EMPLOYMENT TRIBUNALS

Claimant: Mr B Panikulam Paulose

Respondent: Synergy Health UK Limited

HELD AT: Manchester **ON:** 9, 10 and 16 February 2017

BEFORE: Employment Judge Franey
Dr PC Langman
Mr BJ McCaughey

REPRESENTATION:
Claimant: In person
Respondent: Mrs L Keever, Regional HR Manager; and
Miss N Hunt, HR Adviser (16 February 2017 only)

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of victimisation contrary to section 27 Equality Act 2010 fails and is dismissed.

2. The complaint of direct race discrimination contrary to section 13 Equality Act 2010 fails and is dismissed.

3. The complaint of unfair dismissal contrary to Part X Employment Rights Act 1996 fails and is dismissed.

Employment Judge Franey

1 March 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

06 March 2017

FOR THE TRIBUNAL OFFICE

REASONS

Introduction

1. By a claim form presented on 14 April 2016 the claimant brought a number of complaints arising out of the termination of his employment as a Sterile Services Technician with the respondent between 2003 and 18 December 2015. The claimant had been dismissed for having used scissors to cut his fingernail whilst working in a sterile environment assembling trays of medical instruments. He maintained that his dismissal was not only unfair but also direct race discrimination. He also brought a complaint which he described as "whistle-blowing".

2. By its response form of 8 June 2016 the respondent defended the claims on the basis the claimant had been guilty of gross misconduct and there had been no discriminatory treatment.

3. The position was clarified at a preliminary hearing before Employment Judge Horne on 24 June 2016. The whistle-blowing complaint was withdrawn and dismissed. The issues under the unfair dismissal and direct race discrimination complaint were clarified. The hearing was listed for 10 and 11 October 2016 to deal with liability only.

4. That hearing came before a Tribunal chaired by Employment Judge Holmes. In the course of the Tribunal's reading it became apparent that the claimant was also complaining that he had been victimised by the respondent following an earlier grievance which he maintained was a protected act. The respondent confirmed that it understood the claimant to be pursuing that case, but the manager against whom the allegations of victimisation were levelled had left the company and had not been called to give evidence. By consent that hearing was adjourned and re-listed.

5. The intention had been that the same Tribunal would hear the case if at all possible, even though it had not commenced hearing any evidence. However, although the non legal members remained available Employment Judge Holmes was unavailable for medical reasons and therefore the hearing was chaired by Employment Judge Franey.

6. In accordance with Case Management Orders made by the Holmes Tribunal, the claimant served a further witness statement dealing with victimisation and the respondent served a witness statement from Tracie McDonald.

Issues

7. The Case Management Order issued by the Holmes Tribunal confirmed that the allegation of victimisation related to the actions of Mrs McDonald in suspending the claimant and initiating a disciplinary investigation into his conduct.

8. The issues to be determined as to liability were therefore as follows:

Victimisation – Section 27 Equality Act 2010

1. Has the claimant shown that in his written grievance of 18 September 2015 or in the grievance meeting of 24 September 2015 he did a protected act under section 27?

2. If so, has the claimant proven facts from which the Tribunal could conclude that because of that protected act Tracie McDonald subjected him to a detriment in

(a) suspending him on 13 November 2015, and/or

(b) instigating a disciplinary investigation into whether he had committed misconduct that day?

3. If so, can the respondent nevertheless show that it did not contravene section 27?

Direct Race Discrimination Section 13 Equality Act 2010

4. Has the claimant proven facts from which the Tribunal could conclude that in dismissing him the respondent because of race treated the claimant less favourably than it treated or would have treated a person of a different race? The claimant compares himself with Michael Gasiorowski or in the alternative a hypothetical comparator.

5. If so, can the respondent nevertheless show that it did not contravene section 13?

Unfair Dismissal Part X Employment Rights Act 1996

6. Can the respondent show that the reason or principal reason for dismissal was a potentially fair reason relating to the claimant's conduct?

7. If so, was the dismissal fair or unfair?

Documentary Evidence

9. The Tribunal had an agreed bundle of documents which ran to approximately 470 pages. Any reference to page numbers in these reasons is a reference to that bundle unless otherwise indicated.

10. There was an additional bundle of documents provided after the hearing in October 2016. Any reference to pages in that bundle will be preceded by the letter A.

Witness Evidence

11. The respondent called three witnesses. Tracie McDonald was the Production Manager who dealt with the claimant's grievance in September 2015, and who suspended him and carried out the disciplinary investigation in November 2015. Alison Balcombe was the Operations Manager from a different site who took the decision to dismiss the claimant, and Janet Doyle was the Regional General Manager who rejected his appeal against dismissal.

12. The claimant gave evidence himself and called two other witnesses. They were his former colleagues, Binoy Thomas and Aju Kujnappan. He also provided a signed witness statement from his former colleague, Peter Gacca, but Mr Gacca was

unable to attend the hearing for health reasons. The Tribunal accepted his witness statement as a written document but attached less weight to it than if he had attended to give evidence.

Relevant Legal Principles

Direct Race Discrimination

13. Discrimination against an employee by dismissing him is prohibited by section 39(2) Equality Act 2010.

14. The protected characteristic of race is defined by section 9(1) as including colour, nationality or ethnic origins. The definition of direct discrimination appears in section 13 and so far as material reads as follows:

> **"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".**

15. The concept of treating someone "less favourably" inherently requires some form of comparison, and section 23(1) provides that:

> **"On a comparison of cases for the purposes of section 13 … there must be no material differences between the circumstances relating to each case".**

16. It is well established that where the treatment of which the claimant complains is not overtly because of race, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of the mental processes of the individual responsible: see the decision of the Employment Appeal Tribunal in **Amnesty International v Ahmed [2009] IRLR 884** at paragraphs 31-37 and the authorities there discussed.

17. The burden of proof provision appears in section 136 and provides as follows:

> **"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".**

18. In **Hewage v Grampian Health Board [2012] ICR 1054** the Supreme Court approved guidance given by the Court of Appeal in **Igen Limited v Wong [2005] ICR 931**, as refined in **Madarassy v Nomura International PLC [2007] ICR 867** where Mummery LJ held that "could conclude", in the context of the burden of proof provisions, meant that a reasonable Tribunal could properly conclude from all the evidence before it, including the evidence adduced by the complainant in support of the allegations, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. Importantly, at paragraph 56, Mummery LJ held that the bare facts of a difference in status and a difference in treatment are not generally without more sufficient to amount to a prima facie case of unlawful discrimination.

19. Further, unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment: **Zafar v Glasgow City Council [1998] IRLR 36.** It

cannot be inferred from the fact that one employee has been treated unreasonably that an employee of a different race would have been treated reasonably, although Tribunals must scrutinise particularly carefully situations in which only the claimant is affected by such treatment: **Kowalewska-Zietek v Lancashire Teaching Hospitals NHS Foundation Trust EAT 0269/15** (see paragraph 48).

20. Whether the burden of proof has shifted is in general terms to be assessed once all the evidence from both parties has been considered and evaluated. In some cases, however, the Tribunal may be able to make a positive finding about the reason why a particular action is taken which enables the Tribunal to dispense with formally considering the two stages.

Victimisation

21. Victimisation of an employee by subjecting him to a detriment is prohibited by section 39(4). In this context "victimisation" has a specific legal meaning defined by section 27:

> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because--**
>
> **(a) B does a protected act, or**
>
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act--**
>
> **(a) bringing proceedings under this Act;**
>
> **(b) giving evidence or information in connection with proceedings under this Act;**
>
> **(c) doing any other thing for the purposes of or in connection with this Act;**
>
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**
>
> **(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.**

22. This provision does not require any form of comparison. If it is shown that a protected act has taken place and the claimant has been subjected to a detriment, it is essentially a question of the "reason why" the detriment was imposed. If the protected act has had any material influence on the decision, section 27 will have been contravened.

23. Something amounts to a detriment if the treatment is of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment – see paragraphs 31-37 of the speech of Lord Hope in **Shamoon v Chief Constable of the RUC [2013] ICR 337** (House of Lords).

Unfair Dismissal

24. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

25. The primary provision is section 98 which, so far as relevant, provides as follows:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(b) that it is either a reason falling within sub-section (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 sub-section if it … relates to the conduct of the employee …**
>
> **(3) …**
>
> **(4) Where the employer has fulfilled the requirements of sub-section (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".**

26. If the employer fails to show a potentially fair reason for dismissal (in this case, conduct), dismissal is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied.

27. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. The most important point is that the test to be applied is of the range or band of reasonable responses, a test which originated in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal which was subsequently approved in a number of decisions of the Court of Appeal. Since **Burchell** was decided the burden on the employer of showing fairness has been removed.

28. The "**Burchell** test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?

29. If the answer to each of those questions is "yes", the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band falls short of encompassing

termination of employment. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer acted reasonably in characterising the misconduct as gross misconduct, and also whether it acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854** (paragraph 38).

30. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice.

31. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.**

32. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

Relevant Findings of Fact

33. This section of our reasons set out the broad chronology of events to put our decision into context. Any disputed factual matters central to the decision will be addressed in the discussion and conclusions section.

The Respondent

34. The respondent is a substantial employer with approximately 2,600 employees and a dedicated Human Resources ("HR") function. It provides a range of services to NHS Trusts including the supply of sterile medical equipment for use in operating theatres. One of the services it offered at its site in Wythenshawe was to take surgical instruments which had been used, clean and sterilise them, and re-pack them into instrument trays according to each Trust's specifications. Accordingly its premises included a "wash room" where used medical instruments were cleaned and sterilised, and next to it a "clean room" where those instruments would be assembled into trays in a sterile environment. The clean room was also known as the Inspection Assembly and Packing Area or "IAP room". Employees were required to wear sterile scrub suits and gown in both rooms. There was a gowning room available in which they could get changed.

35. The respondent had an employee handbook. On page 57 it said that an employee should inform his manager immediately if suffering from a medical condition which could compromise the produce or his health. On page 65 the handbook said:

> **"We have a manual of operating procedures which are intended to ensure that all employees are aware of their responsibilities in relation to working methods and the recording of changes to data or software, and it is a contractual requirement that you familiarise yourself with, and comply with, the procedures at all times."**

The Claimant and his Training

36. The claimant is of Indian ethnic origin. He was first employed by the University Hospital of South Manchester ("the Trust") in November 2003 but with colleagues transferred to the employment of the respondent on 5 November 2007 under the Transfer of Undertakings (Protection of Employment) Regulations 2006.

37. Later that month he and his colleagues underwent quality assurance and process training. The records appeared at pages 134-143. One of the questions asked the claimant where the quality manual procedures were to be found, and his answer correctly identified that they could be found on the computer, in the clean room, in the staffroom and "on the board".

38. The reference to the quality manual was to something known as the "QMS". There was an introductory booklet at pages 81-84. It made clear that cleanliness and control of bacteria was an important consideration and the cleanliness of the workplace and personal hygiene was paramount. It said:

> **"Attention to personal hygiene is vitally important. Also, always ensure that cuts, abrasions etc are covered."**

39. That handbook was issued to the claimant and other colleagues in training in 2012. The claimant signed for the handbook on page 87.

40. More detailed rules appeared in a series of QMS documents. The document governing IAP room behaviour appeared at pages 101-104. It was marked "display document". It said:

> **"Medical condition[s] such as cuts, sores, dermatitis, eczema, itches, flu, chronic cough or cold like symptoms must be reported to a supervisor or manager prior to entering the IAP room."**

41. It went on to require staff to wear a hair cover and to cover any beard with a face mask, and said that staff should not open the IAP room door and the door to the gowning room at the same time.

42. Training was periodically undertaken. A record of training undertaken up to October 2009 appeared at pages 160-161. Training was given on 1 October 2009 about the QMS procedures. The claimant underwent autoclave training in December 2011 and an equality and diversity course in May 2012.

September 2012 team brief

43. In July 2012 an incident occurred where a fingernail was found in a tray supplied by the respondent to Trafford General Hospital. At page 168 there appeared a service report which described this as a moderate fault creating a "small patient risk" and which recorded that the technician responsible would be invited to discuss matters at a one-to-one meeting. The incident was investigated and the workforce was told about it at a team briefing on 26 or 27 September 2012 depending on which shift the employee worked. The team brief documents appeared between pages 169-172 and A30-A31. They recorded management saying:

> **"A defect was raised by Trafford for a fingernail found on a laparoscopic tray. This is not acceptable. Can all staff refrain from biting their fingernails in work areas. You are handling potentially contaminated instruments in the clean room. They are not sterile until after the autoclave phase."**

Back problems

44. The claimant suffered from a back problem which was periodically the subject of Occupational Health ("OH) advice. An OH report of 8 April 2013 at pages 211-212 said that he would have difficulty standing in one position for longer periods but that a new style chair which had been provided was also causing difficulty. The report said he was likely to benefit from a chair which provided him with good lumbar support. The author expressed the opinion that he was covered by the Equality Act as a disabled person. A further report of 21 October 2013 at pages 214-215 again recorded that the claimant preferred to sit rather than stand when working, but the stools provided were not supportive. The report was provided by a different OH practitioner who did not think the claimant was covered by the Equality Act 2010.

45. In early 2015 the claimant had some time off work with stress. An OH report of 20 March 2015 at pages 238-239 said this was due to stressors in his home life.

46. The claimant went off sick again with a stress related problem at the end of August. Fit notes were issued on 27 August and 11 September. The latter said that it was "stress at work" (page 328). He returned to working night shifts at the end of September.

Grievance

47. On 18 September 2015 the claimant lodged a grievance at pages 329-330. It was addressed to the Production Manager, Tracie McDonald. He said he had been off sick due to stress from 17 August due to being bullied at work. He said that there were not enough stools to go round and generally because of shift changes he had to work for two hours before he got to use a stool. He recounted an incident where a colleague, Darius, took the stool the claimant had been using whilst the claimant was on a break, and refused to give it back when the claimant returned. A dispute developed and the supervisor, Marek, was called. The claimant alleged that Marek said:

> **"That is not your chair, that is Synergy's chair, back to work."**

48. The claimant said he felt bullied and humiliated by this comment and could not concentrate.

49. The claimant attended a grievance hearing on 24 September 2015. The notes appeared at pages 334-336. It started at the time specified in the invitation letter (page 333) although the claimant had not received the letter and had to be telephoned and awoken in order to be called in to attend the meeting. There was discussion of the incident, during which the claimant's need for a chair was also discussed. The claimant also alleged that there had been two incidents where Marek had damaged his car, one a couple of years earlier and another in August 2015. In the course of the meeting the claimant said that he thought all Polish people were crazy.

50. On 27 September Mrs McDonald interviewed Darius, Marek and the supervisor, Al Whilby. The notes appeared at pages 337-344. Marek had also done a witness statement about the incident itself (which actually occurred on 21 August) at pages 331-332. Mrs McDonald also spoke to Mrs Doyle about it. Her conclusions were set out in an outcome letter of 5 October at pages 345-347. She upheld certain aspects of the grievance. Marek had confirmed using the words in question. The claimant had said it was not the tone in which they were said but the actual words to which he objected. This part of the grievance was rejected. Mrs McDonald did not think it was bullying. As to the need for a chair, she confirmed that it would not be practicable to supply the kind of chair the claimant wanted. Although her letter did not make this clear, she explained to our hearing that the chair had a backrest and arms which could impede movement around the clean room. Mrs McDonald said the incident with the car two years earlier could not be investigated and that the CCTV showed no record of the alleged incident in August. She concluded by instructing the claimant to attend an equality and diversity training course on 15 October given his comment about Polish people.

51. The outcome letter gave the claimant the right of appeal within five working days. That was a mistake. The grievance procedure applicable to staff who transferred from the Trust gave 21 days for an appeal. This was corrected in an email of 12 October at page 349. The deadline for appeal was 29 October.

52. The claimant sent an email on 9 October saying he was going to India (page A32) and back on 3 November. He did not appeal. He sent an email on 7 November asking whether his appeal was now out of time (page 354). The response of 9 November said that he could still appeal (page A36). No further time limit was specified, but on 13 November 2011 Mrs McDonald wrote to him to say it was now too late for him to pursue any appeal (pages 355-356).

53. The claimant alleged that allegations he made in this grievance were "protected acts" for the purpose of his victimisation complaint and we will return to that in our conclusions.

<u>Incident 13 November 2011 and Suspension</u>

54. During the night shift on 13 November 2011 the claimant was seen by a colleague, Michael Gasiorowski, using scissors to cut a nail on his finger at his workstation in the clean room shortly before 3.00am. The supervisor, Mr Whilby, was informed and he spoke to the claimant. At 05:49 Mr Whilby sent an email (page 359) saying that when he spoke to the claimant all the claimant would say was "who told you?" The email said he had taken the tray on which the claimant was working and sent it back for rewash. The email said that Mr Whilby did not see any nail cutting on the tray or table.

55. At 09:30 the Operations Manager, Christine Horsley, sent an email (page 360) to say that she had looked at the CCTV which showed that something had happened. She could see Mr Gasiorowski walk past the claimant's workstation and stop and look at something before speaking to Mr Whilby who then spoke to the claimant. She copied her email to Mrs Doyle and asked whether they should suspend the claimant.

56. Mrs Horsley spoke to Mr Whilby by telephone at 11.15am. The notes appeared at pages 371-374. The notes were subsequently signed by him. He said that when he went over to the claimant he saw two pairs of scissors out of the wash basket placed on his table as if he had already checked them. He said that when he asked the claimant if he had been cutting his nails with scissors from the tray the claimant did not say yes or no but simply said "who told you?" He said the claimant did not protest or deny the allegation. Mr Whilby sent the tray back for a rewash. There were no nail fragments in it.

57. At 15:26 Mrs Horsley emailed Charlotte Richards of HR identifying apparent breaches of QMS and suggested that the claimant be suspended. That was done when he came into work at shortly after 8.00pm. The notes of the suspension meeting appeared at pages 375-376. The claimant said that he had cut his nail but not using an instrument from a set. He said he had used some single use scissors. He said his nail had split and it was disturbing him from doing his work so he cut it. Mrs McDonald said that was a breach of QMS procedures and the claimant said that he did not know that. Mrs McDonald said:

> **"You should know this as we have to cover hair, facial hair, etc."**

58. The claimant said:

> **"I mean I didn't know it was gross misconduct."**

59. The suspension was confirmed in a letter handed to the claimant (pages 357-358).

60. Single use scissors were items which were meant to be used only once in the operating theatre but which would be sent back with other instruments for washing and re-sterilisation. Technicians in the claimant's role were meant to take them out of the trays and dispose of them in the sharps bin.

McDonald Investigation

61. That evening Mrs McDonald carried out further investigatory interviews. She interviewed Mr Gasiorowski (pages 377-378) who said that he watched the claimant for approximately a minute and saw him put the scissors he was using back in the basket with the rest of the instruments. Two other employees in the clean room at the relevant time were interviewed, Mr Watson and Mr Robinson (pages 379-380). Neither saw anything. Mr Watson said he would not have thought any technician in the clean room would ever do such a thing.

62. On Monday 16 November Mrs McDonald interviewed Mr Kujnappan. The notes appeared at pages 381-382. He had not seen the incident either. He did not hear what Mr Whilby said to the claimant, but he said that he heard the claimant say:

> **"What's wrong?" and "who told you?"**

63. After that investigation Mrs McDonald prepared a report which appeared at pages 361-367. She provided a summary of the relevant parts of the QMS and a summary of the results of the interviews she had undertaken. She recommended that the claimant face a disciplinary hearing for potential gross misconduct.

Disciplinary Charges and Hearing

64. That recommended was accepted, and by a letter of 27 November 2015 the claimant was invited by Mrs Balcombe to attend a disciplinary hearing. The allegation was described as follows:

> **"The allegation is that you cut your nails with scissors from the tray you were inspecting at TP whilst working in the clean room (IAP) on Friday 13 November 2015."**

65. Copies of the Trust's disciplinary procedure and the statements taken during the investigation were attached. The CCTV footage would be available to view at the start of the hearing. The claimant was given the right to be accompanied.

66. The Trust's disciplinary policy contained disciplinary rules which appeared at pages 42-43. They gave examples of gross misconduct. One example was:

> **"…Failing to observe operational regulations…when the consequences are likely to result in danger to patients or staff."**

67. The disciplinary hearing took place before Mrs Balcombe on 18 December 2015. The notes appeared at pages 386-391. The claimant was accompanied by his union representative, Mr Moore. Mrs Balcombe outlined the allegation then Mr Moore asked why they were here because the scissors used were single use not from the tray. Mrs Balcombe said the issue was not the scissors but the act that was carried out. Mr Moore said that the CCTV showed other breaches of QMS such as not covering facial hair, arms being on show and doors being left open. Mrs Balcombe said those matters would be investigated separately.

68. The claimant then explained that he noticed his nail was split and that the instruments he was working on were dirty. The tray was going to have to go for a rewash anyway. He used single use scissors which he kept on his desk. Mrs Balcombe asked him why he had not mentioned that the tray had been dirty at the investigation interview when he was suspended. Mr Moore pointed out that the claimant should have had representation at that interview according to the Trust's disciplinary policy. After an adjournment to check this Mrs Balcombe offered Mr Moore and the claimant a re-investigation and to delay the disciplinary hearing. This offer was refused because of the stress and strain the claimant was under.

69. The discussion about the incident resumed. Mrs Balcombe said again:

> **"We are getting too hung up on the type of scissors used. It is the act of cutting the nail in the clean room that is the issue. You have admitted to carrying out an act which is unacceptable and I need to understand why."**

70. In the course of the discussion the claimant said that he trained other staff but there were still a lot of breaches by other people of the QMS procedures. Mr Moore pointed out that the procedures did not mention nails specifically, but Mrs Balcombe said they did mention dead skin. During a further adjournment she spoke to Mr Whilby who confirmed the claimant had not told him that the tray was dirty. Mr Moore emphasised the claimant's eight years of service. It had been a mistake. Dismissal would be too harsh. Training was needed.

71. After a further adjournment Mrs Balcombe confirmed that the claimant would be dismissed. She said the claimant admitted he had been integral in training staff in the unit and knew the standards. The breaches of QMS by other people shown on the CCTV would be investigated separately. The claimant was summarily dismissed.

72. Her decision was confirmed in a letter of 21 December 2015 at pages 392-394.

Appeal

73. The claimant appealed that decision by a letter of 15 January 2016 at page 395. He said the allegation did not amount to gross misconduct and that he used disposable scissors not scissors from the tray. He then collected three statements from colleagues, Mr Thomas, Mr Kujnappan and Mr Chacko. They appeared at pages 396-398. Each of them signed to say that they did not know that cutting a nail in the clean room could be considered gross misconduct and they were not getting yearly training on clean room policies.

74. The appeal hearing took place before Mrs Doyle on 8 March 2016. In the run up to it the claimant provided some more information. He provided a letter about his grounds of appeal on 2 March at pages 401-402, and a note at page 403 identifying a number of breaches of QMS which he said were happening on a daily basis. Those eight breaches included use of mobile phones, a failure to change scrub suits when moving from the clean room to the wash room and back again, and leaving the door to the wash room open allowing contamination to pass to the clean room. He suggested this showed a lack of training and that what he had done was no worse than this. He expanded on those allegations in a note at pages 405-408.

75. He also provided a note about the circumstances of the incident at page 412, and a note about his grievance to Mrs McDonald at pages 413-416. He said that the handling of his grievance had been race discrimination and that he had been bullied.

76. His union representative, Sally Grimwood, provided a statement for the appeal at pages 410-411. Her statement emphasised that the CCTV showed Mr Gasiorowski committing more serious misconduct than the claimant, that there had been a lack of formal training about these matters, and that the claimant had reported the tray as dirty.

77. The notes of the appeal meeting on 8 March appeared on pages 417-430. There was an extensive discussion lasting over three hours. The claimant was represented by Ms Grimwood.

78. After the interview Mrs Doyle carried out some further investigations. She interviewed Mr Kujnappan (pages 432-437) and Mr Thomas (pages 440-445). Mr Kujnappan said he had seen the QMS documents in the gowning room but not elsewhere, and that he did not know which documents were in the folder on the wall in the clean room. He said that people used their mobile telephones and supervisors did nothing He thought that cutting a nail would be misconduct but not necessarily gross misconduct. Mr Thomas said he was aware of the QMS and that documents were displayed in the clean room, the wash room and the storeroom (page 440). He said that someone had used a mobile phone in the clean room about six months earlier, and that he would know from experience and common sense not to cut his

nails over a tray in the clean room. He said he would now regard it as gross misconduct but would not have done prior to the incident with the claimant.

79. Mrs Doyle's conclusions were set out in an outcome letter of 12 April 2016 at pages 446-453. She pointed out that the claimant had not identified the tray as dirty prior to being spoken to by Mr Whilby. The CCTV footage did not show the claimant move from his chair to a clinical waste bin to dispose of the nail as he claimed. She rejected the claimant's argument that he did not know this would be gross misconduct, relying in part on the September 2012 team brief and previous training.

80. Mrs Doyle rejected the claimant's assertion that the tray had been dirty and therefore would have to be rewashed in any event. Although he maintained that he had been putting the instruments back in the tray in a way which told him that was the case, she formed the view that had any of the instruments been dirty they should have been placed immediately in a red striped "candy bag" when put into the tray so that when the tray was rewashed the person doing it would know to give those items particular attention. She did not believe that the claimant had already identified the tray as needing a rewash when he cut his nail.

81. As for the allegations about other practices in the clean room, she noted the claimant had said at the appeal hearing that he had not reported them since 2011, and they had been addressed by team briefings in the intervening period. She identified the date of each briefing in question. She concluded the claimant had received adequate training and was concerned that he still did not appear to understand that what he had done was wrong. She took into account his clean disciplinary record, but considered that the other actions in question did not pose the same risk to health and safety as his actions. She rejected the contention that Tracie McDonald had been influenced by the grievance from September 2015. The appeal letter dealt one by one with each of the points raised by the claimant and by his union representative. The appeal was rejected.

82. The points the claimant raised on page 403 were addressed by way of team briefings after the claimant's appeal.

83. After some further emails about CCTV records the claimant emailed Mrs Doyle on 31 May 2016 at page 465. He said that he had put the nail tip in a clinical waste bin which was close to his table on the left-hand side. He did not know whether it was visible on the CCTV or not, but that explained why he had not been seen to get up and move to a different clinical waste bin. He also raised some issues about the scissors which he had used. Mrs Doyle's reply the same day (page 464) asked him to direct all correspondence to Mrs Keever who was dealing with the Employment Tribunal complaint which was then underway.

Submissions

84. At the conclusion of the evidence each party made an oral submission.

Claimant's Submissions

85. The claimant had helpfully prepared a nine page written submission which the Tribunal read as well as listened to his oral submission. For full details of his case reference should be made to that written document.

86. In brief terms, the claimant began orally by highlighting the difference between the treatment of the nail issue in 2012 and his dismissal, and also emphasised that what Michael Gasiorowski had done was as bad as what he had done but he had not been dismissed. He emphasised the background of racially discriminatory treatment of the Indian staff by the Polish staff and said that Mrs McDonald had failed to take action. When asked by the Tribunal whether he had made an allegation of race discrimination in the grievance he said he had done so to Mrs Doyle at the appeal stage but had not said it during the grievance process itself. He explained a range of factors which accounted for that, including his low mood/depression, the fact he was brought in for the grievance meeting at short notice having been asleep at home, and the fact that he was on a stage 2 warning for absence and was worried about what would happen if he raised this issue. He maintained, however, that Mrs McDonald victimised him in the way she dealt with the suspension and investigation, and that his dismissal was unfair for the reasons set out in his written submission.

Respondent's Submission

87. Mrs Keever was unfortunately unavailable for the third day of the hearing. Her colleague, Ms Hunt, who had been present during the hearing, made the respondent's submission, assisted by Mrs Doyle. At the conclusion of her oral submission she provided the Tribunal with a copy of the document on which her submission had been based. Reference should be made to that written closing submission as appropriate.

88. In broad terms the respondent's case was that the contents of the grievance had played no part in the decision of Mrs McDonald to suspend the claimant and investigate the incident with the nail on 13 November 2015, that there was no evidence supporting the case that there had been any race discrimination in the decision to dismiss the claimant, and that it had been a fair dismissal. The claimant had admitted cutting his nail, and whether he used single use scissors or scissors from the tray was in reality irrelevant given that he knew or ought to have known that it was not acceptable to take that course of action in the clean room. Management had taken appropriate action against Michael Gasiorowski and had not been aware of the other alleged breaches of QMS which the claimant raised at the appeal stage. Those matters had in any event been addressed by way of team briefings. There was therefore no inconsistency of treatment between the claimant and any of the people with whom he compared himself. Although he had raised a range of mitigating factors, it was within the band of reasonable responses to dismiss him because he did not appreciate the risk to patient safety caused by what he had done and therefore the respondent could not be confident there would be no repetition.

Discussion and Conclusions – Preliminary Matter

89. Before we commenced our deliberations on the legal claims set out in the List of Issues, it was necessary for the Tribunal to deal with one matter which arose during submissions. In submissions the claimant drew attention to page 168 which was the report from Trafford General of the incident in July 2012 when a nail was found in a tray of instruments supplied by the respondent. The document had not been put in evidence during the hearing and no questions had been asked of any of the witnesses about it. The claimant said that the document showed that this incident had been regarded as a "small patient risk", and that this was evident from the fact

that the technician concerned, who the claimant asserted was English, only faced a discussion at a one-to-one meeting rather than disciplinary proceedings.

90. The respondent engaged with this point during its submission, and Miss Hunt (assisted by Mrs Doyle) told us that the classification of the incident as creating a small patient risk was a classification by Trafford General not by the respondent, and that the form in question was supplied to Trafford so indicated only that there was going to be a discussion with the technician because whether any disciplinary proceedings were then to be pursued was a private matter between the respondent and its employee. Mrs Doyle said in submissions that there was a zero tolerance policy towards "dirty incidents" of this kind and that disciplinary proceedings were pursued against the technician in question, but he was dismissed for an unrelated matter (which the claimant thought was fighting with another employee) before those proceedings were concluded.

91. The Tribunal was left in the difficult position of not having had any evidence about this matter, but both sides having addressed it in submissions. We decided that we had to ignore the matter because it had not been raised in evidence. However, we were in the position of knowing what the evidence would have been had it been explored during the hearing, and we were satisfied that it would not have made any difference to the outcome had it been raised at the proper time in the proper way.

Discussion and Conclusions – Victimisation

92. The victimisation complaint was identified by Employment Judge Holmes and the non-legal members of the Tribunal at the hearing in October 2016. It was recorded in the Case Management Order issued following that hearing. That record indicated clearly that the allegation of victimisation was restricted to the decision by Mrs McDonald to suspend the claimant and to her decision to commence a disciplinary investigation. In his submissions the claimant suggested that there were a number of other actions on the part of Mrs McDonald which amounted to victimisation, but they had not previously been identified as part of his complaint or identified as such during the evidence and we confined ourselves to the issues as identified at the previous hearing.

<u>Protected Act</u>

93. The first matter for us to decide was whether the claimant had done a "protected act" in the course of his grievance in September 2015. A protected act includes making an allegation (whether or not express) that there has been a contravention of the Equality Act 2010. The claimant confirmed during the hearing that his "protected act" was an allegation of race discrimination, not of disability discrimination.

94. The main difficulty faced by the claimant on this point was that he said both in his evidence on oath and in submissions that he had not made an allegation of race discrimination during the grievance. He explained why that was. He was ill, he had been brought into the grievance meeting at short notice having been telephoned whilst asleep, and he was worried about his stage 2 written warning for absence. He said that he was concerned that if he did raise race discrimination he would be penalised for it. He sought to get round this point by suggesting that Mrs McDonald

already knew that there was racism, and therefore it would have been apparent to her that his allegation of inappropriate treatment by a Polish supervisor was in truth an allegation of race, but he had not put that point to Mrs McDonald. There was no evidence before us confirming that Mrs McDonald knew there was any problem with race discrimination as opposed to arguments and disagreements generally between colleagues.

95. Accordingly we concluded that the claimant had not made any express or implied allegation in his grievance of 18 September 2015 at pages 329-330, or in the grievance meeting of 24 September at pages 334-336, of race discrimination. He had been alleging inappropriate treatment and bullying but he did not allege that this was contrary to the Equality Act 2010 even though that may well have been his private view. It followed that his case that there was a protected act failed and on that basis alone the victimisation complaint was dismissed.

96. We noted that the grievance did contain some assertions about the need for a chair because of the claimant's back condition. The claimant did not put his case on the basis that this was a protected act. Had he done so it would have been a difficult matter to determine. There had been two Occupational Health reports on his back in 2013, the first of which advised that he was covered by the Equality Act 2010, the second of which advised that he was not covered.

Causation

97. However, even had his grievance contained a protected act the victimisation claim would still have failed on causation. We were satisfied that the grievance played no part in the subsequent suspension and investigation in relation to the nail incident on 13 November 2015. The emails from the day showed that the question and the decision to investigate was made by the Operations Manager, Christine Horsley, suspension first being raised in her email at shortly before 3.30pm at page A37. Mrs McDonald's investigation report at page 362 recorded that Mrs McDonald had been advised by Christine Horsley to suspend the claimant. Suspension was in accordance with the disciplinary policy at page 39, which recorded that suspension may be necessary to provide an opportunity for further investigations or where the alleged misconduct represented a potential risk to patients or staff. Even if the claimant had done a protected act, therefore, the Tribunal would have found that the suspension and investigation resulted solely from the events of 13 November 2015 and were not influenced in any way by the contents of his grievance.

Discussion and Conclusions – Direct Race Discrimination

98. The next matter the Tribunal considered was the allegation that the dismissal amounted to direct race discrimination. We took into account the legal framework summarised above. The dismissal would amount to less favourable treatment because of race if the fact the claimant was Indian had had any material influence on the decision to dismiss him. The Tribunal had to consider whether an inference that race had been a factor could properly be drawn from the primary facts.

99. The claimant identified four factors which he said taken together showed that his race had been an influence on the decision to dismiss him. We considered each in turn.

1. 2012 Nail Incident

100. The first factor was the treatment of the nail defect service report from Trafford General in 2012. We heard in evidence about the team briefing recorded on page 169. As explained in paragraphs 89-91 above, it was only in submissions that page 168 was drawn to our attention and we did not hear evidence about that matter at all. Formally, therefore, the Tribunal had to disregard this matter as it was not evidenced. However, had it been put in evidence by the claimant and raised with Mrs Doyle, and had she given in evidence the explanation she gave us during submissions, we would have found that it provided no support to the claimant's allegation of race discrimination. Even if the claimant was right to say that the technician was English, Mrs Doyle explained that the respondent did take disciplinary action against him which could not be completed because he was dismissed for another matter. That explained why that technician had not been dismissed in relation to the nail. Further, she explained that the phrase "small patient risk" was a view taken by the customer, not the view of the respondent which had a zero tolerance policy towards "dirty items". Accordingly we were satisfied that even if the matter had been raised in evidence it would not have taken the claimant any further in relation to his race discrimination complaint.

2. History of Racist Bullying

101. The second factor on which the claimant relied was a matter which he emphasised in submissions, being that his colleague, Mr Kujnappan, had reported in the past to Mrs McDonald that a Polish supervisor had called him a "bastard", but that Mrs McDonald had done nothing about this. This was not a matter properly addressed in the evidence. Mr Kujnappan made no mention of it in his witness statement. Mrs McDonald had not been questioned on it. For that reason we did not consider it appropriate to take it into account.

102. However, it was also part of a broader theme on the claimant's part which was that management knew that there was racist bullying going on but had done nothing about it and that this somehow influenced the decision to dismiss him. There were a number of drawbacks to this broader argument. The grievance contained no allegation that the previous treatment had been racist. The decision to dismiss was not made by Mrs McDonald; it was made by Mrs Balcombe who worked at the Knowsley branch not Wythenshawe. There was nothing raised with Mrs Balcombe about race discrimination save for a passing comment by the claimant in the disciplinary hearing (page 389) that:

> **"The Polish people are getting at me."**

103. That statement was made in the course of a discussion about whether the claimant had raised issues in the past and appeared to be an explanation why he had not raised issues with the supervisors, who were Polish. It was not pursued by the claimant or by his union representative, Mr Moore, in the course of that meeting. Accordingly we concluded that this point did not assist the claimant because there was no evidence from which we could find that Mrs Balcombe was aware of any history of racist bullying when she decided to dismiss the claimant.

104. As for the appeal stage, the claimant did say in one of his appeal documents at page 414 that there had been race discrimination in the chair incident in August

2015, but he fell short in either that document or in the appeal meeting of alleging that there was race discrimination in the dismissal decision. He made no mention of the suggestion that Mr Kujnappan had complained to Mrs McDonald and that nothing had happened, although he did tell Mrs Doyle (page 430) that he had been called an "Indian bastard" some four years earlier but had not reported it. This information was not supplied to Mrs Balcombe.

105. Putting these matters together we were satisfied that this second factor did not help the claimant to show that there was any direct race discrimination in the dismissal.

3. Other QMS Breaches

106. The third factor relied upon by the claimant in the race discrimination complaint was an alleged failure by management to take action to deal with what he said were daily breaches of QMS which he itemised at the appeal stage at page 403. They included allegations that staff were using mobile phones in the clean room and wash room, that there was a failure to change scrub suits when moving between the wash room and the clean room, and that staff were not washing their hands properly or leaving the door between the rooms open.

107. These matters had not been raised at the dismissal stage with Mrs Balcombe. She did not know about them because she worked at a different branch. They could not support the claimant in suggesting that her decision was tainted by race discrimination.

108. At the appeal stage Mrs Doyle was made aware of them by the claimant. She was the Regional Manager with responsibility for Wythenshawe as well as Knowsley. She ascertained from the claimant that he had not reported them to anyone since 2011. She also investigated the history of team briefing and saw that some of those issues had been raised with staff in team briefs. An example was the team briefing about hand washing in September 2014 recorded at pages 234-235, and the mention of mobile phones in a team brief in July 2015 at page 320. Indeed, as confirmed by page 234 the respondent had an internal audit system which would identify matters of "clean room etiquette" and address any concerns at subsequent team briefings. Accordingly we were satisfied that the evidence did not establish that the respondent wilfully ignored these matters: they were addressed as and when they came to the attention of managers. We rejected the contention that any failure to deal with these matters in the past by discipline of an individual employee supported the contention that there was less favourable treatment because of race. There was no evidence management knew the names of people responsible, but in any event they were misdemeanours of a different nature.

4. Breaches by Mr Gasiorowski on CCTV

109. The fourth factor related to what was apparent from the CCTV footage of the incident. It showed that Mr Gasiorowski had bare forearms and that he was not wearing a face shroud over his beard. Both were breaches of the QMS, and the claimant maintained that the failure to deal with those matters as gross misconduct warranting dismissal was inconsistent treatment which was influenced by race.

110. When this point was put to her Mrs Doyle explained that disciplinary action had been taken against Mr Gasiorowski, but that it had resulted in a warning rather than dismissal. She explained that the bare forearms could be an inadvertent situation caused either by the fact that the gowns were not always the correct size, or by the fact that there was a task in the clean room which involved rolling sleeves up and placing the forearms into an air blowing device. Sometimes a technician would forget to roll the sleeves back down after using that device. There might also be a good reason why Mr Gasiorowski had temporarily removed his face shroud and forgotten to put it back. Because they could occur inadvertently they were viewed by the respondent as less serious breaches of QMS than the claimant's deliberate act of cutting his nail in the clean room.

111. Although the claimant disputed the respondent's view of this, the Tribunal was satisfied that this explained the difference in treatment between the claimant and Mr Gasiorowski. There was a sound basis for the view that his conduct was consistent with having been inadvertent, whereas the claimant had taken a deliberate step to cut his nail. We were satisfied that this explained the difference in treatment. Mrs Doyle also explained that at the time of the warning Mr Gasiorowski had been acting up as a team leader and it was considered unfair to remove him from that role as it would effectively be a double punishment.

Conclusion

112. Putting these matters together the Tribunal concluded that the claimant had failed to shift the burden of proof, but that even if he had done so the respondent had provided a non-discriminatory explanation for its decision to dismiss him. The circumstances of the individuals with whom he compared himself in different respects were not genuinely comparable. There were material differences in each case which explained the difference in treatment. There was no evidence which supported an inference that race had played any part in the decision to dismiss him over the nail incident. It was a decision made solely because of the misconduct of which he was accused on 13 November 2015. The complaint of direct race discrimination therefore failed and was dismissed.

Discussion and Conclusions – Unfair Dismissal

113. The unfair dismissal complaint required the Tribunal to take a different approach. Section 98 required us first to identify the reason or principal reason for dismissal. Only if a potentially fair reason were established would the Tribunal then move to consider the question of fairness under section 98(4). As the legal principles summarised above make clear, the role of the Tribunal was not to make its own decision on whether it would have dismissed the claimant, but instead to decide whether the employer's approach to the disciplinary investigation and outcome fell within the band of reasonable responses.

Reason

114. Save for his allegation that race played a part in his dismissal, which we rejected for the reasons we set out above, the claimant did not dispute that the dismissal was for a reason relating to his conduct. We found that he was dismissed because of his conduct in relation to the nail incident. We therefore moved to consider the question of fairness.

Fairness – Genuine Belief

115. The first element of the **Burchell** test is whether the employer had a genuine belief that the claimant was guilty of misconduct. This was not challenged by the claimant. Sensibly, he did not suggest to either Mrs Balcombe or Mrs Doyle that they did not really believe he had done anything wrong.

Fairness – Investigation and Procedure

116. The second element of the **Burchell** test is whether the employer carried out such investigation into the matter as is reasonable. This can encompass considerations of a fair procedure.

117. Other than a general suggestion that the investigation had been carried out too quickly, the only specific criticism made by the claimant of the investigation procedure was that he was not given the right to be accompanied at the meeting on 13 November 2015 at which he was first informed of the allegation and then suspended. The notes appeared at pages 375-376. Although the statutory right to be accompanied found in the Employment Relations Act 1999 and the ACAS Code of Practice do not provide for an employee to be accompanied at an investigation meeting, as opposed to a disciplinary meeting, this was an error by the respondent because the right to be accompanied at an investigation meeting was provided by the Trust disciplinary policy clause 6.1.2 (page 38).

118. However, although this was a criticism well made by the claimant, it was put right at the disciplinary hearing on 18 December. The note at page 387 recorded that Mrs Balcombe offered the claimant a chance to adjourn and to have the investigation carried out once again, but he and his union representative, Mr Moore, rejected that because they wanted the matter to be resolved rather than prolonged. Accordingly we concluded that the failure to allow the claimant to be accompanied at the investigation/suspension meeting did not take the procedure outside the band of reasonable responses.

119. More generally, the Tribunal was satisfied that the respondent followed reasonably fair procedures at all stages. The investigations carried out by Mrs McDonald were thorough, and she should not be criticised for having completed her investigations quickly. It was a simple matter where the core allegation was not disputed.

120. The disciplinary proceedings were handled fairly by Mrs Balcombe, and at the appeal stage Mrs Doyle ensured that every point raised by the claimant was considered and addressed, and undertook further investigations herself before making her final decision. She also took significant care to set out in her outcome letter an answer to every point that had been raised and to provide the claimant with a list of all the documents which had been taken into account.

121. We were therefore satisfied that viewed overall the investigation and disciplinary procedures were carried out in a way which was reasonable and within the band of reasonable responses. There was no unfairness to the claimant in those procedures.

Fairness – Reasonable Grounds

122. The next question was whether the respondent had reasonable grounds for concluding that the claimant had committed misconduct. There were plainly reasonable grounds for that conclusion. In the meeting when he was first informed of the allegation the claimant admitted having cut his nail, and as recorded at pages 375-376 he explained to Mrs McDonald that when he said he did not know that there had been a breach of QMS procedures he meant he did not know it was gross misconduct. Further, the QMS procedures themselves and the team briefing in relation to nails conducted in September 2012 provided ample grounds for the respondent reasonably to take the view that what the claimant did was misconduct. This is despite the fact that there was no specific mention of nails in the QMS Procedures themselves.

123. Accordingly the Tribunal concluded that all elements of the **Burchell** test were satisfied. The respondent genuinely believed on reasonable grounds after a reasonably fair investigation and procedure that the claimant was guilty of disciplinary misconduct.

Sanction

124. That left the question of whether the decision to dismiss the claimant fell within the band of reasonable responses, or whether it was a sanction so harsh that an employer acting reasonably would not have imposed it. This issue was at the heart of the claimant's unfair dismissal complaint.

125. In considering this we took into account that in cases of gross misconduct the Tribunal should approach the matter in two stages. The first is to decide whether the conduct can reasonably be characterised as gross misconduct meaning that dismissal for a first offence is appropriate. The second stage is to decide whether the employer acted reasonably in then deciding to dismiss, since it does not follow that an employee guilty of gross misconduct must always be dismissed.

126. The claimant made a number of different points relating to the reasonableness of the sanction and it was convenient to approach them in relation to four broad headings: training; the circumstances of the incident; consistency, and mitigating factors.

127. In relation to training, the claimant argued that the training on the QMS had not been kept up-to-date, and that the respondent failed to undertake regular refresher training every two years as had been done when he worked in the NHS. He also argued that access to the QMS was limited and that neither he nor his colleagues knew that cutting a nail would amount to gross misconduct. He also relied on the absence of any express mention of nails in any of the QMS documentation.

128. As to the circumstances of the incident, the claimant emphasised that single use scissors were available in the clean room when they should not have been, that the nail had been disturbing his work and he had a desire to remove it in order to protect patient safety, that the nail was safely disposed of and that the tray he was working on was dirty in any event and would have to be re-washed so there was no risk to patient safety.

129. His arguments as to consistency were based on the comparison with the treatment of Michael Gasiorowski for failure to cover his arms and wear a face shroud as revealed on the CCTV, and with the alleged tolerance of management for daily breaches of the QMS outlined in his note at page 403 at the appeal stage.[1]

130. Finally, as to mitigating factors the claimant said that the respondent should have taken into account the stress he had been under due to the bullying treatment, the problems he had resulting from back pain because he had not been given the chair that he needed, the fact he was suffering from jet lag at the time of the incident having recently returned from India, the fact he had a clean disciplinary record (despite the absence management warning) and his eight years of service.

131. We were satisfied that all these points were taken into account by the respondent. Some of them were raised with Mrs Balcombe and the majority of them were raised with Mrs Doyle at the appeal stage.

132. As to training, there was a careful consideration of the training records which revealed that the claimant had been aware in his initial quality training following the transfer in 2007 that Quality Manual Procedures could be found in the clean room and "on the board", and he had been specifically trained on the QMS introductory booklet at some point in mid 2012. The relevant QMS document was a display copy, and the claimant's own colleagues confirmed to Mrs Doyle at the appeal stage that there were documents kept in a folder on the wall which included the QMS documents (page 440). Although there was no evidence the claimant had received the employee handbook containing the contractual obligation to keep up-to-date, in an environment of this kind keeping up-to-date with procedures would be an obvious responsibility of an employee.

133. As to the circumstances of the incident, the respondent acted reasonably in concluding that there was no evidence to support the assertion that he had used single use scissors because none were found and Mr Gasiorowski said that he had seen the claimant put the scissors back in the tray. Further, although the claimant claimed to have disposed of the nail safely, the CCTV footage did not support that because it did not show him getting up from his chair to move to the clinical waste bin. Importantly, the claimant's assertion that the tray was dirty was not backed up by the evidence before the decision making managers. Mr Whilby said that the claimant had not told him that the tray was dirty before confronted about the incident, and there was no trace on the CCTV of the candy bag into which any dirty implements ought to have been placed. It was therefore reasonable for management to reject the claimant's account that the tray was dirty. The risk to patients could not be so easily discounted.

134. In any event it was also reasonable of the respondent to take the view that the issue was the deliberate decision to cut the nail in the clean room at all rather than speak to a supervisor and take a few moments to cut it in a different room. Mrs Doyle made clear that the use of single use scissors and whether the tray was dirty in that sense did not matter.

[1] He also relied upon the treatment of the technician responsible for the nail incident in July 2012 recorded at page 168, although we discounted that for the reason explained in paragraphs 89-91 above.

135. As to the consistency arguments, the respondent's witnesses explained why the circumstances of Mr Gasiorowski were different and did so in a way which we considered fell within the band of reasonable responses. The list of alleged daily breaches of QMS at page 403 was also handled appropriately by Mrs Doyle at the appeal stage. Such breaches as had been drawn to the attention of management were addressed in team briefings. There was no evidence that such breaches had been condoned by management despite being aware of them.

136. As to the mitigating factors, the respondent was entitled to reject the combination of stress, jet lag and back pain on the basis that the claimant was required to notify his supervisor if for medical reasons he was not well enough to do his job. The option of allocating him to less demanding work remained possible. The fact he had attended for work and not raised any concerns meant that it was reasonable for the respondent to consider that he was fit to do the job and those factors could reasonably be discounted.

137. As to his clean disciplinary record and length of service, a key concern of the decision makers was that the claimant did not appreciate the potential severity of the course of action he had taken. Although he knew that it was wrong, he did not accept that it could reasonably be viewed as gross misconduct because of the risk to patient safety.

138. Putting those matters together we reached the following conclusion as to sanction. On the face of it this was a harsh decision. The claimant lost his job after eight years of service simply for cutting his nail in the clean room. The evidence did not support a conclusion that he had cut his nail over the tray and the nail fragment was never found. That was consistent with him having disposed of it safely. It was clear from his witness statement that the loss of his job had a severe effect on him and his family.

139. However, the task for this Tribunal was not to decide for itself whether we would have dismissed the claimant but rather to see whether the employer's decision fell within the band of reasonable responses. This was a sterile environment where contamination would create a risk to patient health and safety. The QMS documents reinforced in detail the importance of maintaining that sterile environment and avoiding any risk of contamination. A key consideration for the respondent was the potential risk of recurrence. An employee who refuses to accept that what he has done is a serious matter creates a dilemma for an employer who may reasonably consider that there is a risk of the same action being taken again. Although the claimant accepted he should not have cut his nails he remained convinced (and advanced the case in our hearing) that it could not reasonably be regarded as gross misconduct or a serious matter. That was despite the fact that the Trust's disciplinary policy at page 43 identified as an example of gross misconduct a failure to observe operational regulations where consequences were likely to result in danger to patients or staff.

140. In all the circumstances the Tribunal concluded that it was within the band of reasonable responses to characterise what the claimant did as gross misconduct, and to conclude that if he did not know it was a serious matter he should have known given the training which he had received and the environment in which he was working.

141. Given his continued refusal to recognise how serious his misconduct had been, the respondent acted within the band of reasonable responses in deciding to dismiss him rather than impose a lesser disciplinary punishment, despite the mitigating circumstances.

142. For those reasons the unfair dismissal complaint failed and was dismissed.

Employment Judge Franey

1 March 2017