EMPLOYMENT TRIBUNALS

Claimant: **Ms J Gittens**

Respondent: **Blenheim CDP**

Heard at: **LONDON SOUTH** **On:** **16 17 and 18 October 2017**

Before: **Employment Judge Siddall, Ms N A Christofi and Ms S J Murray**

Representation
Claimant: Mr T Killick
Respondent: Mr M Green, Counsel

JUDGMENT

1. By a majority, the claim for unfair dismissal is not well founded and it is dismissed
2. By a majority, the claims for direct discrimination on grounds of the protected characteristic of race do not succeed
3. It is the unanimous decision of the tribunal that the Claimant is entitled to damages for breach of contract in relation to three months' notice pay, the amount to be determined
4. The tribunal makes a preparation time order in accordance with rule 76(2) of the Employment Tribunal Rules of Procedure 2013, and the Respondent is ordered to pay the Claimant the sum of £264 representing eight hours.
5. A remedy hearing will take place on Monday 15 January 2018 if the parties are unable to agree on the amount due to the Claimant under paragraph 3 above.

REASONS

1. The Claimant brought claims for unfair dismissal, wrongful dismissal and direct race discrimination. We heard evidence over three days, and witnesses were Ms Sharon Daughter, Mr Lincoln, Ms Debbie Lindsay and Mr John Jolly for the Respondent. The Claimant gave evidence on her own behalf.

2. The facts we have found and the conclusions we have drawn from them are as follows.

3. The Respondent is a charity which supplies support to drug and alcohol users, their families and carers. The Claimant commenced employment in 2006 as a Project Manager. She had a break of around two years and returned as an Area Manager in 2012. She had responsibility for a team of approximately thirty people and for a budget of £1m.

4. The Claimant's team was based at the Grove Centre and they had been awarded an iPad in circumstances that were not completely clear to the tribunal. It transpired that the arrangements for the iPad with the provider were that the Respondent would not be charged for data usage for two years but that after that charges would be made. We can find no evidence to suggest that information about this arrangement was communicated to the Claimant and her team.

5. In May or June 2015 Cathy Brewis, Premises Manager, reported to the Claimant that a large bill had been received for the Grove iPad. The Claimant said that Ms Brewis told her that she had written to the provider cancelling the contract and felt therefore that the bill was a mistake. However it appears in fact that the bill for £8,523 was paid on authorisation of the Director of IT on 26 May 2015. The matter was not raised within the senior management team until around November 2015 when there was meeting at which Sharon Daughter queried this very high charge as part of a budget discussion.

6. By an email dated 5 November 2015 Sharon Daughter who was the Director of Services and Line Manager of the Claimant asked the Claimant to carry out an investigation into what had happened. On 6 November 2015 Ms Daughter emailed the Claimant attaching an investigation template and I quote from the email on page 67 of the bundle:

> "Please investigate as fully as possible. Gareth may have supporting information i.e. times of download, content etc. As well as the data download what we also need investigating is the missing iPad."

7. Ms Daughter did not at any stage send the Claimant a copy of the bill in question. The Claimant responded by email on 9 November 2015 (page 71 of the bundle) and she said:

> "Thank you for the information but unfortunately I am unable to carry out the investigation as I am responsible for the iPad being allowed to be used. I can only say I'm very sorry that such a bill was incurred but I did not know that the contract was pay as you go otherwise I would never have allowed it to be used."

   And with the same email the Claimant attached a letter of resignation.

8. The Claimant met with Ms Daughter. She explains in her witness statement that she took responsibility for what had happened as the Area Manager for the Grove as "it happened on my watch". Ms Daughter said that she did not view the Claimant's actions as suspicious in any way. She did not see any reason to ask someone else to carry out the investigation and took the view that the Claimant was simply accepting responsibility as the manager of the team. She persuaded the Claimant to withdraw her resignation.

9. On 24 November 2015 Ms Daughter and the Claimant discussed the investigation which hadn't been started and agreed that it would be completed

within ten working days from 30 November. The matter was discussed again on 5 January 2016 and Ms Daughter asked the Claimant to write up her investigation and deliver it.

10. The Claimant emailed her investigation report to Ms Daughter on 27 January 2016 although the report itself was dated 29 December 2015. As we read this document we find that it does not amount to an investigation report at all. It is essentially an attempted explanation by the Claimant of the misunderstanding over the terms of the contract and a request for better monitoring in the future. Crucially the document contained the following sentence:

> "I cannot narrow the bill charges down to any one person and do not think that it is fair that someone should carry the weight of this mistake as no-one had intentionally acted in a way that could be deemed inappropriate."

11. Ms Daughter did not consider the report to be adequate and on 29 January 2016 she commissioned Chris Campbell to carry out a separate investigation into what had happened with the iPad. On 10 February 2016 the Claimant told Ms Daughter at a supervision meeting that she had been in possession of the iPad when the charges had been incurred and Ms Daughter suggested that disciplinary action could follow. The Claimant was not suspended, but she was asked to report on the work she had done each day to her line manager.

12. Chris Campbell interviewed the Claimant on 18 February and at this point she saw the bill for the first time and she confirmed to him that the iPad had been in her possession when the charges were incurred and said that she thought that members of her family had used it.

13. Mr Campbell's report went to HR who decided that the Claimant's conduct should be considered at a disciplinary hearing. Debbie Lindsay, who was at that time Deputy Chief Executive Officer and Chief Operating Officer, conducted this process. On 7 March 2016 Debbie Lindsay invited the Claimant to attend a disciplinary hearing to consider two allegations. The first was that between the end of March and the beginning of April 2015, without permission, the Claimant had incurred over £8,000 worth of data charges on an iPad and secondly that on 29 December 2015 "you intentionally submitted a false investigation report in relation to the above data charges".

14. On 20 March the Claimant lodged a grievance. She complained about how she had been treated. She raised an allegation of race discrimination, comparing her situation with the way in which another member of staff, Liz Barter, had been treated when she had run up a large bill using a dongle belonging to the Respondent. The Claimant alleged that Liz Barter had not been either investigated or disciplined.

15. The Claimant attended a grievance hearing followed by a disciplinary hearing on 7 April 2016, both of which were conducted by Debbie Lindsay. During the disciplinary hearing the Claimant told Debbie Lindsay that she had realised that she had the iPad in her possession at the time the charges were accruing in either December 2015 or January 2016. It is important to point out that whilst the Claimant agreed that she had the iPad she doesn't take responsibility for the level of charges incurred and indeed can't understand why they were so high.

16. Ms Lindsay rejected the grievance. She took the view that Liz Barter was not an appropriate comparator as she had taken personal responsibility for the charges she had incurred immediately. She told the Claimant at the grievance hearing that Liz Barter had been given a formal warning. (It transpired after

documents relating to the grievance had been disclosed that in fact an informal warning had been issued under the first stage of the Respondent's disciplinary procedure).

17. A letter was issued on 20 May 2016 confirming that the Claimant would be summarily dismissed for gross misconduct on grounds of dishonesty and the resulting breach of trust and confidence in relation to her role as a senior manager. The Claimant appealed against the dismissal saying that the sanction was unreasonable and stating that there had been a history of discrimination against black members of staff by the Respondent.

18. The appeal was heard by John Jolly, Chief Executive Officer. He conducted a review of Debbie Lindsay's decision on 5 July 2016 but the appeal was dismissed in a letter dated 4 August 2016.

19. Our decisions in relation to those facts are as follows. We find that this matter is not clear cut at all and we have had immense difficulties in reaching our conclusions.

20. **Unfair Dismissal**

21. It is not in dispute that the Claimant was dismissed for a reason related to her conduct, which is a potentially fair reason.

22. The correct test to apply is that set out in the case of **Burchell v British Homes Stores.** Did the Respondent have a genuine belief, upon reasonable grounds and after reasonable investigation that the misconduct had occurred? And if so, was dismissal within the range of reasonable responses to that misconduct?

23. When the Claimant was asked to carry out an investigation in November 2015 she found herself in a very uncomfortable position. We find that she considered herself to be responsible for the iPad's charges, first because she was the Manager of the team and had not put in place any rules regarding it's use and secondly, because she was aware that the iPad had been in her possession at some point for a period of time and could have been used by members of her family as well as by herself to a limited extent. We accept her evidence that she could not understand how such a high level of charges could have been incurred and in fact we find that this matter has never been adequately explained.

24. As a result the Claimant felt highly conflicted and said, quite appropriately to Ms Daughter, that she didn't want to carry out the investigation. We are surprised that the Respondent did not look at this more closely or take seriously the Claimant's request that someone else did the investigation. The Claimant was clearly articulating that she was accepting some responsibility for what had happened and as a result she felt conflicted. Had they looked at the situation more closely at the time, the Claimant would not have had to produce her report and we may not have been here today.

25. We find that after Ms Daughter insisted that the Claimant carry on with the investigation the Claimant effectively put her 'head in the sand'. She could easily have resolved the question of who had been using the iPad at the relevant time by asking for a copy of the bill to establish the dates when the usage occurred but she did not do so. Instead she delayed doing anything and prevaricated when asked by Ms Daughter how the investigation was going. She simply did not want to produce the report. We find that the Claimant realised in December or January that the iPad had been in her possession

when the charges were incurred, as stated by her at the disciplinary hearing. Eventually, under pressure from her line manager, she produced her report.

26. In that report she stated that she could not pin down use of the iPad to anyone in particular. We find that was not true. Around two weeks later she told Ms Daughter that the iPad had been in her possession at the time in question.

27. When we look at Debbie Lindsay's dismissal letter, we note that her decision is partly based upon the Claimant's failure to produce an adequate report, for example the failure to use the correct template and the lack of detailed content. In fact by this point Debbie Lindsay must have realised that the Claimant should not have been asked to prepare the report at all because it was she who had the iPad at the time in question. We therefore conclude that there are some matters in the dismissal letter that should have been discounted.

28. The Tribunal as a whole was concerned that Ms Lindsay did not take this into account when she viewed the Claimant's conduct in relation to the investigation. She did not look at it through the lens of the new information that was known to her by the time she conducted the disciplinary information, namely that it was clear by that point that the Claimant had been in possession of the iPad.

29. Nevertheless, two members of the Tribunal, that is myself and Ms Christofi, find that a conclusion of dishonesty was open to Ms Lindsay in light of the contents of the Claimant's report dated 29 December 2015. We find that Ms Lindsay had a genuine belief that there had been a lack of transparency and she had grounds for this belief based on the report and the interactions between the Claimant and Ms Daughter. We further find that the process followed was fair and reasonable. The allegation of dishonesty was put to the Claimant and she had a full opportunity to answer it, but Ms Lindsay found her answers to be evasive. We also find that although there were other sanctions that could have been adopted, such as a written warning, which was considered by the Respondent, that dismissal was within the band of reasonable responses to what had happened.

30. One member of the Tribunal, that is Ms Murray, disagreed and considered there were strong mitigating circumstances, including the lack of information over the terms of the IT contract and the fact that the Claimant had not knowingly incurred the charges, and she also pointed out the great disparity of treatment between the Claimant and Liz Barter who only received an informal warning. So, by a majority, the Tribunal find that the dismissal was fair.

Race Discrimination

31. The allegations of direct discrimination were that the Claimant had been less favourably treated when she had been subjected to disciplinary action and then dismissed; and when she had been required to report to her line manager on a daily basis. Her comparators were Liz Barter and Gareth Packham.

32. When lodging her grievance the Claimant expressed her concern that she was being treated less favourably because she is black. She asserted that there have been problems with racism within the Respondent organisation which are not being addressed. We note that the Claimant made strenuous efforts to get hold of details of the investigation into Liz Barter but was told, after the Respondent had been ordered to produce this information by the Tribunal, that they could not be found.

33. The Claimant alleged in her witness statement, by way of background

evidence, that there had been a number of racist incidents occurring within the Respondent organisation. She encouraged us to infer from this that the way in which she had been treated amounted to direct discrimination.

34. We find it extraordinary that despite the fact that these allegations were included within the grounds of complaint of the Employment Tribunal application, Mr Lincoln, who is the Director of Human Resources and who has been there since 2003, professed to have no recollection of who had investigated the Liz Barter matter or what the outcome was. Nor could Mr Lincoln recall whether a collective grievance lodged by staff at the Wandsworth office had included an allegation of race discrimination, even though this had been reported in the local press. When recalled on the second day of hearing Mr Lincoln agreed that it was possible that one of the complainers at Wandsworth had made a complaint of race discrimination and had left under a settlement agreement, and he confirmed that no formal investigation into the allegations had ever been carried out. We find his apparent lack of recollection of such a high profile and serious matter quite concerning. We were not provided with a clear explanation of why a formal investigation into this complaint had not been carried out.

35. On the second day of the Employment Tribunal Hearing the Respondent produced some papers relating to the Liz Barter investigation. These revealed that Debbie Lindsay had carried out the investigation but that she had recommended that Liz Barter be given an informal warning. This is contrary to what she said in her witness statement where she indicated that a formal warning had been given.

36. None of the Respondent's witnesses deal with the Claimant's allegation of a history of race discrimination in any detail. Generally we find the Respondent's evidence in relation to the allegations of race discrimination to have been most unsatisfactory.

37. However, although there have been significant problems with the evidence, the task of the tribunal was to focus on the specific allegations of direct discrimination made by the Claimant. In relation to the specific allegation that the Claimant had been less favourably treated as a result of the decision first, to discipline her, and then to dismiss her, the majority of the tribunal find that there was a material difference between her case and that of Liz Barter in that in Ms Barter's case there had been no perception that there had been dishonesty. The assertions made by the Claimant in her witness statement about how the Wandsworth complaint was dealt with, and her other allegations of historic racism, did not lead us to draw an inference that discrimination had occurred in relation to this specific complaint.

38. We also considered whether Gareth Packham who had been the Director of IT was an appropriate comparator in relation to the Claimant's complaint of race discrimination in view of the fact that he had not been disciplined over the IT failings identified in relation to the Ipad bill. We do not find those circumstances to be comparable at all. There may well have been a failure to monitor or adequately address the contractual situation but those failings were of a completely different order to the allegations made first in relation to Ms Barter and then in relation to the Claimant.

39. One member, Ms Murray, felt that there were very strong similarities between the Claimant's case and that of Liz Barter who was also an Area Manager. She considered that the Respondent had failed to provide an adequate explanation for the difference in treatment.

40. The third allegation of direct discrimination related to the Claimant's assertion that after she had submitted her report, she had been required to report what she had done at the end of each day and this amounted to less favourable treatment. The Tribunal unanimously do not accept that assertion. We do not consider that requiring the Claimant to report to her line manager at the end of each day, as an alternative to suspension, amounted to less favourable treatment. We note that no comparator has been identified in relation to this allegation.

Breach of Contract Claim: Notice pay

41. The Claimant was summarily dismissed and brings a claim of wrongful dismissal, or breach of contract in relation to the failure to pay her notice pay. Here we have to apply a different test to that which we apply in the case of unfair dismissal, where the guiding case is the **Burchel**l case. In relation to the wrongful dismissal claim, it is necessary for the Tribunal to decide whether the Claimant was responsible for a repudiatory breach of her contract of employment.

42. First, we have noted that there is no express term in the Claimant's contract requiring her to disclose any wrong doing. We have taken account of the case of **Ranson –v- Customer Systems Plc [2012] EWCA 841** which suggests that an employee does not have the same fiduciary duty as a director, and (in the absence of an express contractual term) does not have a general duty to disclose her own wrongdoing. We think this is a significant factor in the circumstances of this case, where the Claimant was effectively asked to investigate her own conduct.

43. We have considered Mr Green's argument, first of all that there was a duty to disclose because the Claimant had a very senior position akin to that of a director and therefore a duty of candour might have been expected. We don't accept that argument. She was clearly not a member of the senior management team and we do not consider her to be comparable to a director. Second, we have considered Mr Green's contention that if an employer asks a direct question then an employee must answer it honestly. He suggests that because the Claimant was asked to carry out an investigation the duty to disclose arose, and the Claimant should have approached her employer and told them exactly what had happened.

44. We do not find the request to carry out an investigation to be quite comparable with being asked a direct question. In fact we find that the Claimant was never asked a direct question about whether she had the iPad at the time in questions, and whether she was responsible for the charges. It was the Claimant herself who disclosed her role in incurring the ipad charges to the Respondent in February 2016, having first sought to avoid the task of carrying out the investigation in November 2015.

45. We therefore find that even though there was clearly some dishonesty in the eventual report that was submitted by her, this needs to be considered in light of the principle that the Claimant was not under a duty to investigate and report her own wrongdoing, in accordance with the **Ranson** case. Ultimately it was the Claimant who came forward to accept personal responsibility for what had happened. Our conclusion is that the Claimant's conduct did not amount to a fundamental breach of her contract of employment and therefore she was entitled to her notice pay.

46. The tribunal expresses the strong hope that the amount of notice pay can be

agreed. If not, there will be a remedy hearing on 15 January 2018.

Costs

47. Finally on the question of costs, I referred above to the late disclosure of evidence relating to the Liz Barter investigation in breach of the Tribunal's Order made on 7 September 2017. The Tribunal considered making a preparation time order on its own initiative. We asked the parties to address us on that and Mr Killick requested reimbursement of eight hours at £33 an hour, which he described as time wasted in preparing to submit a case on the basis that the evidence about the investigation had not been disclosed. Mr Green suggested that we should take into account the gravity of the Respondent's default. He asserted that an honest mistake had been made but stated that the Respondent had regretted what had happened and suggested reimbursement of two hours work. We have taken those representations into account but we have noted that the Claimant had been seeking disclosure of the documentation for a considerable time. It should have been disclosed in accordance with the order of the tribunal because it was highly relevant to one of the central allegations of race discrimination in this case. The fact that it hadn't been disclosed must have added to the Claimant's suspicion that the Respondent was not being honest about what had happened and that she had suffered discrimination. The late disclosure was very unfortunate and under those circumstances we think it appropriate to meet Mr Killick's request that a preparation time order representing eight hours should be paid, and that comes to £264.

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Employment Judge Siddall

Date 1 November 2017