THE INDUSTRIAL TRIBUNALS

CASE REF: 22806/19

CLAIMANT: **Elaine McCrory**

RESPONDENT: **David Lloyd Leisure Limited**

JUDGMENT

The unanimous judgment of the tribunal is that the claimant was unfairly dismissed by the respondent.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Tiffney**

Members: **Ms C Stewart**
Mr M McKeown

APPEARANCES:

The claimant was represented by Mr Tim Jebb, Barrister-at-Law, instructed by Worthingtons Solicitors.

The respondent was represented by Ms Jennie Ferrario, Barrister-at-Law, instructed by Markel Law LLP Solicitors.

BACKGROUND

1. The respondent is a limited company which operates a chain of health, fitness and racquet clubs throughout the UK and Europe.

2. The claimant had been employed by the respondent as a General Manager of its Belfast Club. The claimant held this role for just under 12 years until she was summarily dismissed on the grounds of gross misconduct on 9 August 2019.

THE CLAIM

3. The claimant lodged a claim in the Industrial Tribunal on 2 October 2019 alleging that her dismissal was procedurally and substantively unfair. The claimant's central complaint was that the sanction of dismissal was unduly harsh, unfair in all of the circumstances and fell outside the band of reasonable responses.

THE RESPONSE

4. The respondent contended there had been a fair and reasonable investigation into the alleged misconduct, a fair disciplinary procedure, the claimant was guilty of gross misconduct and her dismissal was therefore within the band of reasonable responses. Within its response the respondent also pleaded that in addition, or in the alternative, the claimant was dismissed for some other substantial reason. However the list of agreed issues made no reference to this ground and it was not an argument advanced by the respondent in its evidence or submissions to the tribunal at the hearing. The respondent wished the tribunal to consider the reduction of any award on the grounds of "Polkey" and contributory fault.

CASE MANAGEMENT

5. There were four Case Management Preliminary Hearings ("CMPH"). At the first CMPH on 28 January 2020 the case was listed to be heard in April 2020. However, owing the pandemic and its impact on the tribunal's ability to conduct hearings, the full hearing was postponed on two occasions in 2020. The hearing was listed for 14-16 June 2021 and proceeded as an in-person hearing on those dates in Adelaide House, Belfast.

6. Following a CMPH on 24 March 2020, an application was made by the claimant, to which the respondent consented, that the full hearing address only the issue of liability with a separate hearing on remedy to be listed thereafter, if appropriate. The tribunal granted that application and the hearing proceeded on that basis.

ISSUES

7. The tribunal had the benefit of a set of agreed issues. The issues related to liability were as follows;

    i. What was the principal reason for dismissal? The respondent asserts that it was a reason relating to the claimant's conduct (Section 130(2)(b) Employment Rights (Northern Ireland) Order (ERO) 1996).

    ii. Did the respondent have a genuine belief in the misconduct and was this the reason for dismissal?

    iii. Did the respondent hold that belief in misconduct on reasonable grounds?

    iv. Did the respondent conduct a reasonable investigation?

    v. Was the dismissal fair or unfair in accordance with Section 130(4) ERO 1996?

    vi. Was the decision to dismiss a sanction within the "band of reasonable responses" of a reasonable employer?

SOURCES OF EVIDENCE

8. The tribunal considered all documents referred to in the agreed hearing bundle.

9. The witness statement procedure was used in this case. Each witness swore or

affirmed to tell the truth, adopted their witness statement as their evidence and moved immediately to cross-examination and where appropriate, brief re-examination. A number of witnesses gave further evidence following questions from the tribunal.

10. The claimant gave evidence on her own behalf. Evidence was also given on the claimant's behalf by Ms Kelly Spiers (nee Martin).

11. The following witnesses gave evidence on behalf of the respondent:-

    (1) Mr Russell Ormerod, Regional Manager, who conducted the disciplinary investigation and disciplinary investigation meetings.

    (2) Ms Michelle Chambers-Cran, Regional Manager, who conducted the disciplinary hearing and took the initial decision to dismiss the claimant.

    (3) Mr Matthew Leggatt, Head of Property and Maintenance, who dealt with the appeal from dismissal.

12. The tribunal sat from 14-16 June 2021. At the conclusion of the evidence, the parties exchanged and lodged written submissions and gave oral submissions.

THE LAW

Unfair Dismissal

13. Article 130 of the Employment Rights (Northern Ireland) Order 1996 ("the ERO") in so far as is relevant and material provides:-

> *"130-(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
>
> *(a) the reason (or if more than one, the principal reason) for the dismissal and*
>
> *(b) that is either a reason falling within paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) a reason falls within this paragraph if it –*
>
> *(b) relates to the conduct of the employee,*
>
> *(4) where the employer has fulfilled the requirements of paragraph (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources*

of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

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

14. The proper approach for an Employment tribunal to take when considering the fairness of a misconduct dismissal is set out by the Court of Appeal in ***Rogan v South Eastern Health & Social Care Trust [2009] NICA 47***. The Court of Appeal in ***Rogan*** approved ***Dobbin v Citybus Ltd [2008] NICA 42*** where the Court held:-

*"(49) The correct approach to [equivalent GB legislation] was settled in two principal cases – **British Home Stores v Burchell [1980] ICR 303** and **Iceland Frozen Foods Ltd v Jones [1983] ICR 17** and explained and refined, principally in the judgements of Mummery LJ, in two further cases **Foley v Post Office** and **HSBC Bank PLc (formerly Midland Bank) v Madden reported at [2000] ICR 1283** (two appeals heard together) and **J Sainsbury v Hitt [2003] ICR 111**.*

*(50) In **Iceland Frozen Foods**, Browne-Wilkinson J offered the following guidance:-*

"Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by [equivalent GB legislation] is as follows:-

(1) the starting point should always be the words of [equivalent GB legislation] themselves;

(2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another;

(5) the function of an industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell

within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair."

(51) To that may be added the remarks of Arnold J in ***British Home Stores*** *where in the context of a misconduct case he stated:-*

"What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, it must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would themselves have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure", as it is now said more normally in a criminal context, or, to use the more old fashioned term such as to put the matter beyond reasonable doubt. The test, and the test all the way through is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion."

15. The Court of Appeal in Northern Ireland further examined the approach that a tribunal should adopt in claims of unfair dismissal in the case of ***Connolly v Western Health & Social Care Trust [2017] NICA 61***. Both counsel cited this judgment in their written submissions. The tribunal found this judgement of particular relevance as like the present case, ***Connolly*** concerned the summary dismissal of an employee for a first offence. Again, like this case, the issue in contention was whether the misconduct had been sufficiently serious to ground dismissal for gross misconduct.

16. The case was the subject of two separate appeals to the Court of Appeal but the references herein are to the later appeal which is the appeal referred to by both

counsel and is of relevance to this case. The majority of the Court of Appeal in ***Connolly***, Deeny LJ and Weir LJ in concluding that the decision of the respondent to dismiss the claimant, in all the circumstances of the case, was not a decision which a reasonable employer could reasonably have reached emphasised that the statutory test of unfairness in Article 130 of the 1996 Order should be applied as a whole. In doing so, Deeny LJ stated (at paragraph 8) that:-

> "*Reaching a conclusion as to whether the dismissal is fair or unfair "in accordance with equity and the substantial merits of the case" as required by Article 130(4)(b) would appear to involve a mixed question of law and fact*".

17. Deeny LJ reflected on the legal principles that apply when a tribunal is assessing the reasonableness of an employer's decision making. In doing so Deeny LJ referred to the decision of the Court of Appeal in England in the case of ***Laws v London Chronicle Ltd [1959] 2 All ER 285*** which considered whether an employee was unfairly dismissed having been summarily dismissed for an act of disobedience. The Court of Appeal determined that the tribunal at first instance was right to hold that the dismissal was unfair. Deeny LJ described the judgment of strongly persuasive authority in this jurisdiction and quoted, with emphasis, a passage from the judgment of Lord Evershed M.R. who having reviewed older authorities, concluded (at page 288);

> " *I do, however, think (following the passages which I have already cited) that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and for that reason, therefore, I think that one finds…..that the disobedience must at least have the quality that it is "wilful"; it does (in other words) connote a deliberate flouting of the essential contractual conditions."*

18. In reaching the majority decision, whilst Deeny LJ endorsed the "band of reasonable responses" interpretation of Article 130(4)(a) of the ERO, he emphasised that tribunals must apply the statutory test as a whole. In essence the reasonable responses approach must be applied alongside Article 130(4)(b) which of "*equal status*" and requires a decision to be determined; "*in accordance with equity and the substantial merits of the case."* Deeny LJ further noted that in applying this test he did not see how one could properly consider the equity and fairness of the decision without considering whether a lesser sanction would have been the one that right thinking employers would have applied to a particular act of misconduct.

19. Whilst the claimant admitted to the misconduct in the present case, an issue for determination is whether the respondent in categorising the misconduct as gross misconduct and/or in reaching its decision to dismiss the claimant, took into account any matter that could not reasonably fall within the scope of the singular disciplinary charge as framed. The tribunal considers the following principles of natural justice and fairness of particular relevance to this case;

    i. An essential requirement of a fair disciplinary procedure is that the employee knows the case he/she has to meet.

ii. The obligation is on the employer to put that case in a clear way, so that on a common sense reading of the relevant documents an employee can reasonably be expected to know what charge or charges he or she has to address. If the employee has to speculate then that obligation has not been fulfilled.

iii. An employee should hear or be told the important pieces of evidence in support of the case against them and be given an opportunity to challenge that evidence and adduce his/her own evidence and argue their case.

20. Section 1 of the 2011 Labour Relations Agency Code on Disciplinary and Dismissal Procedure (the Code) provides guidance regarding disciplinary procedures. In ***Lock v Cardiff RYL Co. Ltd [1998] IRLR 358***, the EAT (Morison J presiding) emphasised that Industrial Tribunals should always have regard to the provisions of the Code even when the parties themselves do not make reference to it. The tribunal found the following extracts of particular relevance to the present case.

21. Paragraph 5 of the Code endorses the drawing up and referencing of a disciplinary procedure to:-

> "*Help employers deal with disciplinary issues in a fair and consistent manner*."

22. If following a disciplinary meeting the employer decides to uphold the allegation, the Code states that the employer must decide if disciplinary action is justified and what form that action should take. At paragraph 20 the Code goes on to state:-

> "*Before making any decision the employer should take account of the employee's disciplinary and general record, length of service, actions taken in any previous similar case within the organisation, the explanations given by the employee and most important of all, whether the severity of any intended disciplinary action is proportionate and reasonable in all the circumstances. In considering the circumstances employers should take account of, in particular, the extent to which standards have been breached*".

23. Paragraph 63 the Code provides:-

> "*When drawing up and applying procedures, employers should always bear in mind the requirements of natural justice – employees should be given the opportunity to challenge the allegations before decisions are reached*".

24. Paragraph 65 the Code emphasises the importance that everyone in the organisation understands the Disciplinary Procedures.

RELEVANT FINDINGS OF FACT

25. Based on the sources of evidence referred to at paragraphs 8 – 12 above, the tribunal found the relevant facts proven on the balance of probabilities. This judgment records only those findings of fact necessary for determination of the issues and does not record all the competing evidence.

26. The claimant was employed as General Manager of the respondent's Belfast club ("the Club") from 12 September 2007 until 9 August 2019 when she was summarily dismissed on grounds of gross misconduct. At the material time the Club was busy having approximately 5,000 members. It was and is the only Club owned by the respondent located in Northern Ireland. The respondent has approximately 98 other Clubs throughout the UK.

27. In her role the claimant managed 77 staff and reported to a Regional Manager, Michelle Chambers-Cran who was based in Scotland.

28. Given the nature of the respondent's business the health and safety of all of its users, visitors and staff is of paramount importance to the respondent. The respondent's Health and Safety ("H&S") Manual details the specific responsibilities of General Managers with regards to health and safety. In terms of overall responsibility, General Managers are "*Accountable for Health and Safety at the Club"*. During her employment, the claimant received training in the in the Club's H&S requirements, including specific training for General Managers. Other key personnel have specific health and safety responsibilities which are set out within the manual. They are the Club's H&S Officer (Operations Manager/Facilities Manager/Health and Safety Manager) and Maintenance Technician.

29. The respondent requires each Club to carry out health and safety checks on a daily, weekly and monthly basis. The relevant checks for the purpose of this claim are the weekly "prime" checks. These are physical checks (comprising of 9 operational and 18 maintenance checks) required to be carried out to ensure H&S compliance and the safe running of the Club. Once completed, the results are required to be entered electronically on the Prime Safety H&S Monitoring form (hereinafter referred to as the "weekly prime safety check") and submitted to the respondent. Any defects or failed checks are picked up by the respondent's Regional H&S Manager, Ms D Wright, who would highlight these matters to the Club's H&S Manager and the claimant, as General Manager.

30. Whilst the weekly prime safety check is recorded and submitted electronically, the results of each of the physical checks are either recorded electronically or on paper files. Therefore, the person completing the weekly prime safety check, prior to doing so, must be satisfied that there is an audit trail, i.e. that each check and the result has been logged electronically, or the paper file updated, as appropriate.

31. The respondent's working week runs from Friday to Thursday. The deadline for submission of the weekly prime safety check was disputed. The claimant maintained it was by close of business on Wednesday and the respondent, by close of business on Thursday. The significance of this point is that on the week in question the claimant asserted she felt under pressure to submit the weekly prime safety check on Wednesday evening rather than Thursday. The tribunal finds that whilst the official deadline was by close of business on Thursday, in practical terms, the culture within the respondent was such that there was a strong expectation that the weekly prime safety check be submitted by close of business on Wednesday. Thus the tribunal finds it reasonable that the claimant felt under pressure to complete the task by Wednesday evening. Our reason for so finding is because slides of a presentation to the respondent's General Managers for Scotland and North East, on 19 February 2019 record that the prime weekly checks should be competed "*no later than Wednesday*". In addition, the Regional H&S Manager

contacts H&S Managers on Wednesdays to remind them to submit the weekly prime safety check. It was also common case that compliance with this deadline was best practice as it allowed for a 24 hour period during which the Regional H&S Manager could raise any issues of non-compliance or mistaken entries with the Club's H&S Manager and/or General Manager and be addressed before the end of the week.

32. Throughout the hearing the respondent placed significant emphasis on the undisputed fact that as General Manager the claimant was accountable for H&S at the Club with ultimate responsibility for ensuring that weekly prime checks and the on-line weekly prime safety check were completed and submitted within the deadline. Whilst accepting this fact, the claimant maintained that in practical terms, she did not carry out these tasks and that prior to the week of 5 – 11 July 2019, she had not carried out prime checks or completed and submitted the on-line weekly prime safety check. The tribunal accepts this was the case as it is consistent with the respondent's H&S manual. It prescribes that the General Manager delegates the responsibility for ensuring that these checks were completed to the Club's H&S Officer and the responsibility for carrying out and recording the checks, to the Club's Maintenance Technician.

33. The Club's weekly checks and weekly prime safety check were almost always completed by the Club's Maintenance Technician, Mr D Thompson (also referred to herein as "Dee"). At the material time Mr Thompson had worked in the Club for 17 years. It was not disputed that Mr Thompson was an extremely dedicated member of staff, regularly coming in on annual leave to complete the relevant checks. It was also common case that the Club consistently scored 100% compliance in these prime weekly checks. Completion of the prime weekly checks are overseen by the various Heads of Department within the Club. At the material time, following management restructuring, oversight for this task had transferred from the Club's Member Experience Manager, Ms S Johnston, the claimant's Deputy, to a newly appointed Health and Safety Manager, Ms K Martin who was still in training. Ms Johnston had previously been Operational Manager for 8 years.

THE INCIDENT

34. On Wednesday 10 July 2019 at approximately 5.13 pm the claimant completed the Club's on-line weekly prime safety check for the week of Friday 5 –Thursday 11 July 2019.

35. The claimant had cause to do so as the other two senior managers, (one of whom was Ms S Johnston) were on annual leave and three new Heads of Department, (one of whom was Ms Martin), were in England on a two-day induction training programme (on 10 & 11 July). The claimant had authorised all of these absences on the basis that she and Mr Thompson were on duty and would be able to cope with the demands of running the Club. However Mr Thompson's father sadly passed away on Sunday 7 July 2019 and Mr Thompson was consequently on compassionate leave.

36. The unexpected absence of Mr Thompson left the claimant under resourced should any out of the ordinary operational issues arise. Two such issues arose. Firstly, issues with the respondent's pool plant meant that a significant amount of the claimant's time was taken up on 8 and 9 July 2019 trying to resolve these issues

and keep two of the respondent's pools open. Whilst the claimant was a trained Pool Plant Operator (PPO), Mr Thompson was a much more experienced PPO as part of his job was to maintain the swimming pool plant and complete all required maintenance health and safety checks. Furthermore, on 10 July 2019 the claimant had to deal with a collapse of the ceiling the in hair salon caused by issues with the respondent's Combined Heat and Power (CPH) Unit. The geography of the Club meant that there were no neighbouring clubs from which the claimant could draw on personnel for immediate hands-on assistance or support with these operational issues.

37. The claimant consistently maintained throughout the disciplinary process that the above mentioned factors placed her under significant pressure over the days leading up to and including the day she completed the weekly prime safety check. The respondent disputed this at the hearing. However the tribunal finds that at the material time the respondent accepted that the claimant was under significant work pressure. This is because comments made by two of the respondent's witnesses at the time, support this finding. Mr Ormerod described the week in question as "*a hell of a week*" (during his investigation meeting with Ms S Johnston on 18 July 2019) and Mr Leggatt described the circumstances as "*exceptional*" (in the appeal outcome). Whilst the claimant did not raise any issue with her Regional Manager, Ms Chambers-Cran about her ability to cope at this time, by any objective assessment, it was a challenging time for the claimant.

38. The claimant managed to keep the two swimming pools open and resolved the issue with the CHP unit on the afternoon of 10 July 2019. At some point on the afternoon of 10 July 2019 the claimant took a call from Ms Martin, who in her role as Health and Safety Manager reminded the claimant that the weekly prime safety check should be completed by close of business that day.

39. On completing the on-line weekly prime safety check, the claimant entered "pass" as the result of the fire alarm test. Throughout the disciplinary process and at the hearing, the claimant consistently maintained that this was a mistake. The claimant accepted she had relied on her mistaken belief that she heard the fire alarm test that week and had neither carried out the fire alarm test or checked the paper record which records the tests (known as the HS15) when she entered pass for this prime check. When making this entry, the claimant ticked "*OK*" to a prompt on the on-line check which stated; "*Are you sure that all checks have been passed? A false declaration could result in disciplinary action*." The other option as a response to this prompt was to tick "*Cancel*". As it transpired the fire alarm had not been tested that week. The tribunal finds it significant that the wording of the prompt indicates that disciplinary action, whilst a clear possibility, is not inevitable.

40. On her return to work on Friday 12 July 2019, Ms Martin checked to see if the prime weekly checks had been completed. In doing so Ms Martin noted that tests had been signed off as completed on-line but the paperwork recording the performance of the fire alarm and legionella tests were not completed, which suggested that these tests had not been carried out for the week in question. Ms Martin mentioned this matter to Ms Johnston who advised her to pick the issue up with the Regional H&S Manager, Ms D Wright when she visited the Club on 15 July 2019.

41. Ms Martin duly did this and Ms Wright raised the issue with Ms Chambers-Cran who asked Ms Wright to investigate further by contacting the fire alarm company as it

also records when each fire alarm is tested. Having done so, Ms Wright reported to Ms Chambers-Cran that the fire alarm had not been checked during the week of 5-11 July 2019. Ms L Saunders, the respondent's HR Business Partner and Mr R Ormerod, a Regional Manager were travelling to the Club on 18 July 2019 to interview staff regarding a grievance so Ms Chambers-Cran asked Mr Ormerod to investigate the matter and outlined the situation to Mr Ormerod based on the information that had been passed to her by Ms Wright.

DISCIPLINARY INVESTIGATION

42. Based on the facts set out in this section, the tribunal's criticisms of the disciplinary investigation are threefold:

    i. The only prime safety check that fell within the scope of the singular disciplinary charge arising from the investigation was the fire alarm test. This was because the Investigating Officer limited the investigation's remit to the fire alarm test despite being aware that the claimant signed off on other checks when she was not certain they been carried out. The claimant's approach to these other checks was a serious matter which on further investigation could have resulted in other checks falling within the scope of the disciplinary charge, or could have formed the basis of a separate disciplinary charge. No additional charge was advanced.

    ii. As the disciplinary charge related to one prime safety check, the use of plural language was not warranted. It had the effect of misleading the claimant into believing that it had been established that other weekly prime safety checks had not been carried out when this was not the case.

    iii. The use of plural language was a serious procedural error which offended the principles of natural justice. It meant that the claimant was not clear about the case she had to meet and injected confusion into the disciplinary process with fatal consequences for the fairness of the decisions to dismiss the claimant at first instance and on appeal.

43. The investigation was carried out by Mr R Ormerod, the respondent's Regional Manager for the North-West. Mr Ormerod was accompanied by Ms L Saunders, HR Business Partner at all of the investigatory meetings.

44. On 15 July 2019 the claimant received an invitation from Ms Saunders to attend a grievance meeting with herself and Mr Ormerod at 11.30 am on 18 July 2019. The claimant understood this meeting to be about a grievance that had been lodged by a member of staff. That grievance meeting did not proceed and instead Ms Saunders and Mr Ormerod conducted an investigatory meeting with the claimant under the respondent's disciplinary procedure.

45. Mr Ormerod and Ms Saunders met with the claimant, Ms S Johnston and Ms L Martin on 18 July 2019 and a follow up meeting (by telephone) with the claimant on 26 July 2019. These meetings were minuted and the attendees were given an

opportunity to comment on their accuracy.

46. The claimant complained that the fairness of the disciplinary investigation was undermined due to the fact that she was not given prior notification of the first investigatory meeting, or the issues to be discussed and attended the meeting under the misapprehension it was a grievance meeting. However, the tribunal is satisfied that these facts had no material impact on the fairness of the investigation. This is because the claimant conceded in cross-examination that they made no difference to the responses she gave to the questions asked at that meeting. Also the explanation given by the claimant for entering "pass" for the fire alarm safety check (see paragraphs 39 & 47) was consistent throughout the disciplinary process and her evidence to the tribunal. Furthermore, a follow-up investigatory meeting was held on 26 July 2019, after the claimant had been given a copy of documents gathered during the investigation which provided the claimant with a further opportunity to respond to the issues raised.

47. The claimant openly accepted that she had entered "pass" for the fire alarm test without carrying out the test herself or checking the paper file to see if it had been tested. The claimant explained that she had heard the fire alarm being tested that week but had erroneously thought that she heard the test on Friday 5 July, i.e. at the start of the respondent's week when in fact she had heard it on Thursday 4 July, i.e. at the end of the respondent's preceding week. The claimant accepted that instead of relying on this belief, she should have checked the HS15 Book but conceded that she did not know where it was kept. The claimant referred to the fact that she was having a difficult week with Mr Thompson on compassionate leave and was really busy over 8 – 10 July with the pool plant issue and the ceiling collapse in the hair salon. The notes of the meeting with the claimant on 18 July 2019 refer to the legionella test. In her evidence to the tribunal the claimant asserted that she mentioned this check during this investigatory meeting. The tribunal is satisfied that this was the case as the minutes record that Mr Ormerod asked; "*You mentioned Legionella?"* In response the claimant replied:

> "*I read through and most I had done as I was doing maintenance all week. I did not know how to do some of them and I thought Dee would have done them when he was in, he does them every week*".

48. The claimant did not condone her actions, fully accepted that her H&S training was up to date but noted that in her 12 years as General Manager she has never had to carry out the weekly prime checks as this has always been done by Mr Thompson, or in his absence, a former Operations Manager or Ms Johnston. These facts were confirmed by Ms Johnston in her interview with Mr Ormerod.

49. The tribunal finds that it was not clear what matter or matters were the subject of Mr Ormerod's investigation. Consistently throughout the contemporaneous notes of Mr Ormerod's investigatory meetings with those interviewed, Mr Ormerod refers to checks that were not carried out. The use of plural language suggests that the investigation concerned more than one check. However the only check mentioned in the notes of the investigatory meetings in any level of detail is the fire alarm check. The only specific check discussed with Ms Johnston, according to the minutes, was the fire alarm test. The notes of the investigatory meeting with Ms Martin record that to her knowledge the fire alarm hadn't been tested on the week in question but was signed as done and the paperwork had not been completed for

the legionella check.

50. Mr Ormerod informed the claimant at the end of the first investigatory meeting on 18 July 2019 that she was suspended pending conclusion of his investigation. The minutes of this meeting read:

> "*Unfortunately given the severity of the allegations and the fact that you admitted to signing checks off without knowing they had been done, I have no alternative but to suspend you from the business until I conclude my investigations*."

This suggests that the scope of the investigation had broadened to consider the claimant's state of knowledge in relation to the other checks she mentioned as having signed off on the assumption that Mr Thompson had carried them out. However Mr Ormerod's letter to the claimant of 19 July 2019 confirming her suspension, refers only to the original concern that she had signed off prime weekly checks which had not been carried out.

51. The tribunal finds it significant that the minutes of the second investigatory meeting with the claimant on 26 July, record that the claimant showed insight into her wrongdoing and stressed that her error was not intentional. The claimant repeatedly asserts that in signing off the prime safety checks she believed that the checks had been done. When asked if the same situation happened again what would be her process, the tribunal finds that the claimant showed insight by stating; "*I would 110% tell Michelle*." The claimant fully accepted that she was accountable for health and safety within the Club, but reiterated:-

> *"I just didn't sign them off intentionally knowing I was being fraudulent, I believed that were compliant"* (sic).

52. On the same date of the second investigation meeting with the claimant, Ms Saunders issued a letter to the claimant referring to the investigation conducted by Mr Ormerod and inviting her to attend a formal disciplinary meeting. The claimant was informed of her right to be accompanied at the disciplinary meeting by a colleague or a trade union representative and that the potential outcome of the disciplinary meeting could be her summary dismissal. The letter outlined that the purpose of the meeting was to;-

> *"discuss allegation of potential gross misconduct. Specifically the allegation relates to:-*
>
> - *Breach of Health and Safety process and procedure, specifically that on 10 July 2019 you signed off Prime weekly checks as completed when they had not been carried out".*

53. On a plain reading of the disciplinary charge the tribunal is satisfied that the scope of the disciplinary charge was limited to prime checks signed off by the claimant as completed which had not been carried out. The tribunal finds that Mr Ormerod chose to limit the scope of his enquiry regarding this allegation to the fire alarm test, despite the claimant and Ms Martin referencing the legionella test. This is because Mr Ormerod conceded on cross examination that his investigation focused on the fire alarm test as this was the matter he regarded as most serious. Mr Ormerod

further conceded that he did not know whether the legionella test was completed or not on the week in question and could not point to any documentary evidence to determine this issue. No new information was put to the claimant about the legionella check or any other check at the follow up investigatory meeting on 26 July 2019. Consequently the tribunal finds that the respondent's investigation identified only one check that was not carried out, namely the fire alarm test and by implication, this was the only check that fell within the ambit of the disciplinary charge.

54. The tribunal finds the claimant's voluntary acknowledgement that she had signed off other checks, specifically mentioning legionella, based on her assumption that Mr Thompson had carried them out, whilst it spoke to her honesty, was a serious matter which had formed part of the basis for the decision to suspend the claimant. Had that matter been investigated, more checks may have fallen within the disciplinary charge advanced. Alternatively the matter could have formed the basis of a separate disciplinary charge. However it was not investigated and no separate charge was advanced. The tribunal is clear that it is for the respondent to determine what matter or matters are brought forward for consideration under its disciplinary procedure. The respondent is a relatively large organisation with a specific policy dedicated to H&S and a detailed disciplinary procedure which sets out examples of each category of misconduct that include breaches of company and statutory H&S provisions. It also has HR support. It is not for this tribunal to speculate why the respondent only brought forward the claimant's conduct in relation to the fire alarm test. The relevant fact is that it did so, a fact which the decision makers at first instance and appeal both acknowledged in their evidence to the tribunal (see paragraphs 62 & 78).

55. The language used in the disciplinary charge is plural. The tribunal finds this to be a significant procedural error which injected unnecessary confusion into the disciplinary process. It misled the claimant as it suggested that the disciplinary charge related to more than one check when it related only to the fire alarm test. It also gave scope for other checks to be wrongly taken into account by the subsequent decision-makers when they did not form part of the charge and thus had not been put to claimant as part of the case against her.

56. Mr Thompson was not interviewed by Mr Ormerod. The claimant asserted that he should have been and that failure to do so was a flaw in the investigation. However, on the facts, the disciplinary charge related only to the fire alarm test. As the claimant admitted the charge and given the documentary evidence that the test had not been carried out on the week in question, the tribunal is satisfied that it was not necessary for Mr Thompson to be interviewed in relation to this matter.

DISCIPLINARY HEARING

57. From the facts found in this section, the tribunal identified a number of flaws in the disciplinary hearing and outcome which fatally undermined the fairness (procedural and substantive) of the decision to dismiss the claimant. In summary the key flaws were:

    i. The reason (or principal reason) for the decision to dismiss was rooted in claimant's conduct in relation to three prime safety checks. However only one of these checks (the fire alarm test) formed the basis of the case against

her. This was a critical error which offended the principles of natural justice and was procedurally unfair.

ii. When considering sanction, the decision maker wrongly believed that dismissal was the only sanction permissible for gross misconduct, under the respondent's disciplinary policy. This was a procedural error which caused the decision maker to wrongly fetter her discretion on the question of sanction. By implication all of the relevant circumstances, including the fact the claimant's conduct was not deliberate or malicious and the many compelling mitigating factors advanced by the claimant were not taken into account by the decision maker when considering sanction. This fatally undermined the procedural and substantive fairness of the decision to dismiss.

iii. The flaws at i and ii above, gravely undermined the fairness and reasonableness of the conclusion that the claimant's conduct encapsulated within the disciplinary charge, amounted to a fundamental breach of the contract of employment warranting dismissal.

58. The disciplinary hearing took place on 9 August 2019 and was chaired by Ms Chambers-Cran. Ms Chambers-Cran was accompanied by Emma Johnston, HR Business Partner who in her evidence to the tribunal described Ms Johnston as a note taker.

59. One of the claimant's arguments of procedural unfairness was that the documentation sent to her in advance of the disciplinary hearing omitted to include an email from Ms Wright to Ms Chambers-Cran dated 16 July 2019 in which Ms Wright reports that both Ms Martin and Ms Johnston informed her that the claimant had completed the weekly prime safety check and passed everything without carrying out the checks. Whilst this omission was unfortunate, it was rectified before the appeal hearing. The tribunal finds the document had little, if any, relevance to the disciplinary hearing given the substance of the disciplinary charge and the claimant's admission to same.

60. At the hearing the claimant admitted to the charge (specifically, the fire alarm test) and again volunteered information about other specified checks which she signed off as having passed without knowing if they had been carried out and acknowledged this was wrong. The minutes record:-

> *"I came in Thursday and was sure the fire check had been done, I heard the bells go, I am sure it was done, I done the pool checks the only thing I wasn't sure of was Legionella and the balance tank that Dee had completed. He has been doing them for 17 years every week. I wasn't going to call him whilst at the undertaker. I just assumed which I know was wrong."*

The tribunal concludes that the claimant referenced these other checks because she was unclear whether, in addition of the fire alarm check, other checks were relevant to the disciplinary charge. The tribunal finds that the use of plural language was the most likely and understandable cause of this confusion.

61. Additionally, the disciplinary outcome letter referred to plural checks and expressly referenced the legionella control test. In this letter Ms Chambers-Cran stated that a

reason why she did not regard the claimant's explanations as satisfactory was because:-

> *"You admitted to signing off the checks with the knowledge that you were signing them as complete when you did not check or know that all the checks had all been physically completed." (Tribunal's emphasis).*

62. In cross-examination, Ms Chambers-Cran indicated she was referring here to the legionella and water balance tests referenced by the claimant at the disciplinary hearing. The claimant maintained that the water balance check had been carried out and she assumed that the legionella check would have been carried out by Mr Thompson when he'd been in the Club that week. After the disciplinary hearing Ms Chambers-Cran ascertained that the water balance test had been carried out. She did not find out whether the legionella test had been carried out but believed this test was still relevant as the claimant did not know how to carry out this test. In response to questioning from the tribunal, Ms Chambers-Cran confirmed that the singular disciplinary charge put to the claimant related to the fire alarm test. Despite this Ms Chambers-Cran confirmed that the claimant's approach to the legionella and water balance tests were relevant to her decision-making. On the facts these matters were not pursued by the Investigating Officer and crucially did not form part of the disciplinary charge. The charge related to checks signed off as completed "*when they had not been carried out*". There was no evidence that the legionella test had not been carried out and the water balance test had been carried out. Therefore the tribunal finds that it was not reasonable or fair for Ms Chambers-Cran to take these matters into account when determining the category of misconduct or in determining the appropriate sanction.

63. On the category of misconduct Ms Chambers-Cran categorised the claimant's actions in the outcome letter as gross misconduct on two counts;

> *"Negligent by falsification of records and also negligent by breaching company health and safety provisions."*

Both counts are expressly cited within the respondent's disciplinary policy under the category of gross misconduct.

64. The claimant took issue with this categorisation of her conduct. However, the tribunal finds that it was permissible for the respondent to categorise the claimant's conduct as gross misconduct given that negligent falsification of records and negligent breaches of health and safety provisions are cited in the respondent's disciplinary policy as gross misconduct. Moreover the claimant fully accepted that health and safety was a paramount consideration for the respondent's operations. However, in applying this categorisation Ms Chambers-Cran, by her own admission took into account the water balance and legionella tests. The tribunal finds that whilst this was a procedural flaw which undermined the categorisation of the misconduct, it was not a critical flaw as the disciplinary policy clearly states that gross misconduct can relate to one single incident.

65. However the tribunal finds that the fairness of the decision to dismiss the claimant was fatally undermined by the conflation of the claimant's admitted conduct in relation to the fire alarm test and her admissions in relation to the legionella and water balance checks. The basis for this finding is that, on an objective analysis of

the disciplinary outcome letter and the evidence of Ms Chambers-Cran, the tribunal concludes that the claimant's conduct in relation to all three checks were material to the decision to dismiss the claimant. Ms Chambers-Cran's reasoning in the outcome letter for her conclusion that dismissal was the appropriate sanction, is such that it is impossible to separate her findings regarding the fire alarm test from her findings regarding other checks (i.e. legionella and water balance). The matters are so intertwined that the tribunal finds that the reason (or principal reason) for the decision to dismiss the claimant was her conduct in relation to the fire alarm and the legionella and water balance checks. As the claimant's conduct in relation to the latter two checks did not fall within the scope of the disciplinary charge, they were not part of the case against the claimant. Therefore the fact that these matters were a material factor in the decision to dismiss offended the principles of natural justices and critically undermined the procedural fairness of the decision to dismiss the claimant.

66. Another point of relevance to the issue of sanction is that at the relevant time, the tribunal finds that Ms Chambers-Cran accepted the claimant's explanation that she had signed off the fire alarm test due to a genuine but mistaken belief that she heard the fire alarm being tested on the week in question – i.e. that her conduct was due to negligence, not any deliberate omission on her part. This is significant. Misconduct caused by a deliberate act or omission is clearly more serious than misconduct that was unintentional but rather caused by negligence. By necessity this distinction is relevant to the question of sanction. In her evidence to the tribunal Ms Chambers-Cran classified the claimant's falsification of records as a deliberate act. However the tribunal does not accept that that was the case. The respondent's disciplinary policy, under the section dealing with gross misconduct, expressly distinguishes between deliberate and negligent falsification of records and breach of company or statutory health and safety provisions respectively, i.e. the conduct can be "*deliberate or negligent*" (Tribunal's emphasis). They are alternatives. Therefore, the tribunal finds that had Ms Chambers-Cran concluded that the claimant's conduct was deliberate, she would have said so in the outcome letter. However she used the word negligent, not deliberate, in relation to both categories of gross misconduct. The tribunal does not accept the respondent's argument that Ms Chambers-Cran is not legally qualified and therefore did not understand the difference between negligent and deliberate conduct. The respondent's own disciplinary policy makes a distinction between the two types of conduct. One does not need to be legally qualified to understand the difference between the two concepts and it is contradictory to assert on the one hand that conduct was negligent and the other that it was deliberate.

67. The claimant's core explanation at the disciplinary hearing for her conduct was her mistaken belief that the fire alarm had been tested by Mr Thompson on the week in question as she had heard the alarm go off. The minutes of the hearing document that the claimant relied on the work pressures she referenced during the disciplinary investigation, to explain why she relied on this belief rather than contacting her as Regional Manager for support. They also record that the claimant accepted that in hindsight this was wrong.

68. The respondent argued that the claimant's concession in cross-examination that the absence of three new Heads of Department made no material difference, meant that the claimant's reliance on the work factors in relation to her conduct was disingenuous and was an attempt to deflect from her conduct. The tribunal rejects

this argument. Firstly, the claimant did not rely on work factors to excuse her conduct but to explain why she had relied on her mistaken belief that she had heard the fire alarm on the week in question instead of availing of other acceptable options open to her. Furthermore, from the outset of the disciplinary process the claimant consistently relied on other work factors namely; the operational issues with the pool plant and CHP boiler, the unexpected absence of Mr Thompson and the fact she had completed the weekly prime safety checks for the first time. Ms Chambers-Cran made it clear in the outcome letter that these factors did not excuse the claimant's conduct. The tribunal finds this to be a wholly reasonable conclusion. However Ms Chambers-Cran didn't conclude that the factors were not genuine. The tribunal finds that the work factors provided relevant contextual background which a reasonable employer would take into account when assessing the gravity of the claimant's conduct with regard to sanction.

69. The claimant argued that dismissal was too harsh a sanction in all of the circumstances of the case and the respondent failed to give due consideration to alternative, lesser sanctions. On the matter of sanction, the respondent's disciplinary policy states that in a case of gross misconduct:-

> *"A likely disciplinary outcome <u>may be</u> to dismiss you with immediate effect." (Tribunal's emphasis).*

70. The respondent's policy clearly envisages that there may be cases where it is not appropriate to dismiss an employee for gross misconduct and gives the decision maker a discretion to consider whether a lesser sanction may be appropriate. The tribunal finds the existence of this discretion to be entirely consistent with good industrial practice and the LRA Code of Practice. The tribunal also finds it to be an important aspect of the respondent's disciplinary policy designed to ensure that all relevant circumstances, including the nature and gravity of the conduct and all mitigating circumstances are taken into account when determining the appropriate sanction. Despite the clear wording of the respondent's policy Ms Chambers-Cran notes in outcome letter (at page 2);

> *"I do believe that your actions constitute gross misconduct and therefore as a result of this <u>I have no alternative</u> but to summarily dismiss you from the company (i.e. dismissal with immediate effect) in accordance with the conduct and disciplinary policy." (Tribunal's emphasis)*

The tribunal finds the highlighted remark to be significant as it revealed that Ms Chambers-Cran misunderstood the provision in the respondent's disciplinary policy concerning sanction for gross misconduct. Consequently she wrongly fettered her discretion on this issue. Despite stating at a later point in the letter that she considered all relevant circumstances (see paragraph 71) the tribunal is satisfied that Ms Chambers-Cran could not have given any real or proper consideration to all relevant circumstances, notably the nature or gravity of the conduct and the mitigation presented by the claimant at the disciplinary hearing with regards to sanction. Those factors could only properly be taken into account if the decision maker believed that alternative, lesser sanctions to dismissal were open to them. Ms Chambers-Cran wrongly believed that this was not the case. This error had a negative impact on the procedural and substantive fairness of the decision to dismiss the claimant.

71. Ms Chambers-Cran goes on in the outcome letter to state:-

> *"Having carefully reviewed the circumstances and considered your responses, I have decided that your conduct has resulted in a fundamental breach of your contractual employment relationship, to which summary dismissal is the appropriate sanction."*

72. Ms Chambers-Cran justification for this conclusion in her evidence to the tribunal, was that it is never acceptable to fail to carry out a health and safety check and falsify a record to say that it was carried out. Her sticking point was that the claimant had other options rather than rely on a mistaken belief, in respect of the fire alarm and her mistaken assumption, in respect of the other checks. The tribunal finds this reasoning to be flawed on a number of grounds. The reasoning takes account of matters that did not form part of the disciplinary charge. Secondly, this conclusion disregards points consistently made for the claimant to counter the penalty of dismissal, notably;

i. the claimant admitted her error with the fire alarm check from the outset;
ii. her conduct was not deliberate;
iii. she was under significant work pressure leading up to her conduct;
iv. she exhibited insight and remorse with regards to her conduct;
v. had a significant length of service and
vi. a clear disciplinary record.

The tribunal regards all of the above mentioned facts to be relevant circumstances, the existence of which gravely undermine the reasonableness and fairness of Ms Chambers-Cran's conclusion that the claimant's conduct falling within the scope of the disciplinary charge, amounted to a fundamental breach of her contract of employment with the respondent. The tribunal, as an industrial jury were unanimously of the view that the claimant's insight into her wrongdoing was particularly significant as it suggested that the claimant would not repeat the same mistake. In view of all of the relevant circumstances outlined herein, the tribunal finds that any reasonable employer would have concluded that the claimant deserved a second chance and that by implication dismissal was not an appropriate sanction.

APPEAL HEARING

73. The tribunal made a number criticisms of the appeal process and appeal outcome based on the findings of fact set out in this section. The key criticisms echo those made of the hearing and outcome at first instance which are summarised at paragraph 57 i–iii above. Additionally the decision maker failed to properly examine and address one of the claimant's grounds of appeal which on the facts, the tribunal found to be a compelling ground. This oversight was a further procedural flaw which undermined the reasonableness of the appeal outcome.

74. The claimant's appeal meeting took place on 3 September 2019 and was heard by Mr M Leggatt, Head of Property and Maintenance. Ms K Todd attended as a note taker and the claimant was accompanied by a former colleague, Mr S McKee. The minutes of the meeting record that Mr McKee attended as a witness, however from the substance of the minutes it is clear that he was not a witness in the normal

sense, but rather accompanied the claimant as a support.

75. The appeal meeting functioned as a rehearing and Mr Leggatt had no previous involvement in the disciplinary process.

76. The tribunal finds that the confusion which characterised the disciplinary process up to this point, pervaded the appeal stage. The basis for this finding is that the minutes of the appeal hearing reveal that the claimant was not clear what matter or matters contributed to the outcome at first instance. At the outset of the appeal meeting, the claimant states:- *"The water ban was completed but not sure why not done <u>others</u>." (sic)* (Tribunal's emphasis). However it is recorded in the minutes that the claimant goes on to state:-

> *"I was dismissed for not checking the alarm which won't be done for weeks and weeks but one day is the difference in being dismissed."*

77. The tribunal finds that these extracts reveal that whilst the claimant understood she was dismissed due to her conduct regarding the fire alarm test, she seemed to be under the misapprehension that the respondent had established that other checks had not been carried and this revelation contributed to the decision to dismiss. In short the claimant was unclear why she was dismissed which led her to speculate. The tribunal regards this confusion to be a natural consequence of the plural language used in the disciplinary charge and the content of the dismissal letter, particularly the references to other checks.

78. Mr Leggatt was very clear in his evidence to the tribunal that the only matter he considered to be relevant to the disciplinary charge and by implication his decision to uphold the claimant's dismissal, was the fire alarm test. However the tribunal rejects this contention as aspects of the appeal outcome letter fundamentally contradict this assertion. As the outcome letter is a contemporaneous document, the tribunal regards it to be the most reliable indicator of Mr Leggatt's reasoning to reject the claimant's appeal and uphold the decision to dismiss for gross misconduct. In the appeal outcome letter, Mr Leggatt refers to "*the check*" and "*checks*" interchangeably. Crucially in one section of the appeal letter Mr Leggatt notes that the fact the claimant was not trained to carry out some of the checks;

> "*does not mitigate that you signed for <u>checks</u> that you did not know had taken place*".

In another part, he notes that whether the "*checks*" had been carried out was not relevant to the case but rather whether the claimant "*<u>knew/checked they</u> had been completed or not*" (Tribunal's emphasis). The tribunal concludes these remarks illustrate that Mr Leggatt fundamentally misunderstood the nature of the disciplinary charge by failing to appreciate that;

i. it related only to one check;
ii. whether or not checks had been carried out was centrally relevant to the disciplinary charge;
iii. whilst the claimant's state of knowledge could be relevant to the disciplinary charge, it could only be relevant to checks that were not carried out which on the respondent's own case could only be the fire alarm test.

79. The tribunal also concludes on the facts found that Mr Leggatt took into account the claimant's admissions in relation to the legionella and water balance checks which although a serious matter, did not form part of the disciplinary charge or any separate charge and therefore could not reasonably be taken into account, when considering the gravity of the claimant's conduct and the appropriate sanction. The tribunal finds that like the outcome at first instance, these matters are interwoven with the fire alarm check in the appeal outcome, to such a degree that the claimant's approach to all of these checks materially influenced Mr Leggatt's decision making.

80. The claimant raised three grounds of appeal in her email of 16 August 2019. Firstly the sanction was too severe. Secondly it was not consistent with how the respondent had previously treated the same or similar issues with prime weekly checks. Thirdly she raised issues of procedural unfairness.

81. With regards to the severity of the sanction, the claimant reiterated her acceptance that she should have checked the record of the fire alarm test and on her behalf, Mr McKee acknowledged that failure to do so was classified as gross misconduct. However the claimant repeated her insistence that she had acted on a genuinely held belief that she had heard the fire alarm on Friday 5 July. Mr Leggatt was clear in the letter of appeal and in his evidence to the tribunal that he accepted this explanation. The minutes of the appeal meeting record that Mr Leggatt stated; *"Everyone makes mistakes and has hiccups"* and within the appeal letter he reiterated that he did not believe that completion of the prime check regarding the fire alarm was done "*in any malicious capacity*".

82. The claimant argued the sanction was disproportionate given the circumstances which had led to the claimant completing the prime weekly checks. The circumstances relied on were those consistently referred to by the claimant throughout the disciplinary process. The claimant's other points in relation to the sanction related to her 12 years' service, the fact she was a top performing General Manager with an exceptional performance record, her Club was awarded Club of the Year in 2013 and her clear disciplinary record.

83. Mr Leggatt confirmed to the tribunal that he took all of these matters into account when considering the appropriate sanction. However the tribunal does not accept that this was the case. This is because in the appeal outcome Mr Leggatt stated that a breach of health and safety procedure:-

> *"Is very clear in our policy and would constitute gross misconduct. As you have admitted to this, the outcome cannot be anything other than a breach of H&S procedure. This then makes it difficult to take anything else into account. If it is a breach of H&S, then it is gross misconduct."* (Tribunal's emphasis)

84. Mr Leggatt explained in cross examination that what he meant was that summary dismissal for this type of conduct was inevitable unless there were exceptional circumstances which did not apply in this case. The tribunal does not accept this explanation as it is at odds with Mr Leggatt's acknowledgement in the outcome letter that there had been exceptional circumstances in the Club that week and the claimant had been under pressure. Secondly, this explanation conflicts with Mr Leggatt's evidence to the tribunal that he did not consider a less severe sanction as

he believed that the only permissible sanction for gross misconduct under the respondent's disciplinary policy was dismissal. The tribunal finds that like Ms Chambers-Cran, Mr Leggatt misinterpreted the respondent's disciplinary policy on this point and wrongly fettered his discretion. In view of these facts the tribunal is satisfied that Mr Leggatt's decision to dismiss was an automatic one. Given the compelling grounds put forwarded by the claimant to support her contention that the sanction was too severe in all the relevant circumstances, the tribunal is satisfied that this was a serious flaw in the appeal process which critically undermined the procedural and substantive fairness of the decision to dismiss the claimant.

85. Related to sanction, Mr Leggatt's justification on cross-examination for concluding that the claimant's conduct amounted to a fundamental breach of trust and confidence in her as a General Manager was based on his view that if the claimant did this once it could happen again. The tribunal finds this conclusion to be unjustified and unreasonable given that from the outset, the claimant openly admitted her error and exhibited insight and remorse.

86. On the ground of inconsistency, the claimant referred to a number of communications from the respondent on the issue of health and safety which suggested that a similar hard line approach may not have been taken with other staff.

87. The claimant relied on notes of a regional weekly conference call dated 23 July 2018 and is headed Health and Safety. Under the next sub-section there is a reference to fire alarm testing and it notes that prime safety records record that this task is complete but that this does not tally with the fire alarm company's digital records of fire alarm tests. The note goes on to set out the correct process and states:-

> *"There are discrepancies that show that this process in some clubs has not been completed, however has been signed off on prime effectively falsifying records. At this stage the next action is for the GM to review their own club records following the data which will be emailed from Michelle. If there are discrepancies the GM must investigate into the reason why and the individual responsible. This information should be emailed back to Debbie, CC Michelle in by Wednesday. Do not take any follow up action from your investigation at this stage the follow-up actions will be communicated to you to ensure a fair and consistent approach across the full company." (Tribunal's emphasis).*

88. In this extract references to "Michelle" refers to Mrs Chambers-Cran and "Debbie" refers to Ms Wright, Regional H&S Manager. The claimant asked Mr Leggatt to clarify what actions had been taken in relation to the individuals found to be responsible following investigation. The tribunal finds this to be a compelling point of appeal. It is clear from this communication that in 2018, the respondent was aware that others within the respondent organisation were doing the same as, or if not, something very similar to what the claimant did on 10 July 2019 with regards to completion of the weekly prime safety check for the fire alarm test.

89. The claimant also referred to an email from the Regional H&S Manager, Ms D Wright dated 18 June 2019 in which Ms Wright outlined a number of matters to watch out for arising from the audits she had carried out. Specifically she referred

to fire safety and the fact that in some instances alarms were not tested. She also referred to legionella and stated "*not all documents have been logged*", and with regard to prime safety notes:-

> "*This has become a tick box and the Club are not carrying out the requirements, so a lot of Clubs are losing list of points in this section. They need to read the question and provide evidence that its been done."*

90. Based on this document, the tribunal finds that one year on from the regional conference call in July 2018, the respondent still had concerns that in some of its clubs prime weekly checks were not being carried out correctly and in some instances checks were being signed off when evidence was not available that the test had been carried out. In a similar vein, the claimant referred to an email from Ms Wright of 9 August 2018 to management on points to note arising from H&S audits. Ms Wright raises the issue of integrity on prime completion checks. Ms Wright notes that prime checks should not be signed off as "pass":- *"if the criteria hasn't been completely reached/checked/completed/relevant. You will lose points!"*

91. The tribunal finds these comments significant. They suggest that whilst the outcome for the claimant for passing the fire alarm test without checking the paper record, was dismissal, the outcome in other cases would be for the club rather than the employee who completed the check. The difference in nature and severity of the two outcomes is difficult to reconcile. The offending checks would have been completed by an employees who, like the claimant, would be subject to the respondent's health and safety and disciplinary policy and should be readily identifiable from the audit trail generated by completion of these checks. It is also at odds with a central plank of the respondent's case that health and safety and associated falsification of records, be they deliberate or mistaken are extremely serious and as per its disciplinary amount to gross misconduct.

92. The argument advanced by claimant's counsel was that Mr Leggatt failed to properly examine and address the consistency point and this failure was a flaw in the appeal process given that the communications relied on by the claimant suggested she was treated more harshly than others in the same or similar circumstances. The tribunal agrees that the correspondence relied on by the claimant raised an important line of inquiry which required full exploration at appeal in order to determine whether the claimant had been treated consistently. The tribunal concludes that this did not happen. The reason for this is that Mr Leggatt concluded in the outcome letter that having spoken to D Wright and A Snowdon (Head of Group Risk) and taken advice from HR, he was;

> "*still not clear whether Clubs had faced disciplinary sanctions regarding failing audits or not following proper process."*

Mr Leggatt acknowledged in cross-examination that despite his enquiries he was not aware that any similar matter had been investigated by the respondent company. The tribunal finds this to be a flaw in the appeal process. It significantly undermines Mr Leggatt's conclusion in the outcome letter that had another member of staff been found to have done what the claimant did, they too would be subject to disciplinary action. It also weakens the reasonableness of the sanction imposed on the claimant.

93. The final ground of appeal was on procedural issues. These largely related to the investigation process. The tribunal has already made findings of fact in relation to the material issues raised save for an issue raised by the claimant regarding the fact that her job had been advertised one day after she had been informed of the respondent's decision to dismiss her. The tribunal accepted the evidence of Ms Chambers-Cran that this advert was mistakenly placed in error. Mr Leggatt did not reference this matter in the outcome letter but acknowledged in cross-examination he should have, for the benefit of the claimant. The tribunal finds that this matter should have been addressed in the appeal outcome for the benefit of the claimant and to safeguard the integrity of the respondent's disciplinary process.

DECISION

94. This is a claim of unfair dismissal in which the claimant alleges that she had been unfairly dismissed as a result of the respondent's failure to follow a fair procedure (procedural unfairness) and because the decision to dismiss, in the circumstances of the case, had been unfair (substantive unfairness). The distinction between procedural and substantive unfairness can become blurred. The important issue is in assessing the fairness of a dismissal is the statutory test set out in Article 130 of the ERO. The tribunal applied the relevant law to the facts found in order to reach the following conclusions on the agreed issues on liability:-

(1) What was the principal reason for dismissal?

95. The parties agree and the tribunal so finds that the reason for the claimant's dismissal was conduct. This is a potentially fair reason for the purposes of the ERO. However on the facts, the tribunal determines that the principal reason for the claimant's dismissal at first instance and at appeal, was her conduct in relation to three checks, specifically the fire alarm, legionella and water balance checks. The tribunal finds this to be wrong and procedurally unfair, as two of these checks did not form part of the disciplinary charge levelled against the claimant and therefore could not reasonably form part of the case against her.

(2) Did the respondent have a genuine belief in the conduct and was this the reason for the dismissal?

96. With regards to the fire alarm test, the tribunal is satisfied that the respondent held a genuine belief in the claimant's conduct, not least because the claimant admitted to the conduct falling within the scope of the charge. The tribunal is also satisfied that at the material time, both decision makers accepted that the claimant's conduct was not deliberate but due to the claimant relying on a mistaken belief that she had heard the fire alarm.

97. However as per paragraph 95 above, the tribunal is satisfied that this conduct was only part of the reason for the claimant's dismissal at first instance and at appeal. Both decision makers erroneously took into account the claimant's conduct regarding the legionella and water balance tests in their decision making and these were material factors. Whilst these matters were serious and could have formed part of a disciplinary charge, they did not. Therefore it was not reasonable for the decision makers to take these matters into account when determining the appropriate sanction for the claimant's conduct falling within the scope of the disciplinary charge. Linked to this conclusion is the fact that throughout the

disciplinary process, the claimant was not clear what matters fell within the scope of the disciplinary charge and by implication the decision to dismiss her. The extracts of the appeal minutes best evidence this fact. On the facts, the tribunal is satisfied that the claimant did not know the case she had to meet and thus the respondent failed to comply with this elementary principle of natural justice and fair procedure and contravened the LRA Code of Practice.

98. For these reasons, the tribunal unanimously conclude that an unfair procedure had been adopted by the respondent which rendered the claimant's dismissal an unfair dismissal.

(3) Did the respondent hold the belief in the misconduct on reasonable grounds?

99. The tribunal concludes that in relation to the fire alarm test, the respondent held the belief in the misconduct reasonable grounds due to the claimant's admission to that charge and the fact that the HS15 record for the week in question evidences that the test had not been carried out and that this was collaborated by the Fire Alarm company Secom.

100. However, as set out above, the tribunal concludes that the decision maker's belief in the misconduct, at first instance and at appeal, was tainted by the fact that both of them erroneously and unreasonably took into account the claimant's conduct in relation to matters that did not fall within the scope of the disciplinary charge when deciding sanction.

(4) Did the respondent conduct a reasonable investigation?

101. Whilst the investigation was perfunctory, the tribunal concludes that it was adequate and reasonable given the claimant's admission in relation to the fire alarm test, the documentary evidence gathered to corroborate the charge and the fact that the disciplinary charge arising from the investigation was limited to this matter.

102. However the plural language used in the documents created during the investigation process and in particular, the disciplinary charge was a procedural failing which facilitated the confusion that ensued regarding what checks were relevant to the disciplinary charge which in turn undermined the fairness of the resulting decision to dismiss the claimant at first instance and at appeal.

(5) Was the dismissal fair or unfair in accordance with Section 130(4) of the ERO 1996?

103. The claimant admitted to the alleged misconduct that formed the basis of the disciplinary charge. Therefore the fundamental question is whether the claimant's dismissal was proportionate in all of the circumstances, in simple terms, whether the punishment fitted the crime.

104. The tribunal is satisfied the claimant's conduct in relation to the fire alarm check fell under the category of gross misconduct in the respondent's disciplinary policy. Signing off a health and safety check as completed and passed, without certainty of these facts, is a very serious matter, particularly for an organisation which has the responsibility for the health and safety, not only of its staff, but its members.

Furthermore whilst both decision makers erroneously took other matters into account in categorising the claimant's conduct, the respondent's disciplinary policy clearly states that gross misconduct can be a singular incident, so this error did not undermine the reasonableness of this classification.

105. However both decision makers in forming the view that the conduct amounted to a fundamental breach of the contract of employment warranting dismissal, erroneously took into account matters which on the respondent's own case did not form part of the charge and which on the facts did not form part of the disciplinary charge. These matters were so interwoven into the reasoning of both decision makers that the tribunal concludes that they were not secondary factors. This fatally undermined the procedural fairness of their respective decisions to dismiss the claimant.

106. Additionally, under the terms of the respondent's disciplinary policy dismissal was not an automatic certainty for an employee found guilty of gross misconduct. Despite this, the tribunal found that both Ms Chambers-Cran and Mr Leggatt were erroneously of the view that it was the only sanction open to them. This procedural flaw critically undermined the procedural and substantive fairness of the decision of both decision-makers with regard to sanction. It meant that they failed to consider whether a lesser sanction was appropriate given all the relevant circumstances of the case. This omission runs contrary not only to the respondent's disciplinary policy but also the LRA Code of Practice (see paragraph 22 above). This was a particularly serious omission in this case given the following mitigating factors;

i. the claimant admitted her conduct from the outset;
ii. it was not deliberate;
iii. she showed timely insight and remorse with regards to her conduct;
iv. she had experienced significant work pressures leading up to her conduct;
v. the claimant was a long serving employee with almost 12 years' service and
vi. this was claimant's first offence.

107. A fundamental consideration on the issue of sanction is the fact that both decision-makers were satisfied that the claimant's conduct arose out of a genuine mistake, rather than any deliberate or malicious act on the part of the claimant to disregard health and safety procedures, or compromise the accuracy of H&S records. In this regard the tribunal is conscious of the case of ***Connolly*** which highlights that gross misconduct justifying dismissal connotes a "*deliberate and wilful contradiction of the contractual terms*". On the facts, the claimant's conduct was neither deliberate nor wilful. It was the exact opposite. It was conduct arising from an accepted error of judgment by the claimant, to rely on a belief rather than availing of other options open to her. In view of all of these factors, particularly the unintentional nature of the conduct and the claimant's insight and remorse exhibited by the claimant, the tribunal is satisfied that any reasonable employer would have concluded that there was every reason to believe the claimant would not reoffend.

108. The guidance in ***Connolly*** (see paragraph 18 above) reinforces that the full statutory test of fairness set out in Article 130(4) of the ERO requires consideration of whether lesser sanctions are appropriate in light of the substantial merits of the case. For the reasons set out herein, the tribunal, as an industrial jury is satisfied that any reasonable employer would have considered a lesser sanction in respect of the claimant's conduct falling within the scope of the disciplinary charge. In light

of the mitigating circumstances, the tribunal is also satisfied that a reasonable employer would have concluded that the claimant deserved a second chance and therefore dismissal was not a reasonable or fair sanction.

109. Whilst not a decisive factor, the tribunal regards Mr Leggatt's failure to fully investigate the claimant's ground of appeal regarding inconsistent treatment to be an additional procedural flaw which further undermined the reasonableness and fairness of the decision to dismiss.

110. In summary, the claimant was dismissed due to her conduct. Whilst this is potentially fair reason for dismissal, on the facts and for the reasons set out herein, it was neither procedurally or substantively fair. This was because the conduct which fell within the scope of the disciplinary charge was not the only conduct taken into account in reaching the decision to dismiss or in upholding the decision to dismiss on appeal. Even if the tribunal was satisfied that the claimant's conduct falling within the disciplinary charge was the principal reason for dismissal, (which it is not), the tribunal has no hesitation in finding that the respondent acted unreasonably in treating it as sufficient reason for dismissing the claimant. Not only did the punishment not fit the crime, it was the only punishment that both decision makers considered open to them given their finding that the conduct amounted to gross misconduct. This meant that all of the relevant circumstances which by any reasonable consideration evidenced that the claimant deserved a second chance, were not given due consideration at first instance or on appeal. Therefore in the circumstances, the tribunal unanimously concludes that the dismissal was unfair as the respondent acted unreasonably in treating the conduct as a sufficient reason for dismissing the employee having regard to equity and the substantial merits of the case.

(6) Was the decision to dismiss a sanction within the "band of reasonable responses" of a reasonable employer?

111. For the reasons set out herein, the tribunal concludes that the decision to dismiss was not within the band of reasonable responses of a reasonable employer. Therefore the claimant's claim is upheld.

SUMMARY

112. In summary, based on the reasons set out in this judgement, the tribunal unanimously concludes that the dismissal was unfair for the purposes of the statutory test set out in the ERO.

113. The tribunal will reconvene on a date to be determined to address the issue of remedy, including the questions regarding the applicability or otherwise of contributory fault and Polkey.

114. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge:

Date and place of hearing: **14-16 June 2021, Belfast.**

This judgment was entered in the register and issued to the parties on: