EMPLOYMENT TRIBUNALS

Claimant		Respondent
Miss T Patel	v	**Sheffield Teaching Hospitals NHS Trust**

PRELIMINARY HEARING

Heard at: **Sheffield** **On:** **9 – 12 March 2020**

In Chambers: **19 March 2020**

Before: **Employment Judge Wedderspoon**

Members: **Mr L Priestley**

Ms B R Hodgkinson

Appearance:

For the Claimant: **In Person**

For the Respondent: **Mr D Bayne, of Counsel**

JUDGMENT

The unanimous decision of the Employment Tribunal is that: -

1. The claim for automatic unfair dismissal pursuant to section 103 A of the Employment Rights Act 1996 is not well founded and is hereby dismissed.

2. The claim for unfair dismissal is well founded and is upheld.

3. The Claimant contributed to her dismissal and the contribution is assessed at 65%.

4. The Polkey argument is not well founded and is hereby dismissed.

5. There will be a remedy hearing to assess the Claimant's compensation on 7 July 2020 at 10 a.m. at Sheffield Employment Tribunal sitting at Sheffield Combined Courts, The Law Courts, 50 West Bar, Sheffield, South Yorkshire S3 8PH.

REASONS

1. By claim form presented on 29 December 2018 following a period of early conciliation from 17 October 2018 to 1 December 2018, the claimant brought complaints of unfair dismissal and automatic unfair dismissal (public interest disclosure).

2. The issues are as follows: -

   Unfair dismissal

   2.1. It is agreed that the Claimant was dismissed;

   2.2. What was the principal reason for the dismissal and was it a potentially fair one in accordance with sections 98 (1) and (2) of the Employment Rights Act 1996 (ERA)? The respondent asserts that it was because of the claimant's conduct. In particular her breach of the respondent's data protection and confidentiality policy

   2.3. Although the claimant was also disciplined for her contribution to an incident of inappropriate conduct, in which the other participant was Ms. Chapman, that incident was not regarded as sufficient to justify dismissal on its own.

   2.4. If so, was the dismissal fair or unfair in accordance with ERA section 98 (4) and in particular did the respondent in all respects act within the so called band of reasonable responses?

   2.5. The claimant avers that the dismissal was unfair for the following reasons:
   (a) The lack of consistency between the claimant's treatment and that her colleague Ms. Chapman. The claimant alleges that Ms. Chapman too improperly accessed the respondent's database but was not dismissed.
   (b) The fact that the claimant's case was investigated by her line manager
   (c) The delay in suspending the claimant
   (d) The failure to record the suspension meeting
   (e) The refusal to permit the claimant to attend the first investigation meeting with a representative
   (f) The refusal to permit the claimant to be represented by her choice of representation of the second investigation meeting
   (g) The failure to take into account the effect on the claimant of the provocation by Ms. Chapman
   (h) The failure by the respondent to investigate inappropriate behaviour on the part of the members of staff, including Ms. Chapman
   (i) The fact that no consideration was given to the claimant's health during the disciplinary process
   (j) The fact that insufficient consideration was given to the claimant's previous good record
   (k) The failure to accept the claimant's explanation for viewing Ms. Chapman's personal record of more than one occasion.

Public interest disclosure (PID)

2.6. Did the Claimant make one or more protected disclosures (ERA sections 43B as set out below: The Claimant relies on subsections (1)(a), (b) and (d).

2.7. She asserts that on 2 February (orally) and 27 February (in writing) she disclosed to her line manager that she believed that her colleague Ms. Chapman had used her position as an employee to seek to obtain for herself a prescription in manner which was contrary to the respondent's procedure and potentially fraudulent

2.8. In particular the claimant contends that Ms Chapman used the out of office telephone referral system to log a call on her own behalf and seek to obtain a prescription for medication for her own use. Having so obtained that prescription, Ms. Chapman then cancelled the call, with the effect that the issuing of the prescription would not be notified to Ms. Chapman's general practitioner. This might put Ms. Chapman in a position to obtain a second prescription from her general practitioner. In such a circumstance, Ms. Chapman might have obtained twice as much medication as she needed with the possibility of her double dosing herself or disposing of the surplus drugs for gain. Such conduct would certainly be in breach of her obligation to the respondent as an employee might be illegal or might put Ms. Chapman's own health at risk.

2.9. The respondent does not concede that either the disclosure on second February or on 27 February amounts to a Public Interest disclosure. The Tribunal will be invited to consider based on its findings of fact whether the claimant disclosed information whether that information tended to show any one of the states of affairs set out in s.43B (1) (a), (b) or (d) and whether the claimant had a reasonable belief.

2.10. The respondent also does not accept that if the claimant did make a protected disclosure it was made in good faith

2.11. The claimant contends that the principal reason for her dismissal was the fact that she made such a disclosure or disclosures. She contends that the unfairness of her dismissal generally and the explanation she gave to the respondent for accessing the relevant database (assuring herself that Ms. Chapman was guilty of the matter that she had reported) show that the dismissal was so unreasonable as to be explained only by the fact that the claimant had made a Public Interest Disclosure

2.12. The respondent asserts that the principal reason for the Claimant's dismissal was the fact of her misconduct and was entirely unrelated to any protected disclosures.

3. Despite the fact that the issues of Polkey and contributory fault were not identified in the agreed list of issues at the Preliminary Hearing on 8 April 2019, these matters had been pleaded by the Respondent in its ET3 at paragraph 44.

In the circumstances, the Employment Tribunal agreed to consider these matters too.

4. The Employment Tribunal was provided with an agreed bundle of 988 pages. In the course of the hearing and with no objections from the Claimant, the respondent added three further documents; namely an email from Kenny Greig to Liz Eaton dated 3 June 2018; an email from Helen Chapman to Liz Eaton dated 30 May 2018 and a letter to Mrs. Portman following a disciplinary sanction meeting dated 15 August 2018.

5. The respondent called three witnesses Elizabeth ("Liz")Eaton, Clinical manager of the Sheffield GP Collaborative; the Claimant's Line Manager, disciplinary investigator; Laura Evans, Professional Head of Occupational Therapy, chair of the disciplinary panel which heard the disciplinary case against the Claimant and also heard the disciplinary case against the claimant's colleague, Helen Chapman; and Helen Kay, the Operations Director responsible for the Combined Community and Acute Care Group within the Trust who heard the Claimant's appeal against dismissal. The claimant represented herself and relied upon her evidence. Prior to commencing the live evidence, the Tribunal took half a day to read the witness statements and relevant documents referred to in the witness statements.

6. In accordance with the Equal Treatment Bench Book, the Tribunal sought to ensure that the Claimant as a Litigant in Person was not disadvantaged in the Tribunal hearing; ensuring that the Claimant understood what was going on and what was expected of her at all stages of the proceedings and providing time to the Claimant to prepare her cross examination and submissions.

7. Further, by reason of the nature of the Claimant's unfair dismissal allegations the Tribunal was required to consider as part of its fact finding the evidence against and sanction imposed against Mrs. Chapman.

8. The Employment Tribunal provided the parties with two cases which appeared to be potentially relevant to the issues in the case; **Bolton School v Evans (2006) and Dray Simpson v Cantor Fitzgerald Europe (UKEAT/0016/18)** in which the President of the Employment Appeal Tribunal had provided a very detailed and helpful summary of whistleblowing case law.

Facts

The Service

9. The respondent runs a G.P. Collaborative which provides an out of hours service for the GP surgeries in Sheffield of which there are approximately 98. It also treats patients who present themselves to the Accident and Emergency Department ("A & E") at the Northern General Hospital (via the NHS England Initiative Primary Care Streaming) whose illnesses are minor or less urgent such that it is more appropriate for them to be treated by a G.P or an Advanced Nurse Practitioner ("ANP") rather than A & E.

10. When patients are treated by a G.P. or ANP within the G.P. collaborative, the clinician inputs the details of that treatment onto a clinical patient management system called Adastra. Each time a patient is dealt with, the details are recorded on Adastra as a "call" (also referred to as a case). The information as to what happened as a result of the call is recorded in the event list for that call; the event list is essentially a timeline from when the call comes in until the time that it is closed. The service informs the patient's G.P. practice of what was happened with them, so that the patients' usual G.P. is aware of the treatment including any prescriptions that have been given to them. This is part of national quality requirements – as a provider the respondent must send details of all out of hours consultations to the practices where the patient is registered by 8 a.m. the next working day.

11. The G.P. Collaborative became part of the Trust in 2009. It is located adjacent to A & E at the Northern General Hospital and is open from 6p.m. to 8a.m. on weekdays and from 12 midday on Thursday afternoon's, and 24 hours over weekends and on Bank Holidays. Between 8 am and 6pm one G.P. is available to see patients referred by A & E.

12. The Claimant commenced her employment with the Respondent on 17 March 1997. The Claimant was employed by the respondent as a G.P. Collaborative Trainer/Operation Support (Band 4) along with other trainers Helen Chapman and Clare Perks. The trainers were responsible for all aspects of staff training at the G.P. Collaborative including inductions to all staff including G.P.s and G.P. registrars under the G.P. training scheme. The Claimant and Mrs. Chapman were primarily responsible for training individuals who were new to the out of hours team and Ms. Perks was primarily responsible for training those joining the "in hours" team. The claimant had assisted in setting up a primary care streaming process for patients.

13. As a trainer the Claimant would train new starters on how to use Adastra. The Adastra system allowed the G.P. Collaborative to gain access to a patient's out of hours care record and input information onto that record to document the details of their visit to the G.P. Collaborative. NHS 111 also use Adastra so that if a patient is referred by 111, the 111 call handler can input details of the demographics and the reason why the patient is calling. This information is sent through to the control room at the G.P. collaborative and the GP or ANP to treat the patient; they can also input any clinical information. On days where G.P. surgeries are closed calls come straight through to the G.P. collaborative call handlers (rather than 111) and those call handlers then input the initial information.

14. The record on Adastra is the out of hours care which the patient has received from the G.P. collaborative service and it is not a complete medical record. It does contain clinical information related to out of hours care. It is possible to search for a patient referred to the service using certain personal details. It is stand-alone system and is not linked with any clinical patient management system which allows access to a patient's full medical records such as System 1.

15. Adastra contains sensitive patient information including in each case the patient's contact details, clinical information and past medical history related to out of hours care. The staff at the service have full access to patient care records on Adastra to ensure patient safety. System 1 contains clinical confidential material including medical and GP records. In her evidence, Liz Eaton told the Tribunal that Adastra could be just as confidential as system 1 if a person used out of hours a lot. On the basis that the Tribunal heard the service had the general purpose of providing out of hours service to patients, the Tribunal rejected this evidence. The Tribunal found System, 1 contained far more highly confidential patient clinical information than Adastra. In the context of other evidence given by Liz Eaton set out below, the Tribunal found that Liz Eaton attempted to down play the seriousness of accessing system 1 (an act which Mrs. Chapman had committed).

16. To access the Adastra system involves the deliberate effort of the operative and undertaking a four clicks process to enter so to see comments concerning activity with the service. An events list record can be open for a long period whilst the operative does other work and does not necessarily mean that the operative is looking at the same record for that period.

Policies

17. The Trust has a Data Protection Policy (p.184 to 198) which members of the service are trained on annually. Pursuant to paragraph 9 it places a responsibility on employees of the Trust as individual data users to comply with the requirements of the DPA (including Data Protection Principles) and the Trust's Data Protection Policy including any procedures and guidelines which may be issued.

18. At paragraph 13 of the Policy it is stated that *"It is the Trust's policy to seek and obtain explicit consent whenever practicable from individual data subjects for the main ways in which the Trust may hold and process personal data concerning them".* At paragraph 14.1.2 in respect of members of staff it is stated *"members of staff have no personal or informal right of access to their own medical and confidential records. Staff wishing to exercise their right of access will need to formally request this information in writing to the Trust Medical Records Manager and follow the official procedural approach...any member of staff accessing their own medical and confidential records outside the formal request route ...would be considered in breach of their contractual obligations and will be subject to disciplinary action by the Trust".* To emphasise in blocked writing it is stated ***"There are no exceptions to this procedural approach."***

19. Further, the Trust has a Confidentiality Staff Code of Conduct which refers to Abuse of Privilege at paragraph 7.9. It states at 7.9.1. *"It is strictly forbidden to look at any information relating to their own family, friends or acquaintances unless they are directly involved in the patient's clinical care or with the employee's administration on behalf of the Trust."* Again, it is emphasised there are no exceptions to this procedural approach.

20. Pursuant to paragraph 10 of the Trust's Disciplinary Policy and Procedure, it extends the right to be accompanied to all formal meetings that form part of the

investigation by a companion. Pursuant to paragraph 10.2 of the Policy a companion is defined as a *"trade union representative (whether a recognised trade union for consultation purposes or not) or a work colleague. It does not extend to a friend or relative of the employee".* Under paragraph 16.2 managers have a responsibility to investigate all concerns brought to their attention in a timely and effective manner. When considering the level of misconduct investigating managers and panels need to consider the wilfulness of the act, the impact on patient care/service provision/colleagues, the number of occasions the employee is alleged to/has committed this or a similar act (is there an escalation of behaviour, repeated/persistent act) and any mitigating factors (page 108). Examples considered to be gross misconduct are considered to be so serious that *"they strike at the heart of the employment contract and are considered a breach of trust and confidence such that they will usually result in dismissal".* Conduct of a lesser nature or where there are mitigating factors would normally result in a less sanction. Examples of gross misconduct include the deliberate and persistent refusal to carry out a proper and lawful instruction given in a reasonable manner or lack of respect for a colleague; breach of a duty including compliance with the Data Protection Act. Pursuant to the Appeal section of the Policy, under paragraph 8.10, the Appeal Panel will adjourn to consider their decision and whether the disciplinary hearing decision was arrived at fairly and reasonably based on a fair and thorough investigation of the issues, sufficient evidence on which to base the decision, the conclusion reached was based on a reasonable belief of the information submitted, whether in the circumstances the decision was fair and reasonable and commensurate with the evidence heard and whether in the circumstances the level of warning/decision was reasonable.

21. The respondent Trust has a whistleblowing policy titled "Raising Concerns at Work Policy and Procedure". It's stated objective is to promote a culture of openness and accountability within the Trust by encouraging reporting of concerns offering guidance on raising concerns/making disclosures and reassurance as to how the Trust will respond to them. The overarching aim of the policy is stated to encourage staff to report specific concerns as soon as possible in the knowledge that these concerns will be taken seriously and investigated appropriately and its purpose includes setting out how the Trust will respond to those concerns. At paragraph 9 of the Policy it states, *'a member of staff considering raising a concern should be aware that they may be asked to present evidence to substantiate their concern and/or make a written statement and/or explain their concerns or allegation at any resulting formal proceedings"*. The policy envisages some evidence being presented to substantiate a concern raised. The procedure provides for a stage 4 process including at the first stage raising the concern with a line manager/supervisor; stage 2 the next level of authority; third stage approach to be made to the Chief Executive and a fourth stage, a concern raised externally. The procedure envisages a recording of the concern and an investigation to be conducted by the Trust at all first three stages.

22. Pursuant to the Acceptable Behaviour at Work Policy employees are expected to embrace the trust's core values including affording dignity, trust and respect to everyone and having an awareness of the effect of behaviour on others. The Trust's PROUD values are patient safety first, respectful, ownership, unity and deliver.

The Claimant

23. The claimant was regarded as very competent and the "go to person" by her manager, Liz Eaton because of the claimant's knowledge and expertise about the system and service. The Claimant had an exemplary disciplinary record. Testimonials relied upon by the Claimant within the disciplinary process and provided in the Tribunal bundle evidenced an individual who was very well respected by medical professionals in the service. The Tribunal found the Claimant to be a dedicated employee who was passionate about providing an excellent service to the public. This is supported by the concerns she raised with her manager where she believed that the patients were not receiving an appropriate or adequate service. Her concerns included significant delays between calls in 2014, staff shortages on shift in 2015; seeking clarification of the delivering of controlled drugs in 2015; in 2016 where a district nurse failed to take medication to a patient to administer which had to be delivered by a driver; in 2016 concerns about the introduction of Rotamaster and leaving shifts with staff shortages and her complaints about staff excessive use of the internet and mobile telephones during working time. She was respectful of authority and raised concerns with her manager as she thought appropriate. Under cross examination, the Claimant accepted that some of the concerns she raised were dealt with by Liz Eaton, her manager, but others were not.

24. On 14 December 2017, the Claimant emailed concerns to her manager, Liz Eaton, about the Christmas Rota and the staffing levels on some shifts. Her concerns related to the allocation and distribution of seniority of staff during particularly busy periods. Liz Eaton replied on the same day that she shared the Claimant's concerns and promised to "look at today". However, she did not seek to meet with the Claimant or resolve the issue until 29 December 2017 (after the Christmas period) by which time the Christmas rota was no longer relevant and the Claimant's concerns were not resolved. When Liz Eaton was asked why she had not met or resolved the staffing issue with the Claimant prior to the Christmas period, Liz Eaton informed the Tribunal she had been on annual leave. The Tribunal found her response to the Claimant's concerns unsatisfactory and in fact inconsistent with her contemporaneous email dated 14 December 2017 when she agreed to look at the issue.

25. There were factious relationships in the Claimant's teams. The Claimant and Mrs. Chapman had a previous dispute and had entered mediation in 2010 to resolve their issues. The Tribunal heard evidence there was a gang/clique consisting of Helen Chapman, Laura and Vicky with hostility towards others in the team including the Claimant. This was not assisted by the introduction of a system of scheduling rotas which was unpopular and eventually, deemed by management as unworkable. The difficulty of team working was aggravated by some team members using their mobile telephones/internet excessively whilst on shift. The Tribunal found the Claimant had complained about these issues to her manager, Liz Eaton but was inadequately resolved by the manager; Liz Eaton stated it was difficult to monitor. These issues were not assisted by the fact that the direct line manager, Liz Eaton was positioned at a distance from the team and was not a hands on manager. Mrs. Chapman also made a complaint against Paul Harvey, a driver and partner of the Claimant which was ultimately dismissed

as a complaint having no case to answer. Liz Eaton commented to the Tribunal that there were different "friendship groups" and disputed that there was a gang or clique. The Tribunal having heard the evidence concluded that Liz Eaton's description was inaccurate and there was a toxic environment in the team resulting in poor working practices of some team members and the Claimant was frustrated by the failure by Liz Eaton to address these. The Tribunal deals with these in more detail below.

Events

26. On 1.1.2018 the claimant had an altercation with her colleague, Helen Chapman. The background to this issue was the allocation of work. By 9 p.m. there were three visits waiting to be despatched. They were in different parts of the city. There were two drivers who entered the control room available to take the work; Mrs. Chapman and her team allocated all three visits to Paul, the Claimant's partner. Sometime later in the shift one visit was then passed to the other driver from Paul by Ms. Chapman. The Claimant had taken a call for a palliative patient which required a visit; the G.P. also entered the control room to state she had put through an urgent palliative visit. Ms. Chapman said this would have to be passed to the nightshift so would not go out until after midnight. The Claimant was upset at this because she believed had the work been allocated fairly between the drivers initially the palliative patient could have received a visit sooner. An argument took place between Ms. Chapman and the Claimant. The Tribunal finds that potentially this could have were overheard by the public because the Doctor on call closed the door to avoid the altercation from being overheard.

27. On 2.1.2018 Ms. Chapman reported the altercation to Liz Eaton and accused the Claimant of verbal abuse. She was asked to provide a witness statement. On the same date Liz Eaton spoke to the Claimant briefly about this matter and she was not asked to provide a witness statement at this stage.

28. On 3.1.2018, Ms. Chapman, sent a text message to the Claimant (p.265) at 1 a.m. stating
"Hi Just wondering. Can you sleep at the moment? I can't. I would just like to ask you when you die. Do you think you will go to heaven or hell (heaven/hell emojis) I hope u don't mind me asking".

29. This was described by Liz Eaton in her evidence to the Tribunal as "inappropriate". The Tribunal having heard the Claimant's evidence accepted that the Claimant found this text outside work, late at night, extremely upsetting and Ms. Chapman's behaviour was serious misconduct and a reasonable employer would have deemed it as such. The Tribunal found that Liz Eaton under played the significance of the effect of this email on the Claimant's health.

30. On 4.1.2018 Ms. Chapman provided Liz Eaton with her written account of the altercation between the Claimant and herself (page 261). She complained that she was verbally abused by the Claimant which was witnessed by Eve Hunt, Laura Lewis and Richard Faulkner. She said she was accused of a number of

things sparked off because she did not send two doctors out on visits after 21.00 and was accused of not working her hours.

31. On 5.1.2018, the claimant, asked that the text message be added to the meeting agenda. At a meeting on 5 January 2018 between Liz Eaton, the Claimant and Ann Parker (Operations Manager) the Claimant's concerns about the Christmas rota were discussed. The Claimant complained about Mrs. Chapman's behaviour during the altercation on 1 January 2018 and in sending the text. The Claimant stated the sending of the text message was a form of cyber bullying on the part of Mrs. Chapman.

32. Liz Eaton asked Human Resources what she should do. She was advised to conduct a fact find and she stated she did not feel the Claimant and Ms. Chapman needed to be separated whilst at work.

33. On 15.1.2018 Victoria Day opened the clinical case 81320 for Ms. Chapman at 19.14. There was nothing in particular different about this as colleagues do on occasions open clinical cases on the system for one another. Ms. Chapman had a medical consultation with Dr. Ben Gharbia who issued a prescription. Victoria Day then cancelled the case at 19.57 (p.159). The claimant who was training a colleague on the Adastra system saw in the course of this training Ms. Chapman's Adastra records. The Claimant then conducted a database search of case 81320 at 21.00 (p.159). On 16.1.2019 the Claimant viewed Ms. Chapman's Adastra records at 13.36. On 18.1.2019 the Claimant viewed Ms. Chapman's Adastra records on three occasions at 23.16, 23.19 and 23.21 (p.159).

34. On 25 January 2018 the Claimant emailed Liz Eaton, Ms. Booker, Anne Parker, Mr. Osborne and Mr. Grieg her account of the altercation (p.267-72) and her reference to the bigger picture namely the context of how and why she said events unfolded on 1 January 2018. The Tribunal found this document to be significant and a reasonable employer would have deemed it as such as it placed the Respondent on notice that the workings of the team members and the management of that team were dysfunctional. The Claimant sets out her concerns about a personal vendetta against her partner Paul by Mrs. Chapman and her team; bullying behaviour by them to others, the placing of work as a secondary purpose to gossiping and her assertion that little is being done about it. A reasonable employer faced with this material would have been alert to the fact that Liz Eaton as a manager should not be investigating issues within the team and that another manager should have taken over the investigation at this stage.

35. On 29.1.2018 the Claimant viewed Ms. Chapman's Adastra records at 21.23 and again on 31.1.2018 at 20.43.

36. On 2.2.2018 the claimant informed Liz Eaton that Ms. Chapman had placed a call for herself and obtained a prescription and that the medical consultation was subsequently cancelled on the system. This is the first public interest disclosure. The claimant made it clear she wanted to report this issue under the whistleblowing policy. Liz Eaton asked the Claimant how many times she had

accessed Mrs. Chapman's records and the Claimant had responded *"just the once as far as (she) could remember".* There was a dispute of evidence as to what Liz Eaton told the Claimant. Liz Eaton's evidence is that she informed the Claimant that this was a breach of policy and she should not view her colleagues records on Adastra. The Claimant's evidence was that Liz Eaton said she shouldn't have anything to do with Mrs. Chapman as there was an investigation ongoing. She conceded in cross examination, Liz Eaton stated that what the Claimant had done was serious. The Tribunal determined that it was unlikely that Liz Eaton quoted the policy in the manner she asserted because generally Liz Eaton had referred to Human Resources for advice as to appropriate procedural steps to take. However, the Tribunal is satisfied that the Claimant was informed that she should not have done what she did and at least should have understood implicitly by this she should not look at Ms. Chapman's record again. The Claimant further recorded her disclosure to Liz Eaton in an email of the same date *"Just a reminder of our conversation today regarding Helen placing a call for herself in Adastra and cancelling the call shortly after a script has been printed which I will be bringing up at the meeting.."*

37. On 12 February 2018 the Claimant accessed Ms. Chapman's Adastra records again.

38. On 19 February 2018 Liz Eaton wrote to the claimant and Ms. Chapman and invited them to a fact finding meeting for 28 February in respect of the altercation on 1 January 2018 under the Acceptable Behaviour at Work Policy. They were informed about their right to be accompanied.

39. On 20 February Liz Eaton responded to the Claimant *"Please can you write me a summary of how you knew about this call and the reasons why you did what you did in order that I can talk this over with Anne Heslop. As discussed this is a very serious incident with possible consequences therefore you need to explain your reasoning in as much detail as possible.."*

40. On 26.2.2018 (p.156) Kenny Greig, provided an Adastra log to Liz Eaton which showed the Claimant accessing Ms. Chapman's records multiple times including after the meeting on 2 February 2018.

41. On 27 February 2018 the Claimant sent her statement (dated 26 February 2018); the second public interest disclosure (p.49) to Liz Eaton titled "Raising Concerns". In the document, the Claimant explained she had come across her colleague's name on the Adastra system when she was training an Advanced Nurse Practitioner on 15 January 2018. She was demonstrating going through the Advice queue by scrolling through the calls and what conditions/symptoms patients were ringing in with when the nurse said "is that our Helen". It appeared to the Claimant that Helen Chapman had placed a call for herself on the system. She noted that the call was placed, a prescription printed and then the call was cancelled a few minutes later which she thought was odd. A few days later it occurred to the Claimant that there is a policy for logging scripts that have not been used/damaged or printed in error but when she checked there were no entries for this day. She also did not believe it appropriate for Helen Chapman to place calls for her family on the system or ask a driver to collect prescriptions

from the pharmacy on her behalf. She was aware that Helen Chapman had previously been reprimanded for viewing her family records. She also stated she had spoken hypothetically to an ex Director of the G.P. Collaborative who was aware of the service and knew how Adastra works. He deemed it could potentially be serious due to the consequences to the surgery not knowing about it and prescriptions could be traced to check if they have been cashed. She stated that there could be a perfectly reasonable explanation and she could be completely wrong but that could only be established by looking further into the call but she raised it as a concern so that the correct procedures could be followed to ensure that anything untoward had not occurred. She further stated whilst employees are encouraged to raise concerns by the Trust at the time she thought she needed to provide some evidence. She emphasised that she would not have looked at the case had it been on system 1 or any other database that accessed personal medical records. She said *"With hindsight I realise that I should not have even looked at the event list and regret making that decision. It was a grave error of judgment and one which I deeply regret. In all of my 20 years of service in which I have worked hard and been conscientious and observed all rules and regulations."*

42. On 27 February 2018 Liz Eaton also conducted interviews with Eve Hunt, Laura Lewis and Richard Faulkner about the altercation on 1 January 2018. She also interviewed John Cotton, Doctor's assistant and Anne Parker.

43. On 28 February 2018 Liz Eaton conducted the first investigatory meeting with Ms. Chapman. Ms. Chapman gave her consent to Liz Eaton to investigate her Adastra records. On 28 February 2018 the claimant investigation meeting was adjourned because her work colleague, Andrea Cooke was unable to attend. At this time Liz Eaton had been informed that the Adastra report showed the Claimant accessing the system on numerous occasions. Anne Heslop advised Liz Eaton the Claimant had to be suspended. Liz Eaton informed the Claimant the information indicated she had accessed the system of multiple occasions. The Claimant replied she was unaware of these dates. The Claimant was suspended on full pay. She was informed that her conduct was viewed as potential gross misconduct and the investigation would continue.

44. The Claimant had some concerns as to why there was a delay in her suspension if her conduct was deemed so serious. The Tribunal rejected this point having heard the evidence it was at this stage when the Respondent was aware there was multiple access to the records and advise had been received to suspend the Claimant from work. Further, the Claimant could not identify any particular disadvantage as to the delay in her suspension or the failure to record it.

45. The Claimant's suspension was reviewed on 4 May 2018 and 1 June 2018 and maintained.

46. By letter dated 8 March 2018 (p.603-9) Liz Eaton confirmed the discussion at the investigation meeting to Ms. Chapman. She had been asked by the Respondent about the altercation with the Claimant on 1 January 2018. In the course of this discussion, Ms. Chapman was asked about the text message sent to the

Claimant. She stated she regretted it and was not in the right frame of mind. She was also asked about the amount of time she spent on her phone and Facebook during working time. She stated she used this during her break and she had an ill husband and disabled mother. She denied a personal vendetta against the Claimant's partner, Paul, a driver with the Trust and giving him three visits. She was asked whether she had seen Dr. Ben Gharbia. She said she had. She was asked whether this was the only time she had asked to see the G.P. on a professional basis for herself and she said it was. This was untrue. She had in fact obtained 19 prescriptions (see below) and the statement of Dr. Gharbia (see below) was that Ms. Chapman used the service frequently as opposed to using her G.P. Ms. Chapman stated she had been given a prescription for anti-histamine recently which was undated. On the information provided to the Tribunal Dr. Gharbia does appear to have expected the prescription to have been cancelled. Ms. Chapman stated that she knew she should not access the system. On this basis (of the cancellation of the call) Ms. Chapman's own G.P. would not be informed about this consultation and this posed a potential risk.

47. On 11 March 2018 (p.251) the Claimant emailed Liz Eaton stating that she had changed her representative for the meeting the next day at short notice. The person used to work for ENS but still worked for the NHS. The Claimant stated that her original representative could not attend and she was unhappy (as previously mentioned) to involve some one she worked with to avoid repercussions from staff certain members.

48. On 12 March 2018 an investigatory meeting took place. The Claimant wanted Gavin Dunk to represent her. *"Work colleague"* who has the right to accompany an employee is not defined in the disciplinary policy. The Claimant's unchallenged evidence was that Mr. Dunk remained on the bank as an employee of the trust although accepted he had not worked at the trust for 6 months. The Tribunal found the Respondent's refusal of the Trust to permit the Claimant Mr. Dunk to accompany her as petty and an unreasonable interpretation of the policy but the Claimant latterly conceded (meeting on 15 November 2018 p.468) she could not say she was materially affected by the fact he was not permitted to attend this meeting.

49. The Claimant brought with her a sealed envelope and agreed to decide at the end of the meeting whether to open the envelope. The Claimant stated that she looked at the records again because she could not act on a hunch she needed to put forward evidence. The Claimant stated that it was a *"stupid thing to have done but you had done it under the terms of raising a concern"*. In the course of the tribunal hearing the Claimant referred to the Raising Concerns document which refers to providing evidence pursuant to paragraph 9. The tribunal was satisfied that this was the Claimant's understanding and was a reasonable interpretation of the policy; an employee reading the policy may reasonably believe providing evidence was a requirement before raising a whistleblowing complaint. She described a bullying culture in the group. The Claimant stated that not all points she wished to raise in the meeting were raised. The tribunal concluded that in general terms the points raised by the Claimant were raised but not fully considered due to lack of time. However the Claimant continued to raise

that there were issues in the team such as excessive use of the internet, drivers not getting breaks and "nothing had changed" and she as mentally exhausted.

50. On 13 March 2018 Mrs. Chapman was suspended for the alleged misuse of Adastra. The system had showed that Ms. Chapman accessed her own record on the Adastra system on 16 May 2017, 17 September 2016 and had accessed the Adastra medication stock on this date and issued it to herself. Ms. Chapman could not recall doing this or accessing her records on any given dates. She had also accessed the system on 22 May 2014. In 2016, Ms. Chapman had accessed her son's records on System 1, (a more confidential clinical health system than Adastra). The Tribunal had asked Liz Eaton why this had not been a matter for formal disciplinary action. Liz Eaton informed the Tribunal this had been picked up by a third party organisation and not the respondent. The Tribunal was unconvinced that this made any difference to an employee being excused from disciplinary sanction. When previously asked about this Ms. Chapman had read the confidentiality staff code of conduct and assured Liz Eaton this would not occur again. The sending of the text to Ms. Patel was also to be further investigated. She was informed that her conduct was regarded as a very serious matter and may lead to disciplinary action including dismissal.

51. On 15 March 2018 (p.744) Dr. Gharbia provided a witness statement. He stated he saw Mrs. Chapman when she was very stressed and described not sleeping for the last few days. He provided a prescription for Mrs. Chapman which "was on call". Dr. Gharbia asked for it to be cancelled as *"I thought best to her and me as she frequently ask for medical help...no other intention and she can buy over the counter."* A reasonable interpretation of this information, is that Dr. Gharbia expected the script to be cancelled.

52. A Statement of Events (page 619) signed by Mrs. Chapman dated 22 April 2016 records Mrs. Chapman admitting to looking at her son's medical records on system 1. She says that she unfortunately did this in the spur of the moment in a panic without thinking. She said she had been informed he was going on holiday with his girlfriend in three weeks' time to Thailand and she knew he required travel vaccination ideally 6 weeks before travel. She stated *"so without any forethought I tried to look on system 1 to see what vaccinations he had been given.."* She then looked at her own record on system 1. She said that she had a close relationship with her son, he still lived at home and it will never happen again. Liz Eaton told the Tribunal that Mrs. Chapman had the consent of her son to look at his record. There was no note of that in the signed witness statement on 22 April 2016. Liz Eaton stated that Mrs. Chapman must have said this. Consent in the policy has to be obtained in a strict and formal manner and there was no evidence this had occurred. The Tribunal were not satisfied that this was the case. The signed record indicates an impulsive and an ill thought out interrogation of the system by Mrs. Chapman who was in a panic. The Tribunal did not accept the evidence of Liz Eaton and the Tribunal concluded that she downplayed the activity of Ms. Chapman because she had dealt with Ms. Chapman in an unduly lenient manner. Ms. Chapman's son was 19 years of age and an adult.

53. On 29 March 2018 (p.247) the Claimant agreed to be sent to Occupational Health. She chased this up on 14 June 2018 because she had not received an appointment and was informed by Occupational Health the referral had not been received (p.57).

54. A further investigation meeting took place with Ms. Chapman on 4 April 2018 (p.752). As a result of the Respondent's investigation, it was discovered that over the period of 2013 to 2018, Ms. Chapman has accessed the out of hours service on 24 occasions and received 19 prescriptions. Liz Eaton informed the Tribunal that this was not a significant amount. The Tribunal rejected this evidence. The out of hours service is simply that and not to be used as a substitute for consultations with an individual's G.P. The Tribunal viewed the activity of Ms. Chapman again had been downplayed by Liz Eaton. This activity had occurred on her watch and she had not been alert to it or apparently done anything about it. Ms. Chapman was asked about her access to Adastra and Odyssey systems on 16 May 2017. Ms. Chapman was unable to explain why she had accessed the system 6 minutes prior to logging off the system. Ms. Chapman was also asked about her accessing the system on 17 September 2016 her records; Ms. Chapman had gone into stock control and taken it off her record without she said realising she accessed her record; she stated that *"sometimes she (did) things without thinking".* Ms. Chapman had also accessed her records on Adastra on 22 May 2014 to demonstrate during training how to modify a case. Ms. Chapman stated she *"decided without thinking"* to do this. Ms. Chapman said she did not at the time know she should do this. This access was in addition to the Ms. Chapman's access of her son's records on System one in 2016, after which she had read the Confidentiality Staff Code of Conduct and assured Liz Eaton it would not happen again. Ms. Chapman was also questioned about the sending of the text to the Claimant and Ms. Chapman stated she was very tired and had not slept for 4 nights and were sorry and really regretted it. Ms. Chapman confirmed she had undergone the Trust induction, worked in the Trust a long time and understood the Policies and Procedures. Prompted by her representative, Ms. Chapman said she *"had not thought."*

55. A further investigation meeting with Ms. Chapman took place on 2 May 2018 (p.847) about her distribution of work to drivers and whether palliative care patient home visits were required to wait longer than necessary when there was capacity to send a G.P. and driver out. She was asked about three occasions. More visits were allocated to Paul, the driver, the Claimant's partner. She was asked in specific terms about the events of 1 January 2018 and allocation of visits. Ms. Chapman stated she got mixed up with drivers. Liz Eaton told the Tribunal it was the judgment call for Ms. Chapman but the Tribunal were not satisfied with this response since Ms. Chapman was very experienced in the role and there appeared a pattern of Ms. Chapman allocating more visits to Paul, the driver.

56. On 2 May 2018 Teresa Portman was asked about her access to Ms. Chapman's records on Adastra. She explained she accessed the events list of Ms. Chapman because she wanted to check if Ms. Chapman had been seen by the doctor. Ms. Chapman had been upset at the time. Anne Parker had asked if Ms. Chapman

was ok and so Ms. Portman checked Adastra. She said she was unaware that this was in breach of Data Protection.

57. On 14 May 2018 Ms. Chapman apologised to Liz Eaton for sending the Claimant the text. Ms. Chapman did not apologise to the Claimant at this stage.

58. Liz Eaton did not investigate the Claimant's public interest disclosures. On questioning by the Tribunal, Liz Eaton stated she believed that there was an investigation into Mrs. Chapman's accessing the service and retaining and cashing the prescription after the consultation was cancelled. However, she did not have any direct or detailed evidence about this. She stated it was looked into by a doctor at the Trust and it was a private discussion. The Tribunal invited the Respondent to provide any documents about such an investigation and provided time during the hearing for the Respondent to provide this material. However, the Respondent informed the Tribunal that there were no documents or further information. The Tribunal found this to be very unsatisfactory; there was no evidential trace as to what was done about the Claimant's concern. A prescription is a legal document; the consultation had been cancelled but the prescription had been cashed and not destroyed. The Raising Concerns policy was clear that an investigation should be undertaken into a whistleblowing concern and it was unsatisfactory there was no evidential trace or any direct evidence that this had occurred. Simply suggesting (as Liz Eaton did) it was a private matter where it involved a legal document was very unsatisfactory. The Tribunal concluded that the Respondent had not looked into the Claimant's whistleblowing concern with the diligence of a reasonable employer applying its own Policy and no credible reason for this had been given by the Respondent.

59. Liz Eaton found an altercation did take place and both the Claimant and Mrs. Chapman made inappropriate comments to each other. She also found there was an issue with their working relationship and also the culture and atmosphere in the G.P. collaborative when the friendship group of Mrs. Chapman, Laura Lewis and Eve Hunt were on duty although she did not find that this went as far as a gang mentality as described by the Claimant. The Tribunal found these findings perverse on the material evidence before Miss. Eaton. No reasonable employer could have considered the problems in the department were as a result of different friendship groups. The obvious context was the altercation concerning a disproportionate allocation of work to a driver who was the Claimant's partner by Mrs. Chapman and her team, complaints of excessive usage of internet and mobile telephone on shift by Mrs. Chapman and her team and the text message sent by Mrs. Chapman to the Claimant outside working hours aggravated by the introduction of an unworkable rota by management. The Tribunal found Liz Eaton stated the differences were a result of different friendship groups because regrettably she had failed to manage these problems in the team adequately. A reasonable employer would have been alerted at this stage that Liz Eaton should not have been investigating these issues.

60. On 2 July 2018 the claimant was invited to a disciplinary hearing on 20 July 2018 to consider the Claimant's access to the events list of Adastra records of Mrs. Chapman on 15, 16, 18, 29, 31 January and 21 February 2018 which resulted in an allegation of breach of statutory duty or obligation imposed by Act of

Parliament or Regulation which is binding upon Sheffield Teaching Hospitals NHS Foundation Trust and/or its employees; brings the Trust's reputation into disrepute which adversely affects the employee's suitability for continued employment (The Trust believed this was gross misconduct and an incident on 1 January 2018 which was a lack of respect for a fellow colleague in accordance with the Acceptable Behaviour at Work Policy. The Claimant was provided with a sequence of events (namely the process to be followed at the hearing), management case summary, list of appendices of the documents gathered during the investigation process and a further copy of the Trust's Sheffield Teaching Hospitals Disciplinary Policy and Procedure (see pages 60 to 251). The Claimant was informed that she could be dismissed and was advised she had a right to be accompanied at the hearing.

61. In the background section of her investigation report, Liz Eaton acknowledged the introduction of an unworkable rota for staff had resulted in unhappiness of staff and inappropriate behaviour at work. Liz Eaton had instructed Kenny Grieg to interrogate the system. The interrogation of the system showed that the Claimant accessed the system one time on 15 January 2018 at 21.00 hours; on 16 January 2018 at 13.36 one time; on 18 January 2018 at 23.16, 23.19 and 23.21 three times; on 29 January 2018 one time at 21.23 and on 31 January one time at 20.43 and on 12 February 2018 at 22.32 one time The audit report showed no clinical access had been made but potentially clinical aspects of the case could be seen by the Claimant. It was noted that the Claimant has accessed the system of Adastra to raise a case for Mrs. Chapman with her consent on 21 November 2016, 1 June 2015 and 4 December 2014. Mrs. Chapman was advised that a member of staff had accessed the events list of her record notes and she had given written consent for her records to be looked at. Liz Eaton recommended that there was a case to answer in respect of three matters namely breach of statutory duty or obligation; compliance with Data Protection; bringing the Trust's reputation into disrepute and lack of respect for a fellow colleague.

62. On 16 July 2018 the Claimant submitted additional evidence to the disciplinary hearing.

63. The disciplinary hearing took place on 20 July 2018 (notes at pages 369 to 394). It was chaired by Laura Evans, Professional Head of Occupational Therapy. The Claimant was accompanied by Andrea Cook, a work colleague. Liz Eaton attended to present the management case. The meeting commenced at 9 a.m. and finished at 1.26 p.m. The Claimant had an opportunity to put her case. The Claimant accepted that she and Ms. Chapman raised their voices on 1 January 2018. She repeated her understanding of the raising concerns policy that she needed to provide evidence for any concerns. When asked about occasions she had entered the record she stated she was reassuring herself by looking at the event list. She was asked about consulting an ex-employee and the Claimant said she wanted some advice to make sure she was doing the right thing and approached him with a hypothetical example. She described the bullying culture. The Respondent was unclear whether the Claimant had raised this before or whether it was relevant (page 380). She explained that she had reported things before and action had not been taken (page 382 and 389) so that it had become

the norm. The Claimant explained any delay about reporting the cancelled consultation was because she needed advice she was going the right thing. She said it was a stressful time for her and she never felt like that before. The Claimant stated that there should be an explanation if or why a script is cancelled. There was none. Liz Eaton said she knew why the consultation was cancelled. There was an acknowledgement by the Respondent in the meeting that excessive use of telephones by the team during working time needed to be addressed. Liz Eaton described different friendship groups in the team as opposed to a clique/gang. The Tribunal found that this was inconsistent with Liz Eaton's findings that this needed to be looked at and a perverse finding bearing in mind the background and context referred to above which culminated in the altercation on 1 January 2018. The Tribunal finds that tensions in the team had not been adequately dealt with by Liz Eaton. Liz Eaton stated there was now a policy to prevent staff placing themselves on the system for a consultation. Liz Eaton stated that the Claimant was raising concerns under the appropriate policy and she wished the Claimant had come to her to that first of all and she stated that the Claimant produced very high quality work and is very meticulous.

64. After an adjournment of 24 minutes at the hearing, the Claimant was informed that she was dismissed for gross misconduct. The first allegation concerning inappropriate conduct was upheld. Ms. Evans stated that the Claimant failed to provide plausible evidence for accessing Mrs. Chapman's record and there were three occasions there was no reason provided for the access. She was informed on the seriousness of inappropriately accessing Ms. Chapman's record on 2 February 2018 but accessed the record on 12 February 2018 which showed a complete disregard for management advice and the trust's policies and procedures in place to protect patient's information. The Claimant was criticised for undertaking her own investigation and failing to escalate to management immediately and she failed to escalate concerns in a timely manner. The Claimant was dismissed for gross misconduct. She was given a right to appeal.

65. By letter dated 30th July 2018 the claimant's dismissal for gross misconduct was confirmed. Mrs. Evans found on 1 January 2018 the Claimant's conduct did not emulate the PROUD values. Although it is not clear from the dismissal letter, the evidence of Mrs. Evans to the Tribunal, was that the decision to dismiss was based on the findings of the Adastra incident. Mrs. Evans found there was an inconsistency in the Claimant raising some concerns with her manager but failed to do so in respect of Mrs. Chapman and looked into the Adastra in some depth herself. She said that the Claimant had told Liz Eaton she had accessed the system just once but had accessed it on six occasions. In oral evidence Mrs. Evans emphasised that the Claimant had failed to explain why she accessed the system so many times.

66. Laura Evans stated following questioning at the hearing she took the Claimant's exemplary disciplinary record into account and the context of the poor management of the team but this was not sufficient to mitigate the Claimant's actions. She stated at the time of the Claimant's disciplinary hearing she had no knowledge of Mrs. Chapman accessing her son's medical records on System 1.

67. By letter dated 4 August 2018 the Claimant appealed her dismissal. The Respondent requested further details of her grounds of appeal. On 19 August 2018 the Claimant provided further details of her grounds of appeal and these included being dismissed for highlighting wrongdoing/whistleblowing; the penalty of dismissal was too harsh; it was a first offence; she had a long and exemplary employment record; another colleague had been given a less serious sanction for same/worse conduct; mitigating circumstances.

68. On 15 August 2018 (p.991) Mrs. Portman received a final formal warning for accessing Mrs. Chapman's Adastra records.

69. Liz Eaton's' final investigation report dated 30 August 2018 (p.853) concluded that inappropriate comments were exchanged on that evening between Miss. Patel and Mrs. Chapman. It was concluded there was an issue with the working relationship of Miss Patel and Ms Chapman and she concluded there was an issue with the culture and atmosphere in the unit when this team was on duty. It recommended that there was not acceptable or professional behaviour on 1.1.2018. She removed from the investigation inappropriate allocation of home visits (5.1.3). Kenny Grieg was asked to consider this issue. He provided an email dated 3 June 2018 and concluded that he could not see anything untoward from the log sheets.) Liz Eaton considered this was a judgment call for Mrs. Chapman and her team to make.

70. On 10 September 2018 Mrs. Chapman attended a disciplinary hearing chaired by Laura Evans. This concerned allegations of inappropriate behaviour 1 January 2018; plus accessing Adastra records on 22 May 2014, 17 September 2016; 16 May 2017 and the sending of the WhatsApp message to the claimant. She said she had regretted sending the message the next day but her husband was poorly and upset about the argument. On 16 May 2017 Mrs. Chapman explained that the case had been held in the safety net as pending as she did not realise her earlier consultation had not been completed by the clinician. On 17 May 2016 whilst training she selected stock for herself as if she would do for a patient. She did not consider this was accessing her own record. On 22 May 2014 she had accessed her own record during training and modified her record. She did not realise this would be seen as accessing her record as it was prior to the incident when she accessed her son's record on system 1 in 2016.

71. The outcome letter dated 24 September 2018 (p.981) states that Mrs. Chapman was given a final written warning. The Tribunal were informed Mrs. Chapman was demoted at her request even though this was not a potential disciplinary sanction within the policy. Management acknowledged there were mitigating circumstances for some of the allegations. Laura Evans was also the disciplining officer in the case of Mrs. Chapman. She imposed a warning following a disciplinary hearing on 10 September. She did not provide any evidence to the Tribunal why she had reached the decision to impose a final warning as opposed to dismissal. The Respondent provided to the Tribunal the letter of 24 September 2018 (p.981). Mrs. Chapman appeared to serially breach the Adastra system in 2014, 2016, and 2017. She also used a driver (who job function was to visit patients) to deliver some medication to her husband which was an abuse of her position and of the service. This was deemed to be an "error of judgment" and a

misuse of trust resources. She had also sent an offensive text message to the Claimant and conducted herself inappropriately (like the Claimant) on 1 January 2018. Mrs. Chapman had conducted a number of serious breaches. The Panel had upheld an allegation of accessing her record to obtain medication stock for herself in May 2016 (two months after writing the statement of reflection for looking at her son's and her records on system 1) but the Respondent accepted she did not intentionally access her record. It dismissed the 2014 incident as it was too historic and 2017 was considered to be accidental. The Respondent considered there was mitigation and personal circumstances were given weight including not being in the right state of mind when sending the text to the Claimant. The panel decided not to dismiss her but due to the severity of the allegations she was given a final formal warning live for 12 months. She sought redeployment to any role band 2, 3 or 4.

72. The Claimant's dismissal appeal hearing took place on 15 November 2018 and was chaired by Helen Kay, Operations Director (page 467). The Claimant's appeal was not upheld. Helen Kay informed the Tribunal that she was not provided with the outcome of Ms. Chapman case dated 10 September 2018. Instead she was provided with the investigation outcome letter. There was no explanation provided to the Tribunal why Ms. Kay was not provided with the disciplinary outcome letter concerning Mrs. Chapman. The Tribunal found this to be unsatisfactory on the basis that it was available at the time of her decision and particularly as both the Claimant and Mrs. Chapman were being disciplined for events on 1 January 2018 and data protection breaches and that Ms. Kay had asked about other cases. Instead she received advice from the Human resources department about the sample sanctions for offences of this kind and was informed that the range of sanctions included formal warnings to dismissal. She decided to uphold the Claimant's dismissal. She told the Tribunal she would have dismissed Mrs. Chapman for accessing her son's record and her own record on System 1 in 2016.

73. The Tribunal were informed that the Trust has now introduced new guidance; Patient use of G.P. collaborative by G.P. Collaborative staff and Doctors, Consultants and Dentists prescribing for family and staff members.

The Respondent's submissions

74. Mr. Bayne on behalf of the Respondent provided a written submission and supplemented this with oral submissions. He submitted that the Respondent accepted that the Claimant made two qualifying and protected disclosures on 2 February 2018 and 26 February 2018. He submitted the real issue in this case was one of causation. He submitted the Claimant was dismissed because she looked at a colleagues Adastra records. He set out the provisions of section 98 (1) and section 103A of the Employment Rights Act 1996 and summarised the comments of Lord Justice Mummery in **Kuzel v Roche Products (2008) IRLR 530** paragraphs 46 to 60 namely (a)the unfair dismissal provisions including those relating to protected disclosures pre-supposes that in order to establish unfair dismissal, it is necessary for the ET to identify only one reason or one principal reason for the dismissal (b)the reason for dismissal consists of the set of facts which operated on the mind of the employer when dismissing the

employee (paragraph 53); (c) the burden of proof must be kept in proper perspective because in contrast to discrimination cases it is rare in practice for unfair dismissal cases to turn upon the burden of proof; (d)If it is necessary to resort to the burden of proof however it operates as follows (i)it is for the Respondent to establish if it can the principal reason for the dismissal; (ii)If it cannot do that to the then it is for Claimant to establish if it can that the principal reason for the dismissal was the fact of the protected disclosure (iii)If C cannot do so then the dismissal will be ordinarily unfair but not automatically unfair.

75. He further submitted that in general when determining the set of facts which caused an employer to dismiss the Tribunal need go no further than to examine the reasoning of the appointed decision maker; **Royal Mail v Jhuti 2019 UKSC 55** (at paragraph 60). There is a distinction to be made between the making of a protected disclosure on the one hand and conduct which is related to the making of that disclosure on the other. To fall within section 103A, the Claimant must establish that it was the making of the disclosure itself rather than any relevant conduct which was the reason for the dismissal **Bolton School v Evans 2006 EWCA Civ 1653**.

76. Mr. Bayne submitted in respect of fairness generally, the starting point is section 98 (4) of the Employment Rights Act 1996. He invited the Tribunal to consider whether the employer had a genuine belief in misconduct, whether the belief was based on reasonable grounds, whether the employer carried out a reasonable investigation and whether the sanction of dismissal was within the range of reasonable responses (**BHS v Burchell 1978 IRLR 379**). He reminded the Tribunal in applying the statutory test it must not substitute its own view for that of the employer. The question for the Tribunal is whether the dismissal lay within the band of conduct which a reasonable employer could have adopted (**J Sainsbury v Hitt 2003 ICR 111**). The Tribunal must consider the fairness of the procedure in the round including the appeal; **Taylor v OCS Limited 2006 IRLR 613**. Mr. Bayne further relied upon **Paul v East Surrey District Health Authority 1995 IRLR 305** namely that consistency of treatment may be a relevant factor when considering the question of fairness even in cases where similar conduct is involved but ultimately the question for the employer is whether in the particular case dismissal is a reasonable response to the misconduct proved. He further submitted to be relevant the allegedly similar cases must be truly similar (**Hadjioannou v Coral Casinos Limited) 1981 IRLR 352**. If any employer consciously distinguishes between two cases the dismissal cannot be successfully challenged unless there is no rational basis for the distinction made (**Securicor Limited v Smith 1989 IRLR 356**). Even if there is clear inconsistency that is only a factor which may have to give way to flexibility. Accordingly, if say an employer has been unduly lenient in the past he will be able to dismiss fairly in future notwithstanding the inconsistent treatment (**United Distillers v Conlin 1992 IRLR 503**). He submitted that both the Claimant and Helen Chapman were trained and knew they should not access patient records on Adastra for any reason other than for the proper performance of their duties and should not access records of themselves family members friends of acquaintances. There was an inappropriate and verbal altercation between the Claimant and Mrs. Chapman on 1 January 2018 which both were equally at fault. Both complained about the others behaviour. The Claimant accessed and searched for Mrs.

Chapman's record on Adastra on numerous occasions and once after being told by her manager not to do so. At the disciplinary hearing the Claimant accepted she had accessed Mrs. Chapman's record. She was unable to explain her repeated access of HC's record save for stating she was reassuring herself and it was a stressful time for the Claimant. She was dismissed for misconduct for accessing Mrs. Chapman's Adastra records. At the appeal after checking the dismissal decision was in line with other comparable cases across the Trust, the appeal was dismissed.

77. Mr. Bayne invited the Tribunal to consider the way Mrs. Chapman was treated emphasising that the Tribunal's focus should remain on the fairness of the dismissal and submitted that as a result of an external audit Mrs. Chapman was found by another trust to have accessed her son's medical records and her own in 2016 on System 1 (a more comprehensive database) on 11 March 2016. Liz Eaton interviewed Mrs. Chapman about that access on 22 April 2016. Liz Eaton required the Claimant to make a reflective statement. The outcome was unusually lenient. He submitted that Mrs. Chapman's conduct on 1 January 2018 and sending the offensive WhatsApp message was found to be serious misconduct in accordance with the disciplinary policy. Using the cancelled prescription; it was submitted that Mrs. Chapman was permitted to leave the consultation with a live prescription. The clinical lead for GPC investigated. On 15 March 2018 Mrs. Chapman was suspended for allegedly accessing her own records on Adastra on 3 occasions but the disciplining officer Laura Evans found that two of the allegations were not upheld as 16.5.2017 it was found to be inadvertent (Helen Chapman did not know it was her case in the safety net until after she had clicked on it) and one on 22.5.2014 because it was too historic. The only allegation upheld was that on 17.9.2016 by accessing her medication from the stock room (which she was entitled to do) she had accessed her own records. The panel also concluded that Helen Chapman didn't do it with intent but rather that she did not realise that it amounted to the accessing of her own records. On one occasion it was found that Helen Chapman had asked a GPC driver to collect a nutritional supplement for her husband; it was upheld as a misuse of trust resources. She was issued with a formal warning.

78. Mr. Bayne also submitted that Teresa Portman accessed Helen Chapman's records on Adastra on 1.10.17 for about 6 minutes. Liz Eaton accepted her account that she did so because she was concerned about Helen Chapman's welfare and wanted to check if Helen Chapman had seen by a doctor. She was issued with a final formal warning.

79. Mr. Bayne submitted that the Claimant was dismissed for accessing the medical records of a colleague. The dismissal was procedurally fair since the Claimant and Liz Eaton were on good terms and there was no reasonable belief that there was a conflict of interest in her conducting the investigation. The Claimant's reference in her witness statement that matters had been ongoing for years was an oblique criticism of Liz Eaton and this was not an issue raised as part of her appeal. It was not unreasonable to interpret work colleague as current colleague at the second investigation meeting.

80. In respect of the consistency Mrs. Chapman was treated unduly leniently in 2016; just because one employee is treated unduly leniently does not mean that another employee should be treated unduly leniently. The fair approach was adopted by Helen Kay was to ensure that the sanction imposed was consistent with other similar cases across the trust. There were real differences between the Claimant's conduct and that of Helen Chapman's conduct namely aggravating factors in Claimant's case; Helen Chapman's access with consent and she did not do so after having been specifically warned. In 2018 she was given a lessor sanction than the Claimant because she accessed her own records rather than those of a colleague, only once, with no intent and was open and honest about her behaviour. Theresa Portman was given a less serious sanction because her conduct was less serious than that of the Claimant because the Respondent found she accessed the records only once, out of concern for her colleague's welfare and was open and honest about her conduct and did not do so again after accepting it was a mistake and being warned not to.

81. In respect of other matters relied upon by the Claimant namely no consideration of provocation of Helen Chapman, or Claimant's good disciplinary record these were taken into account. In the circumstances it was submitted that both automatic unfair and ordinary unfair dismissal claims were not well founded and should be dismissed.

The Claimant's submissions

82. The Claimant was provided with time to consider the oral submissions she wished to make. The Claimant submitted that her public interest disclosures raised a flaw in the system and as a direct result of her concerns the policy was tightened to ensure operatives did not use the out of hours system. She alleged her concerns revealed that the G.P. failed to comply with GMC Good Medical Practice guidelines in that he failed to prevent misuse of the prescription and should have ensured the prescription was voided. The actions of Helen Chapman were an abuse of the system. The out of hours process was not to be used for over the counter medicines. The out of hours system was for urgent requests only. She submitted that the actions of Helen Chapman were not reported to the Fraud office; the actions of using a prescription obtained from a consultation that was cancelled on the system was a potential fraud issue. Pursuant to the relevant policies this issue should have been referred to CFS and investigated. She submitted prescriptions are legal documents. She had raised an issue of gravity and there was no evidence that advice was sought by the Respondent from NHS England. Fundamentally the Claimant submitted that there were specific legal requirements pursuant to the NICE guidelines and HC using a prescription obtained from a consultation which was quickly cancelled could be a deliberate concealment from HC's General Practitioner. The prescription should have been cancelled as soon as the consultation was cancelled. By failing to do so and allowing the Claimant to use the prescription was a danger to health and safety of Helen Chapman as an individual and Helen Chapman could have put herself at risk. Evidence was that Helen Chapman had used the out of hours service on 19 occasions. Further Helen Chapman had accessed medication from stock which was an abuse. By using a driver from the

Trust to collect medication for personal use or use of her family was an abuse of the service and could have delayed the care of others.

83. The Claimant submitted that her dismissal was unfair because the investigation was not thorough enough. Liz Eaton was biased against the Claimant because of the previous concerns the Claimant had raised which placed Liz Eaton under scrutiny. HR should have picked up on this and been alert to a conflict of interest. The Claimant submitted that she was set to fail from the start as she was not provided with full information about Helen Chapman's data protection breaches. There was a failure on the part of the Respondent to follow up her concerns raised via her public interest disclosures. The investigation was not thorough because the Respondent needed to look at her conduct in the context of the bullying and harassment she was subjected to by Helen Chapman. She submitted the sanction of dismissal was too harsh. She compared her treatment with Helen Chapman and noted that Helen Chapman was guilty of multiple breaches; her conduct had the potential of delaying patient care; the Respondent alleged Helen Chapman was demoted but there was no real evidence of this and it is not a disciplinary sanction pursuant to the disciplinary policy and by Helen Chapman accessing System 1 which has clinical records and more detailed medical information about a patient (more than Adastra), Helen Chapman had accessed a greater amount of information. The Respondent had failed to enquire whether more than one driver was being asked to collect medication for Helen Chapman.

84. The Claimant submitted the sanction of dismissal was disproportionate. By reason of the Claimant's discovery and her raising of concerns the Respondent changed its policy. The Claimant stated everything she had done was done in good faith with no ulterior motive. She has genuine concerns. She refuted the acceptance of the Trust believing that Mrs. Chapman had consent to access the system by her family; consent was specifically defined under the policy and Mrs. Chapman did not have the consent required to do what she did. Liz Eaton had described the actions of Mrs. Chapman of cashing the prescription from a cancelled appointment as "unusual" failed to reflect the gravity of what Mrs. Chapman had done. The Claimant submitted her performance had not been properly taken into account before dismissing her. She submitted she had been thrown under a bus for raising a genuine concern and had suffered professionally and financially for this.

The Law

85. Misconduct is a potentially fair reason for dismissal under section 98 (2) (b) of the Employment Rights Act 1996. It is for the employer to show that it dismissed for an admissible reason and misconduct was the reason for the Claimant's dismissal. In misconduct cases, the tribunal should first consider the three stages set out in **British Home Stores Limited v Burchell (1980) ICR 303** namely whether the employer genuinely believed that the employee was guilty of misconduct; whether the employer held that belief on reasonable grounds and whether the employer carried out a proper and reasonable investigation. The Tribunal should then consider whether it was fair to dismiss for that conduct.

86. In considering fairness and section 98 (4) of the Employment Rights Act 1996, the Tribunal is not permitted to substitute its view for the employer and decide whether it would have itself dismissed or carried out a fuller investigation; **Iceland Frozen Foods Limited v Jones (1982) IRLR 439** and **Sainsbury's Supermarkets Limited v Hitt (2003) IRLR 23.** The Tribunal must consider whether the dismissal in the circumstances of the case fell within the range of reasonable responses open to a reasonable employer (**United Distillers v Conlin 1992 IRLR 503).** Relevant factors to be taken into account prior to dismissal include the employee's length of service and past conduct

87. Inconsistent treatment by the employer towards different employees may amount to unfairness. The ACAS Code states that employers should act consistently. The EAT decided in **Hadjioannou v Coral Casinos Limited (1981) IRLR 352** that a complaint of unreasonableness by an employee based on inconsistency of treatment would only be relevant in limited circumstances including where employees have been led by an employer to believe that certain conduct will not lead to dismissal or where evidence of other cases being dealt with more leniently supports a complaint that the reason stated for dismissal by the employer was not the real reason and where decisions made by an employer in truly parallel circumstances indicate that it was not reasonable for the employer to dismiss. Employers are allowed flexibility. Where an employer consciously thinks about the two cases and makes a distinction between them the dismissal will only be unfair if there was no rational (reasonable) basis for that distinction; **Securicor Limited v Smith (1989) 356.** Further, the Court of Appeal in **Paul v East Surrey District Health Authority (1995) IRLR 305** held that where arguments based upon disparity are raised, scrutiny should be applied with care. Ultimately the question for the employer is whether in the particular case dismissal is a reasonable response to the misconduct proved. If the employer has an established policy applied for similar misconduct, it would be not be fair to change the policy without warning. If the employer has no established policy but has on other occasions dealt differently with misconduct properly regarded as similar, fairness demands that he should consider whether in all the circumstances, including the degree of misconduct proved, more serious disciplinary action is justified. An employer is entitled to take into account the nature of the conduct and the surrounding facts but also any mitigating personal circumstances affecting the employee concerned. The attitude of the employee to his conduct may be a relevant factor in deciding whether a repetition is likely. Thus an employee who admits that the conduct proved is unacceptable and accepts advice and help to avoid a repetition may be regarded differently from one who refuses to accept responsibility for his actions, argues with management or makes unfounded suggestions that his fellow employees have conspired to accuse him falsely.

88. On the basis that the Respondent has openly conceded that the Claimant made qualifying and protected public interest disclosures in good faith, the Tribunal sets out the law in relation to automatic unfair dismissal and causation.

89. Pursuant to s.103A of the Employment Rights Act 1996 *"an employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that if the employee made a protected disclosure".*

90. The employee has an evidential burden to show without having to prove that there is an issue which warrants investigation and which is capable of establishing the competing automatically unfair reason that he or she is advancing. Once the employee satisfies the tribunal that there is such an issue the burden reverts to the employer who must prove on the balance of probabilities which one of the competing reasons was the principal reason for dismissal (**Kuzel v Roche Products Limited 2008 ICR 799**; held that if an employer does not show to the satisfaction of a tribunal that the reason for dismissal was the one the reason put forward by the employer it is open to the tribunal to find that the real reason was not that put forward by the employer then it must have been that asserted by the employee.

91. Further, when the Tribunal determine the set of facts which caused an employer to dismiss the Tribunal it need go no further than to examine the reasoning of the appointed decision maker; **Royal Mail v Jhuti 2019 UKSC 55** (at paragraph 60). There is a distinction to be made between the making of a protected disclosure on the one hand and conduct which is related to the making of that disclosure on the other. To fall within section 103A, the Claimant must establish that it was the making of the disclosure itself rather than any relevant conduct which was the reason for the dismissal **Bolton School v Evans 2006 EWCA Civ 1653**.

Conclusions

92. The Employment Tribunal has first to decide whether it accepts the reason for the Claimant's dismissal advanced by the employer before turning, if it does not find a that reason to be proved, to consider whether the reason was the making of the protected disclosures.

93. The Respondent's policies make it clear that data protection breaches and breaches of confidentiality can amount to gross misconduct and an employee in breach of the procedures can be dismissed. In the circumstances, investigation was reasonably required into the Claimant's viewing of the Adastra system. The Respondent could reasonably require the Claimant to answer why she had looked at the Adastra record of Mrs. Chapman after having discovered the cancelled appointment and once she had raised it with her manager (when at this point the Tribunal finds the Claimant should have known not to look at the record again).

94. There is no dispute that the Claimant made qualifying and protected disclosures when she raised with her manager that Mrs. Chapman had (despite a cancelled medical consultation) cashed a prescription obtained from the consultation. This could pose a risk to, not only the health and safety of Mrs. Chapman because the consultation once cancelled would not be reported to her G.P,. but it may amount to fraud if the script was used following the cancellation of the consultation. In summary, the Claimant exposed a potential abuse of the system. The Tribunal rejected Liz Eaton's suggestion that the script not being cancelled after the consultation was simply "unusual". This along with the Claimant's concerns required investigation under the Trust's Whistleblowing Policy. There was no evidential trace of a whistleblowing investigation being undertaken in accordance with the Policy. The Tribunal merely heard hearsay evidence from Liz Eaton the

matter was addressed by a doctor at the Trust meeting with Mrs. Chapman because it involved a "private medical consultation". The Tribunal was not satisfied that an adequate investigation had been conducted in accordance with the Raising Concerns policy. A prescription is a legal document and it can only be used in accordance with the prescribing doctor's direction. Although from the information provided to the Tribunal, Dr. Gharbia does not appear to have been asked directly whether the prescription should have been cancelled following cancellation of the consultation, the Tribunal finds, the written note of Dr. Gharbia implicitly suggests there was an expectation that the prescription would be cancelled and not cashed by Ms. Chapman. The Tribunal were left with the strong impression that the Respondent failed to deal with the Claimant's concerns with any great investigative detail or in accordance with the whistleblowing policy. Instead, the Tribunal finds the Trust introduced new policies whereby staff members could no longer place themselves on the system so to prevent abuse.

95. The discovery of this event by the Claimant, was in the first instance whilst she was undertaking her role as a trainer and the Tribunal finds it was permissible of her to discover it in the course of her role and to check it the record in the course of her work. The Tribunal finds that the Claimant was permitted in the course of her work as a trainer to ensure that there is no abuse of the system. The Tribunal also finds that by checking the record on another occasion the Claimant was reasonably ensuring she had evidence to present in accordance with paragraph 9 of the Whistleblowing Policy.

96. However, the Claimant, then persisted in accessing the system multiple times, to check on the events list concerning Ms. Chapman which was beyond her role or normal activity of her checking role. The Claimant provided an explanation to the Respondent for accessing the records on other occasions. The Claimant described the stress she was under at this time in the context of the altercation and bullying group; she was checking to ensure she was right prior to raising a concern because some issues she had raised with management had not been dealt with. However, the Respondent and in particular, Laura Evans did not consider this was an adequate explanation.

97. The Tribunal finds the principal reason for the Claimant's dismissal was misconduct namely because the Claimant had accessed the system on a number of occasions and provided an explanation which the Respondent did not accept and in particular accessed the system having been aware on 2 February 2018 that she should not do so. The Tribunal concludes that a distinction has to be made between the making of a disclosure and the conduct which is related to the making of that disclosure (accessing the system). The Tribunal do not find it was the making of the disclosure itself (rather than any relevant conduct which was the reason for the dismissal).

98. The Tribunal now considers the fairness of the dismissal pursuant to section 98 (4) of the Employment Rights Act 1996. The Tribunal must consider whether the employer had a genuine belief in misconduct, whether the belief was based on reasonable grounds, whether the employer carried out a reasonable investigation and whether the sanction of dismissal was within the range of reasonable responses (**BHS v Burchell 1978 IRLR 379**). The Tribunal is mindful that it

cannot substitute its own view for that of the employer so that a harsh dismissal may still be a fair dismissal. The question for the Tribunal is whether the dismissal lay within the band of conduct which a reasonable employer could have adopted (**J Sainsbury v Hitt 2003 ICR 111**) and consider in the round the fairness of the procedure in the round including the appeal; **Taylor v OCS Limited 2006 IRLR 613**.

99. Fundamentally, the application of consistent disciplinary sanctions amounts to good industrial practice but allegedly similar cases must be truly similar. The question for the employer is whether in the particular case, dismissal is a reasonable response to the misconduct proved.

100. Significance was placed by Mrs. Evans on her decision to dismiss the Claimant, for gross misconduct, the number of times the Claimant accessed the system; accessed the system when told effectively not to and a rejection of the Claimant's reasons for accessing the system multiple times.

101. The treatment by the Respondent of the Claimant and Mrs. Chapman was different. The Tribunal finds that the cases of data protection misconduct bear similarities. Both the Claimant and Mrs. Chapman were experienced operatives who has been trained annually in data protection. Both individuals had interrogated patient information systems outside and beyond their permitted access. Both individuals had been told accessing patient records outside of their role was serious and wrong and despite this both individuals accessed the systems. The Tribunal does not find as Liz Eaton suggested and Mr. Bayne submitted that Mrs. Chapman had any consent to view her son's clinical records on system 1. The Tribunal finds the significant difference between the Claimant and Mrs. Chapman was that the Respondent accepted Mrs. Chapman's explanation but were unsatisfied with the Claimant's. The Respondent further accepted Mrs. Chapman's mitigation but did not accept the Claimant's asserted mitigation namely she was seeking to provide evidence to support her whistleblowing complaint; she was just checking because she was not in a good state of mind; there was a toxic/bullying environment in the team and some matters in the past she had raised were not acted on by management. In comparison the respondent accepted the mitigation provided by Mrs. Chapman that she did things without thinking and could not really provide a fuller explanation.

102. Mr. Bayne's submission that Mrs. Chapman (unlike the Claimant) was open and honest cannot be substantiated on the evidence. Mrs. Chapman's breaches were detected as a result of the Claimant's complaints and on the Respondent's interrogation of the system. She had also failed to be candid as to the number of consultation/prescriptions she had obtained via the out of hours service. The Tribunal is mindful it is not permitted to substitute its view for the employer. However, another employer may well have considered Mrs. Chapman's additional misconduct of abusing her position and the system so to use a driver to deliver some medication to her husband (rather than a patient accessing the service) and to send an offensive email to a colleague as significantly more serious than the Claimant's misconduct.

103. The Tribunal finds that there were differences between the Claimant's interrogation of the system and that of Mrs. Chapman so that the cases are not truly similar, and an employer must be permitted to be flexible in the sanctions it applies to individual cases. The Tribunal does not find that the decision to dismiss the Claimant was so unreasonable when compared to Mrs. Chapman that it must reach the conclusion that the fact the Claimant made public interest disclosures was the principal reason for the dismissal.

104. The Tribunal considers whether the decision to dismiss falls within the band of reasonable responses in the individual circumstances of this case. The Tribunal finds that the Claimant's dismissal was unfair.

105. Fundamentally, the Claimant's initial statement about the background and context of the altercation on 1 January 2018 and access to Mrs. Chapman's records revealed a bullying environment and a dysfunctional team which was poorly managed by Liz Eaton. The Tribunal finds that a reasonable employer applying its mind reasonably to the issues raised by the Claimant would have removed Liz Eaton from the investigative process due to the fact it was obvious that there was conflict in her investigating these matters. A reasonable employer considering the individual case would have paused to consider why a diligent competent employee of long standing service and an exemplary record could have acted in a manner so out of character. At the disciplinary hearing the disciplinary panel were unaware that the Claimant had raised the issue of bullying and questioned its relevance. The Claimant had accessed the system outside her remit but a reasonable employer when considering the individual case and appropriate should reasonably have considered any background and context of the misconduct.

106. Further, the Respondent failed adequately to consider as it had done for Mrs. Chapman, the mitigation available to the Claimant in this case; that fell outside the band of reasonable responses. Although, Mrs. Evans purported to take into account the Claimant's mitigation and long service her evidence was insufficiently convincing. In particular that after 4 hours of a disciplinary hearing she summarily dismissed the Claimant after an adjournment of 24 minutes. A reasonable employer faced with a competent and diligent employee would have considered the background and context of how these matters arose. The Tribunal were left with the clear impression of the existence of a clique/bullying group; poor working practices were adopted by some team members including excessive use of the internet and mobile telephones during the shift; consequent frustration on the part of the Claimant that there was failure to provide adequate service to the public; which exacerbated her conduct on 1 January 2018; the receipt of a distressing text should have placed a reasonable employer on notice that there was a failure of management to resolve these issues in a timely fashion and a failure of the manager to either be aware or to do anything about abuse of the system by operatives. The Claimant did have mitigation (like Mrs. Chapman) including that she was an employee of exemplary disciplinary record; an employee dedicated to providing a good service to the public and she was working in a difficult working environment and was under stress. The Tribunal reject the Respondent's submission that the Claimant was not that ill as she worked long hours; the evidence heard was that the Claimant always worked long hours. The Tribunal finds that the Respondent's failure to take into account

the mitigation advanced by this Claimant on the particular facts of this case fell outside the band of reasonable responses.

107. In respect of the other procedural failings the Tribunal do not find that the delay in suspending the claimant or recording the suspension meeting impacted on the fairness of the dismissal. Furthermore, the refusal to permit the claimant to attend the investigation meeting with her preferred representative did not impact on the fairness of the dismissal as indicated by the Claimant in the course of the appeal hearing.

108. The Tribunal do take into account that the Claimant had been provided with the opportunity to appeal. The Tribunal have must looked at this in the round before reaching its decision that the dismissal was unfair. Laura Kay was in an invidious position that she had been provided with findings by an investigator who should not have been investigating the issues; she had insufficient information about the context and background of the working environment of the Claimant and she had not been provided with the outcome of Mrs. Chapman's disciplinary case despite it being available; the Claimant and Mrs. Chapman were being disciplined for 1 January 2018 and data protection breaches and that she requested information about other cases. Laura Kay was therefore in some difficulty in considering the relevant issues and mitigation raised by the Claimant in her grounds of appeal. The Tribunal therefore conclude that the appeal hearing did not in the round remedy any the flaws of the disciplinary process.

109. The Tribunal finds that the Claimant was unfairly dismissed.

110. The Tribunal also find that the Claimant contributed to her unfair dismissal.

111. The Claimant was a long standing and experienced employee familiar with the data protection provisions. Her acts of persistently accessing her colleagues' records to check the record and following 12.2 discussion with her manager can be considered to be blameworthy conduct. The disciplinary policy takes such breaches seriously. The Tribunal considers that the Claimant contributed to her dismissal so that the Tribunal award a 65% deduction for contribution.

112. The Tribunal do not make a Polkey deduction. The Tribunal's findings, as set out above, means that it cannot conclude that had a different fair procedure been adopted, the Claimant would have been dismissed as opposed to receiving a formal warning.

113. The remedy hearing will take place on 7 July 2020 at 10:00 a.m.

Employment Judge Wedderspoon

Date 22 April 2020