairness of the dismissal if one or more of what are said to be 4 separate but equal charges is not based on reasonable grounds, is part of the Tribunal's consideration under Section 98(4) of the ERA
- 15 80. The Tribunal was satisfied Mr McCrea genuinely believed the claimant was guilty of matters which underpinned the 4 charges she found upheld, based on the fact that the claimant was charged by the police and did not report that to the SSSC, and was subjected to a TSO. The Tribunal was also satisfied that she genuinely believed that these matters related to the conduct of the claimant, which is a potentially fair reason for dismissal.
- 20 81. The Tribunal was satisfied that the respondents had established the reason for dismissal, and then went on to assess the reasonableness of the decision to dismiss under Section 98(4) of the ERA.
82. It was at that stage it considered whether the respondents had a belief formed on reasonable grounds in each of the separate charges of misconduct for
25 which the claimant was dismissed, and the sufficiency of the reason for dismissal, applying the reasoning in *Tayeh* and *Broecker*.
83. In connection with charge 3, there was no issue that the claimant had not reported being charged by the police to the SSSC. Leaving aside any issue reasonableness about treating this conduct as a reason for dismissal, there

were reasonable grounds for reaching a conclusion that the claimant had not reported the matter, and that this was a conduct matter,

84. In connection with ground 4 while there was no issue the claimant had received a TSO, applying the subjective test of the reasonable employer, there were no reasonable grounds upon which to conclude that the claimant's receipt of this amounted to conduct on her part. The imposition of the TSO was at the hands of an external third party, the SSSC and was a limitation on the claimant registration in order to allow them to carry out their own investigation into her fitness to practice. Objectively being subjected to a TSO could not amount to misconduct or even conduct on the part of the claimant.
85. The Tribunal had regard to Mr Cox's submission to the effect that Ms McCrea was entitled to have regard to the evidence which she heard at the disciplinary hearing, which included the failure to record the incident in the Daily Recording sheet, and on the basis of that and the other evidence before her to take into account that 'something significant' had happened in reaching her decision.
86. Applying the objective test of the reasonable employer, in reaching the decision to dismiss it was unreasonable to take into account an unspecified 'something significant' which the claimant had not been charged with and had no notice of. The claimant had not been charged with failure to record the matter in the Daily Recording sheet. Ms McCrea, not having upheld charges 1 and 2, has no reasonable grounds upon which to conclude that something significant had occurred which contributed to gross misconduct on the part of the claimant.
87. The Tribunal also notes that Mr Cox made submissions to the effect that it would have been open to the claimant to challenge the TSO, and to seek a full hearing at an early stage. He suggested that if the claimant wanted to clear her name, and perhaps lead to a shortening or alternative outcome to the ongoing disciplinary procedure, it would be an ideal opportunity to do so.
88. The Tribunal considered the submission to be something of a red herring. Firstly, it had no evidence to allow it to conclude that such a challenge to the

imposition of a TSO would result in an earlier hearing or investigation into the allegations. Secondly that the claimant's failure to challenge the TSO was not something which was considered in the course the disciplinary proceedings either at the investigation, or at the stage of making the decision to dismiss.

5 89. The Tribunal also considered charges 5 and 6. It appeared to be accepted by the respondents that charges 5 and 6, which with the alleged breaches of the Resource Code and the Code, were in effect duplications or the offences alleged in charges 3 and 4. It was accepted by Ms Murray and Ms McCrea, that charges 5 and 6 could not exist without charges 3 and 4. The matters
10 which underpinned charges 5 and 6 were the same as the matters in charges 3 and 4. Objectively while it was not unreasonable to refer the alleged offenses to the relevant codes, it was unreasonable to include these as separate charges which are said to have equal weight among 4 cumulative reasons for dismissal, where the effect of this was that that the claimant was
15 charged and penalised twice with the same offence.

90. The respondents have been clear that the charges are cumulative in nature, and that one does charge does not attach more weight than another. Applying the reasoning in *Tayeh* it is fatal to the fairness of the dismissal if any significant charge had been taken into account without reasonable grounds.
20 The respondents did not have reasonable grounds upon which to conclude that claimant's being subjected to a TSO amounted to misconduct on her part

91. The respondents did not have reasonable grounds to conclude that breaches of the Resource Code and the Code were separate and equal charges of misconduct, which resulted in the claimant facing two counts of equally
25 serious misconduct for the same offence.

92. Applying the objective standard of a reasonable employer the decision for the cumulative reasons relied upon by the respondents fell out with the band of reasonable responses open to the employer, rendering the dismissal unfair under section 98(4) of the ERA.

30 93. If the tribunal is wrong in this conclusion, and the dismissal is not rendered unfair as a result of the respondents reliance on charges 4 ,5 and 6, it also

considered whether dismissal fell within the band of reasonable responses for the misconduct found in charge 3, 5, and 6.

5 94. Ms McCrea gave evidence the effect that she was aware of the degree of distress caused to the claimant by the fact that she had been criminally charged. She was also aware that the matter was reported to the SSSC on 16 December, just over two weeks after the claimant was charged. She was aware of the claimant's length of service.

io 95. Applying the band of reasonable responses test, a reasonable employer, having regard to these factors would not have dismissed, and a decision to do so on the basis of this conduct would have fallen out with the band of reasonable responses open to the respondents.

Breach of Contract

15 96. The Tribunal also considered the claimants claim for breach of contract. In order to amount to a repudiatory breach of contract, the employee's conduct must disclose a deliberate intention to disregard the essential requirements of the contract.

97. The burden of proof rests with the respondent to show there was a repudiatory breach. It is not sufficient that the respondents demonstrate a reasonable belief in the conduct of the employee.

20 98. The degree of misconduct necessary to amount to a repudiatory breach is a question of fact for the Tribunal. That conduct must so undermine the trust and confidence inherent in the contract of employment that the employer can no longer be expected to be bound by it.

25 99. The Tribunal concluded that the claimant did not report being charged by the police to the SSSC as she was required to do in terms of the SSSC code. It was satisfied however that the reason for this conduct, was that the claimant did not think about reporting the matter to the SSSC it at the time as she was so distressed about what had happened, and she believed that management would report it, as her previous experience had been that management reported the police involvement to the SSSC.
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100. The respondents did report the matter to the SSSC just over two weeks after the claimant was charged.

101. The Tribunal did not conclude that the failure to report the matter to the SSSC, where she was in a state of distress, and believed that management would report it (even if that belief was mistaken) was conduct on the part of the claimant which was capable of so undermining the trust and confidence inherent in the contract of employment to the extent that the respondents can no longer be expected to be bound by it. The claimant's complaint of breach of contract therefore succeeds.

10 **Further Procedure**

102. A remedy hearing will now be fixed by way of Date Listing Stencil.

103. The claimant should provide the respondents with a schedule of loss specifying the basis of the wage loss and pension loss claims within 21 days.

104. The respondents have 21 days to respond to that, indicating what aspects, if any are agreed, what is not agreed, and why it is not agreed.

20 **Employment Judge: L Doherty**
Date of Judgment: 30 May 2022
Entered in register: 31 May 2022
and copied to parties

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