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EMPLOYMENT TRIBUNALS

Claimant: **Mr D Woolf**

Respondent: **London Borough of Hackney**

Heard at: **East London Hearing Centre** **On: 29 March & 4 - 6 April 2017**

Before: **Employment Judge Martin**

Members: **Mr T Burrows**
Mr M Rowe

Representation

Claimant: Ms R White (Counsel)

Respondent: Mr J Davies (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

(1) The Claimant's complaint of breach of the Working Time Regulations (holiday pay) is dismissed upon withdrawal by the Claimant.

(2) The Claimant's compliant of sex discrimination under section 13 of the Equality Act 2010.

(3) The Claimant's complaint of an alleged detriment on the grounds of making a protected interest disclosure contrary to section 47(B) of the Employment Rights Act 1996 is dismissed upon withdrawal by the Claimant.

(4) The Claimant's complaint of automatic unfair dismissal for making a protected interest disclosure contrary to section 103A of the Employment Rights Act 1996 is dismissed upon withdrawal by the Claimant.

(5) The Claimant's complaint of unlawful deduction from wages is well-founded and the Claimant is awarded three days pay.

(6) The Claimant's complaint of unfair dismissal is also well-founded and this case will be listed for a remedies hearing on 22 and 23 August 2017.

(7) The Claimant's complaint of victimisation for doing a protected act contrary to section 27 of the Equality Act 2010 is not well-founded and is hereby dismissed.

(8) The Claimant's complaint of wrongful dismissal is also not well-founded and is hereby dismissed.

REASONS

Introduction

1 The following gave evidence on behalf of the Respondent:

- Ms Sarah Marshall, Interim Service Manager Access and Assessment Team;
- Ms Brigitte Jordaan, former Head of Service;
- Ms Lorraine Robinson, HR Business Partner,
- Ms Briege Gilhooly, former Interim Service Manager for Children in Need;
- Sarah Wright, Director of Children and Family;
- Natalie Wright, HR Business Partner and
- Ilona Sarulakis, Principal Head of Adult Social Care Directorate.

2 The Tribunal also read the witness statement of Catherine Isaacs, former line manager of the Claimant who was not able to attend the Tribunal to give evidence. We gave such weight as was appropriate to that evidence.

3 The Claimant gave evidence on his own behalf.

4 Norman Saggers a friend and trade union representative gave evidence on behalf of the Claimant. The Tribunal also read and accepted into evidence on behalf of the Claimant the statement of Bryony Jones a friend and former colleague of the Claimant. The Respondent did not contest that evidence.

5 The Tribunal were provided with an agreed bundle of documents marked Appendix 1.

The law

6 The law which the Tribunal considered was as follows:-

6.1 Section 98(1) of the Employment Rights Act 1996:

> "(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."

Section 98(2) ERA 1996:

> "A reason falls within this sub-section if it –
>
> …
>
> (b) relates to the conduct of the employee"

Section 98(4) ERA 1996:

> "… 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."

6.2 Section 13(3) of the Employment Rights Act 1996 provides:

> "Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

6.3 Section 86(1) ERA 1996:

"The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more –

(b) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than 12 years."

6.4 Section 97(1) ERA 1996:

"Subject to the following provisions of this section, in this part "the effective date of termination" –

(b) in relation to an employee whose contract of employment is terminated without notice means the date on which the termination takes effect."

6.5 Section 11 of the Equality Act 2010:

"In relation to the protected characteristic of sex –

(a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman."

6.6 Section 27(1) EA 2010:

"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."

Section 27(2)

"Each of the following is a protected 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."

Section 27(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."

6.7 The well known case of *British Home Stores Ltd v Burchell* [1978] IRLR 379 where the EAT held that in cases of suspected misconduct the employer must be able to first establish that they had a reasonable belief in the employee's misconduct and then that they had reasonable grounds upon which to sustain that belief and that they undertook a reasonable investigation into the circumstances of the case.

6.8 The case of *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 where the EAT held that the function of an Employment Tribunal 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.

6.9 The case of *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23 where the Court of Appeal held that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason.

7 The case of *Airbus UK Ltd v Webb* [2008] IRLR page 309 where the Court of Appeal held that:

> "Having regard to the reason for dismissal shown by the employer the question to be determined under section 98(4) is whether, in the circumstances, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and this shall be determined in accordance with equity and the substantial merits of the case. There is nothing in the very wide wording of the provisions that laid down a rule for tribunals that the circumstances of the employee's previous misconduct must be ignored by the employer, if the time-limited final warning had expired at the date of the subsequent misconduct, which was the reason, or principal reason, shown by the employer for the dismissal.
>
> The fact of the previous misconduct, the fact that a final warning was given in respect of it, and the fact that the final warning had expired at the date of the later misconduct would all be objective circumstances relevant to whether the employer acted reasonably or unreasonably, and to the equity of the case and the substantial merits. The legislation does not single out any particular circumstance as necessarily determinative of the questions of reasonableness, equity, merits or fairness…

> In that regard, Diosynth is not authority for the general proposition of law that the misconduct, in respect of which a final warning was given but has expired, can never be taken into account by the employer when deciding to dismiss an employee, or by a tribunal when deciding whether that employer has acted reasonably or unreasonably…
>
> Diosynth was addressing a different issue from that which arose before the employment tribunal in the present case. In Diosynth, the position of the employer was that the expired warning "tipped the balance in favour of dismissal", as the other factors taken together would not have justified dismissal. In those circumstances, the expired warning was part of the set of facts that operated on the mind of the employer in his decision to dismiss. It was the principal reason for the dismissal…
>
> That was not so in the present case. The subsequent misconduct on its own was shown by Airbus to have been the reason, or the principal reason, for dismissal. Neither the expired warning nor the July 2004 misconduct were invoked as being within the set of facts constituting the reason, or the principal reason, for dismissal. The relevance of the previous misconduct and the expired warning was to the reasonableness of the response of Airbus to the later misconduct, ie whether dismissal of Mr Webb for the later misconduct was within the range of reasonable responses."

8 The Tribunal also considered and were referred to a number of paragraphs in the judgment, namely paragraphs 44, 46, 47 and 48, 56, 67, 68, 69 and in particular paragraphs 72 and 74.

9 The case of *Neary and Neary v Dean of Westminster* [1999] IRLR 288 where we were referred to paragraph 22 of that judgment wherein Lord Jauncey asked what degree of misconduct justified summary dismissal. He refers to a number of cases and concludes that conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment.

10 The case of *Santamera v Express Cargo Forwarding t/a IEC Ltd* [2003] IRLR 273 where the EAT held that the employment tribunal had not erred in holding that the employers had acted fairly in dismissing the applicant on the basis of allegations by other employees that she had harassed and bullied them, notwithstanding that those making the allegations had not been called to give evidence at the disciplinary hearing and the applicant had thus not been given the opportunity to cross-examine them.

11 *Taylor v OCS Group Ltd* [2006] IRLR 613 where we were referred to paragraph 43 of that judgment where the EAT held that the Tribunal must look at the substance of what had happened throughout the disciplinary process. The EAT went on to say there is no such rule that only a re-hearing of a disciplinary hearing is capable of curing earlier defects and that a mere review never is.

12 *Mattu v University Hospitals Coventry and Warwickshire NHS Trust* [2006] EWHC 1774 where we were referred to paragraph 49 where the Judge observed:

> "… it is in the nature of a "recommendation" that, while it may have to be taken into account, it does not have to be followed."

We were also referred to paragraph 53 and paragraph 54 where:

> "The Judge held that it would be contrary to natural justice, and to the terms of the Disciplinary Procedure, for matters which had not been the subject of any finding by the Panel to be taken into account when considering penalty."

We were also referred to paragraph 55 where:

> "It was argued in the Court of Appeal that the words "depending upon the circumstances" in the Procedure indicated that the Chief Executive was entitled to take into account, in deciding what disciplinary action to take, matters other than mitigation – including allegations which had not been the subject of any finding by the Panel. Moreover, it was submitted that if the relationship of trust and confidence had broken down that was a fact which could of itself be relevant in selecting a disciplinary sanction."

13 The case of *Chabbra v West London Mental Health NHS Trust* [2014] IRLR 227 where it was held that there was implied contractual term in a fair disciplinary process which the Respondent breached, amongst other procedural irregularities, by allowing the case investigator's conclusions to be amended by an HR adviser.

14 The case of *Shrestha v Genesis Housing Association Ltd* [2015] IRLR 399 where the Court of Appeal held that:

> "To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the *Burchell* test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the *Burchell* test will depend on the circumstances as a whole."

15 The case of *Brown v Southall & Knight* [1980] IRLR 130 where the EAT held:

> "Where dismissal is communicated to the employee concerned in a letter, the contract of employment does not terminate until the employee has actually read the letter or had a reasonable opportunity of reading it. It is not enough to establish that the employer has decided to dismiss a man or has posted a letter saying so…
>
> Nor is the effective date of termination retroactive to the date that the letter was written. In such circumstances, the effective date of termination is the date when the employee either does read the letter or the date when he reasonably had the opportunity of knowing about it."

We were also referred to paragraph 21 where it was held:

> "In our judgment, the employer who sends a letter terminating a man's employment summarily must show that the employee has actually read the letter or, at any rate, had a reasonable opportunity of reading it."

16 The case of *McMaster v Manchester Airport plc* [1998] IRLR 112 where the EAT held:

> "The effective date of termination of a contract of employment cannot be earlier than the date on which an employee receives knowledge that he is being dismissed… If employers wish to know at what point the contract of employment has been terminated, they can best do so by communicating directly with the employee concerned so that they will be satisfied that the communication has been received."

17 The case of *Kirklees Metropolitan Council v Radecki* [2009] IRLR 555 where the Court of Appeal held:

> "Where an employee is dismissed summarily, the effective date of termination for the purposes of section 111 of the 1996 Act is the date of the summary dismissal, as long as the employee knows of it…
>
> It is important that there should be no scope for doubt as to the effective date of termination: an employee needs to know when it is and he needs to know that at the time of the effective date of termination..."

18 The case of *Gisda CYF v Barratt* [2010] IRLR 1073 where the Supreme Court held:

> "Where an employee is dismissed by letter, the three-month limitation period … runs from the date when the employee has actually read the letter, or has a reasonable opportunity of reading it, rather than the date when the letter was posted or delivered, or the date when the employer has decided to dismiss the employee.
>
> … an employee is entitled either to be informed or at least to have a reasonable chance of finding out that he has been dismissed before time begins to run against him…
>
> An employer who wishes to be certain that his employee is aware of the dismissal can resort to the prosaic expedient of informing the employee in a face-to-face interview that he or she has been dismissed."

19 The case of Société Générale, London Branch v Geys [2013] IRLR 122 where the Supreme Court held:

> "It is a necessary incident of the employment relationship that one party notifies the other in clear and unambiguous terms that the right to bring the contract to an end is being exercised, and how and when it is intended to operate. These

> are general requirements applicable to notices of all kinds, and there is every reason why they should also be applicable to employment contracts."

20 *Sandle v Adecco UK Ltd* [2016] IRLR 941 where the EAT held that an employer must communicate its unequivocal intention to terminate the contract of employment to the employee.

21 The case of *Newcastle Upon Tyne NHS Foundation Trust v Haywood* [2017] EWCA Civ. 153 where we were referred to paragraphs 48-50 and paragraphs 56-57 of that judgment. The Court of Appeal held that there is a general requirement that notices of all kinds in employment contracts need to be communicated. At paragraph 57 the Court of Appeal held that:

> "I find that the contents of the letter had to be communicated to the employee. That is the effect of *Geys*, and in employment law, it is necessary for the employee to know where he or she stands. I agree, for the same reasons, with what Bean J said in [17] of his judgment in the EAT in *Gisda Cyf.*"

The issues

22 The issues which the Tribunal had to consider are set out in the agreed list of issues and directions at pages 128-137 of the bundle. In summary the claims and issues are as follows:-

<u>Protected act</u>

22.1 By the Claimant telling Briege Gilhooly on 17 August 2015 that she was acting in a sexist manner bullying and harassing him, did he do a protected act within the meaning of section 27 of the Equality Act 2010? If so, was the act of Briege Gilhooly in complaining about the Claimant's conduct on 17 August 2015 a detriment to which the Respondent subjected the Claimant because he had done a protected act?

22.2 In relation to the complaint of victimisation and dismissal, did the Respondent subject the Claimant to a detriment by dismissing him because he had made a protected act as referred to above?

<u>Unfair dismissal</u>

22.3 In relation to the complaint of unfair dismissal, the Tribunal had to consider what was the reason for the Claimant's dismissal and whether it related to his conduct. In that regard the Tribunal had to consider whether the Respondent had a genuine belief in that misconduct, whether that was based on reasonable grounds and whether they followed a reasonable investigation. The Tribunal also had to consider whether the dismissal was procedurally and substantially fair and whether dismissal was a reasonable response in the circumstances.

22.4 In relation to the complaint of wrongful dismissal, the Tribunal had to consider whether the Respondent were entitled to terminate the Claimant's contract of employment without notice.

22.5 In respect of the complaint of unlawful deduction from wages the Tribunal had to consider what was the total amount of wages properly payable by the Respondent to the Claimant and whether the latter was entitled to be paid for 26, 27 and 28 February 2016.

22.6 The Claimant withdrew his complaint under Regulations 13 and 14 of the Working Time Regulations in relation to holiday pay at the outset of the hearing.

22.7 At the conclusion of the case after the evidence had all been heard and before submissions, the Claimant's representative withdrew the complaints of sex discrimination under section 13 of the Employment Act 2010; the complaints relating to allegations about making a protected disclosure contrary to section 47B of the Employment Rights Act 1996 and section 103A of the Employment Rights Act 1996.

Findings of fact

23 The Respondent is a large local authority in London. In common with most local authorities it has an HR department.

24 The Claimant was employed by the Respondent as a social worker. He was still undertaking his assessed first year in practice (AYSE) at the time of his dismissal. He had been employed by the Respondent for seven years.

25 As the Claimant was undertaking his AYSE he said that he should have had regular formal supervisions. The Respondent says that there was no requirement for regular formal supervision, but that the Claimant had informal supervision through regular discussions with his line manager, Catherine Isaacs, and weekly unit meetings. They also said that there were some infrequent formal supervision of the Claimant by Catherine Isaacs but that he did not require any formal supervision sessions.

26 The Respondent admits that the Claimant's formal supervision notes and appraisals were not signed off at the time but at a later time and as it transpires during the period of his suspension. They say that is not unusual for supervision notes to be signed off later. The Claimant and his friend Norman Saggers, the latter who is a trade union representative, say that they notes of formal supervision or appraisals should be signed and agreed by both parties shortly after the meeting so that any areas of improvement can be addressed.

27 The Respondent's disciplinary procedure and policy is at pages 464-479 of the bundle.

28 At page 464 the policy sets out the operating principles of the policy. It states at paragraph 2.1 that the objective of the policy is improvement and that employees will be supported in achieving the required standards. It further states that issues will be dealt with informally and promptly where appropriate. At paragraph 3.1, the policy states that where possible managers should try to deal with issues informally as part of day-to-day management or supervision. It also states that if the informal process does not achieve the desired outcome, a formal process should be commenced. It also refers to warning periods to be used to reinforce standards and provide employees with the opportunity to improve.

29 Page 465 and 466 of the policy refers to suspension and states that inter alia a suspension may be necessary where there are grounds for believing that the employee's continued presence in the workplace could result in a repeat offence or hinder the investigation. It also states that suspension would only occur in cases of gross misconduct. It then states that only a fourth tier (or more senior manager) may suspend. It further states that the suspension would be reviewed every four weeks.

30 At page 469 the policy states that a disciplinary hearing should be held without unreasonable delay and it should allow the employee reasonable time to prepare his or her case. It sets out the procedure that would be adopted in a disciplinary hearing at paragraph 8.1, namely that the manager chairing the meeting will explain the complaint and go through the evidence. They may then ask the investigatory manager to confirm points and clarify evidence, after which the employee would be allowed to set out their case and answer the allegation and would be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. It is noted that both parties must give the other advance notice of their intention to call relevant witnesses.

31 The appeal process is set out at paragraph 10 on page 470 and states the appeal can be on more than one of the following grounds:-

31.1 The evidence did not support the conclusions reached at the formal hearing.

31.2 The sanction was too severe given the circumstances of the case.

31.3 The procedure was not followed properly.

31.4 New evidence has emerged.

It states that the appeal will be dealt with by a manager who has not previously been involved in the case and is of at least a grade equal to the manager who made the original decision. It says that employees have a right of appeal which would normally be within 10 working days upon receiving the letter confirming the disciplinary decision.

32 Appendix 1 of the disciplinary procedure sets out examples of gross misconduct at page 747. It states that any breaches of the code of conduct will normally result in disciplinary action. It states that some breaches i.e. gross misconduct could be so serious as to justify summary dismissal. It goes on to say that any action which destroys the relationship of trust and confidence that the Respondent needs to have in an employee will constitute gross misconduct. It sets out examples in a list which is

stated not to be exhaustive but includes at number 5 – "seriously demean or offend the dignity of others or abuse their position".

33 The procedure also includes at Appendix 2 on page 475 examples of misconduct which include abusive objectionable or insulting behaviour.

34 The disciplinary procedure also indicates what happens if a grievance is raised during a disciplinary investigation. It states at page 476 that either the grievance will be added to the matter under investigation or both matters would be dealt with separately.

35 The Respondent also had a code of conduct for its employees which is at pages 480-488 of the bundle.

36 At page 481 the code of conduct states that this code forms part of the contract of employment and employees must comply with it. It states that a failure to do so may result in disciplinary action which could include dismissal.

37 The Code of conduct at paragraph 3.4 states that respect for others is part of the Code. It states that "an employee must treat colleagues … the public respectfully and with dignity". It also states under the paragraph dealing with working with managers that an employee must follow all reasonable instructions given by a manager and that an employee must respect the manager's role which means that the employee may not always agree with all of the manager's decisions.

38 Appendix 1 of the code is at page 488 and refers to a list, which appears to be the same list in the disciplinary procedure, of examples of gross misconduct which includes "seriously demeaning or offending the dignity of others or abusing their position".

39 The Claimant acknowledged in his evidence before the Tribunal that he received the Respondent's disciplinary procedure and code of conduct through the Respondent's intranet.

40 Whilst the Claimant was working in another unit within the childcare team at the Respondents an issue was raised by Alison Bishop who was the head of service of that department. The concern raised by her related to the Claimant's behaviour. She sent an email dated October 2013 to the Claimant, which was copied to a number of people including Brigitte Jordaan the Head of Service for Children in Need. In that email, she raised an issue about an incident where she says it was alleged that the Claimant raised his voice to a service manager A Bernard and was verbally aggressive to her. Ms Bishop referred to the fact that she met with the Claimant to discuss that incident and that he denied his behaviour was inappropriate. In that email she referred him to the Respondent's code of conduct in particular paragraph 3.4. She copied the email to Ms Jordaan as the Claimant was due to transfer to that unit very shortly afterwards. That email is at page 185 of the bundle.

41 In evidence to the Tribunal, the Claimant said that he did not lose his temper or behave aggressively but that it was a heated discussion with a colleague which was not uncommon in the field of social work, as colleagues often challenge each other.

He said that Alison Bishop was recognised by many in that department to lack the skills to manage a team of social workers. He said that he did not dispute that the allegations were made at the time but he did not dispute the allegations then or comment on the email because no further action was taken at the time and he was due to transfer to another department.

42 Another incident arose concerning the Claimant the following year in 2014 when allegations were made in March 2014 about the Claimant. Three of the complaints were made by service users and one was made by the Claimant's line manager.

43 The allegations made by the service user related to a visit that the Claimant made to a family. It was alleged that the Claimant used profane language – "fuck", in front of a child. In evidence before the Tribunal, the Claimant said that he had developed a good relationship with this family which was a very difficult family. He said that on this occasion he had attended at the family home but that the father was not supposed to be there. The Claimant said that the meeting became very heated. He said that he had stopped himself short of saying the "f" word.

44 The complaint by the manager related to a visit to another family where it was alleged that the Claimant had not made the visit and had allegedly said that he was not effectively bothered about doing so.

45 A formal investigation was undertaken into those matters. The Claimant was interviewed as part of that investigation. It is noted that a recommendation was made in that investigation report that a first written warning should be issued to the Claimant. It also states that support should be given to the Claimant in managing complex situations and in managing his emotional responses to those situations.

46 Following this report, Ms Jordaan who was the Head of Service for the Claimant's department, decided that there was no case to answer on the part of the Claimant for misconduct and that no further action should be taken. However, she reiterated that the Claimant should consider taking up the offer of professional coaching, which support had been offered to him in the course of that investigation. The Claimant did not take up the offer of professional coaching. He said in evidence to the Tribunal that he was not sure of the basis on which it had been offered or what it entailed.

47 The Tribunal (like the disciplinary panel) have been provided with some notes from a few of the Claimant's formal supervision sessions with Catherine Isaacs. In the first of those in January 2015, it is noted that the Claimant is finding the unit okay but it has been a mixed experience. It is noted that he said that he still feels a bit awkward in terms of how he fits in and thinks a lot about how he can work collaboratively with people but he prefers to just work by himself. It is noted that he recognises that he can be quite defensive. It is also noted at page 291 that he feels that his place in the unit is complicated and that they are suspicious of him and that they do not support him. It is noted that he says that he feels that he has not felt to be a valued member of the unit and that they do not work alongside him.

48 It is noted at page 292 of the supervision notes that the Claimant is noted as saying that he feels that he is judged and not appreciated for who he is and that he feels unsure within the unit and isolated. It is also noted on that page that the Claimant states his previous reputation precedes him and that this makes it difficult in terms of progression. Catherine Isaacs signed that note but the Claimant has not signed it. In evidence before the Tribunal, the Claimant says that he cannot recall the detail of that discussion and therefore could not agree with what was noted as his comments. He says that he did not sign the notes and that they were only signed by Catherine Isaacs during his subsequent suspension.

49 Further notes from a formal supervision in June 2015 are at pages 294-298 of the bundle. At page 297 it is noted that Catherine Isaacs feeds back that the Claimant is fitting into the unit. She explains that it is positive that the Claimant and other social workers were able to challenge each other. He is noted as saying that he is very aware about how he comes across. He feels that there has been positive progress but there are still challenges. It is also noted at page 298 some comments about the weekly unit meetings and some discussion about the Claimant's presentation at those meetings and how he can present as angry even when he does not intend to. The Claimant is noted as saying that sometimes this is because he feels very strongly about things and that he is very keen for people to understand his way of thinking and then if they do not it frustrates him. There then followed a discussion of the dynamics of weekly unit meetings and how the Claimant operates within those unit meetings.

50 In evidence before the Tribunal, the Claimant said that again he could not recall the details of those discussions and that he had not seen the notes or had the opportunity to agree or see the notes so that he could sign them. He says that Catherine Isaacs signed them during the course of his suspension which is not disputed by the Respondent.

51 The Claimant's line manager, Catherine Isaacs, went on annual leave in August 2015. She arranged for Briege Gilhooly the then Service Manager for Children in Need, who was Catherine Isaacs' line manager to provide support to the team during this period. Catherine Isaacs met with the Claimant to discuss how the team would be supported during her absence, namely by Briege Gilhooly. During the course of that conversation the Claimant and Catherine Isaacs both say that the Claimant raised concerns about him being temporarily supervised by Briege Gilhooly. He said he had told Catherine Isaacs that he did not think Briege Gilhooly had much time for him and that she treated him differently to other staff in the unit, especially female staff.

52 In evidence before the Tribunal, the Claimant said that he had had a difficult encounter with Briege Gilhooly in the past where he felt that Briege Gilhooly had not supported him. The Claimant said in evidence before the Tribunal that he felt that Catherine Isaacs had brushed off his concerns when he had raised this matter with her before she went on holiday. Catherine Isaacs said that she told him that his concerns did not reflect her own impression of Briege Gilhooly. She could not recall him specifically relating these concerns to gender but she did acknowledge that there was a long discussion about this matter. Catherine Isaacs also went on to say that she mentioned these concerns that had been raised by the Claimant about Briege Gilhooly to Briege Gilhooly herself to make her aware of the situation. The Claimant was not aware that his concerns about Briege Gilhooly had been passed on by Catherine Isaacs to Briege Gilhooly.

53 An incident occurred on 17 August when the Claimant approached Briege Gilhooly regarding one of his cases. This was a high profile case concerning a challenging family. Prior to approaching Briege Gilhooly about the case, the Claimant had been on the telephone to one of the other services involved in the case. One of the Claimant's colleagues, Katherine Mawdsley, said that conversation seemed to be difficult and suggested that the Claimant seem to be angry on the telephone. The Claimant says that he did not recall being angry on the telephone.

54 Shortly afterwards, the Claimant went around the bank of desks to speak to Briege Gilhooly. The Claimant says that he outlined the concerns about the case and says that Briege Gilhooly told him to send an email to one of those other services. The Claimant says that he told her he had already been on the telephone to them and had emailed them. The Claimant says that Briege Gilhooly kept repeating her instructions and was not listening to his concerns. He says that there was an issue with this family in court when the Respondents were criticised and that he says he then said that what Briege Gilhooly was suggesting could look like "a botch" to the court. The Claimant says that when he used the term "botch" Briege Gilhooly became visibly angered. He acknowledged with hindsight that it was not the best use of words. The Claimant says that Briege Gilhooly asked him to return to his desk. He acknowledged that when he was returning to his desk he was saying something like "that was out of order". The Claimant admits the conversation was heated. The Claimant then says that either he or Briege Gilhooly suggested taking the conversation to a meeting room. This conversation had been taking place in an open plan office.

55 The Claimant says that he went into a meeting room and sat down but Briege Gilhooly continued to stand by the door. The Claimant says Briege Gilhooly was standing and he kept on asking her to sit down. He admits that Briege Gilhooly said that he should not speak to her in that manner. He says that he complained that she would not do this if it was a female worker and a male manager. In his witness statement, the Claimant says that he denied saying that he thought Briege Gilhooly accused him of being sexist before saying that he thought her behaviour was sexist and bullying. He acknowledged in his witness statement to the Tribunal that he thought he may have let his stress and frustration at the way she reacted to him to show. He said he may have been flushed in the face but he was often like that. The Claimant says that he did keep saying that Briege Gilhooly was not hearing or listening to him and would not let him finish what he was saying. He accepted that Briege Gilhooly did suggest that there should be a third person in the room. The Claimant also acknowledges that when Briege Gilhooly left the room the Claimant said something to the effect "about her going off to tell the teacher" and he confirmed in Tribunal that he had said this.

56 In evidence before the Tribunal, the Claimant accepted that he may have handled the situation differently but also suggested in evidence that he had been treated badly by Briege Gilhooly. In evidence before the Tribunal, the Claimant admitted that his behaviour in this encounter was in part inappropriate and unprofessional. In response to questions on cross-examination he also acknowledged in evidence that his actions on that day warranted some form of disciplinary action because he had spoken out of line to a senior colleague.

57 Briege Gilhooly said that on 17 August 2015 the Claimant came around to her desk to discuss the case of which she said she was aware. She said that the Claimant seemed frustrated and raised his voice and kept interrupting her when she made suggestions about how to progress the case. She says that she asked him to return to his desk, but the Claimant kept continuing to challenge her in a negative way and that his voice was raised. She says that she then suggested that they take the conversation away from the open plan office to another meeting room.

58 Briege Gilhooly says that when they got to the meeting room, the Claimant sat down and she remained standing. She said that the Claimant seemed angry and she tried to tell him to calm down. She said that she felt that his stance was so aggressive that she did not want to remain in the room with him without a third party. She said that the Claimant yelled at her on a number of occasions to sit down. Briege Gilhooly said that the Claimant called her "a passive aggressive bully".

59 In evidence before the Tribunal, Briege Gilhooly said that the Claimant's behaviour was so shocking to her in a professional environment that she felt it necessary to escalate the matter to her manager. She said that she thought he was aggressive and hostile to her and that he was out of control.

60 In evidence before the Tribunal, Briege Gilhooly presented as a softly spoken, calm and professional woman, albeit a little detached. Her evidence before the Tribunal was consistent with her witness statement and her initial email when she reported the matter to her manager as referred to below.

61 Shortly after the incident, Briege Gilhooly raised the matter with her manager Brigitte Jordaan, the Head of Service, and sent a detailed email to her setting out details of the incident. The email is at pages 306a-d in the bundle. In the email, Briege Gilhooly said that the Claimant seemed frustrated by her suggestions and she said he had said that it looked like a "botch up". She said that the Claimant then continued to challenge her with regard to her suggestions. She said that he accused her of not listening and became aggressive and disrespectful. She said that he was standing over her and talking to her raising his voice. She said that she had then suggested going to a meeting room where the Claimant had sat down and she had remained standing. She said that when they went to the meeting room he continued to be aggressive towards her. She said that she raised concerns with him about the way he had behaved towards her. She said that the Claimant then said that she was going to accuse him of being sexist and said to her that she was being sexist and that she was a bully. Briege Gilhooly said in that email that she said that she then thought that she needed someone else in the room. She said that when she left the room the Claimant shouted after her to the effect about her going to make a complaint and that he would get in there first and make one. The Claimant has in evidence accused Briege Gilhooly of speaking to him in a dismissive and demeaning manner which she denied in evidence before the Tribunal.

62 On the same day, 17 August, Katherine Mawdsley sent an email about the incident. That email is at page 307 of the bundle. In that email, she says that she observed an incident concerning the Claimant and Briege Gilhooly and that the debate appeared to get heated. She said that the Claimant's voice got louder and that the Claimant walked back to his desk accusing Briege Gilhooly as being on a power trip. She said that they then went to another room.

63 The Claimant says that he went to speak to Briege Gilhooly the next morning on 18 August and apologised to her. Briege Gilhooly said that she was about to go into a meeting when the Claimant approached her the next morning. She says that he did not apologise to her although he was not aggressive on that occasion.

64 On 18 August Brigitte Jordaan sent an email to the Claimant. That email is at page 308 of the bundle. In that email she notes that the Claimant appeared to try to speak to her on 17 August and that she assumed it was about the incident on 17 August between him and Briege Gilhooly. She told him that she could not discuss the matter with him and that she was seeking advice on the matter. She did however say that she would be happy for him to email his version of events.

65 A further incident arose on 19 August when the Claimant approached Brigitte Jordaan who is the Head of Service and with whom he had previously had a good relationship. He says that when he approached her she told him that she was not talking to him and mentioned the incident with Briege Gilhooly two days earlier. The Claimant says that he tried to explain that he wanted to speak to Brigitte Jordaan about the case concerning the family and that he thought Briege Gilhooly had been fobbing him off. Brigitte Jordaan then told him that she thought the situation had been resolved regarding accommodation for the family. The Claimant admits that he then said something to the effect that Briege Gilhooly was lying about that. The conversation became heated and Brigitte Jordaan told him that he should stop and that the conversation was at an end and then asked him to return to his desk. The Claimant says that he did say something along the lines that Brigitte Jordaan was talking over her in the same way that Briege Gilhooly had done.

66 Brigitte Jordaan said that when the Claimant approached her desk she explained that she could not talk to him about the incident on 17 August. She said that the Claimant appeared angry and frustrated. She said that she then discussed the case of the family and that she explained that she understood that the options regarding accommodation were being considered. She said that the Claimant started accusing Briege Gilhooly of lying and then accused her of was not listening to him either. She says that the Claimant started to raise his voice and became aggressive and disrespectful to her. She says that this was in an open plan office and that she had concerns about the Claimant's lack of control.

67 Brigitte Jordaan sent an email sometime later on 10 September regarding her recollection of the incident on 19 August. It largely corresponds with the evidence she gave to the Tribunal.

68 Brigitte Jordaan said that following the incident with the Claimant on 19 August she discussed the matter with Sheila Durr, her line manager who is a fourth tier manager, and the HR manager Lorraine Robinson. She says that Sheila Durr decided that the Claimant should be suspended at this stage. She was asked to meet with the Claimant to inform him of his suspension.

69 Brigitte Jordaan says that she met the Claimant to inform him of his suspension which she told him was due to the two incidents and that he would be invited to a formal meeting very shortly. She said that he was much calmer at that meeting.

70 On 20 August 2015, the Claimant was invited to a meeting to discuss his suspension. However he was unable to attend this meeting as he had been signed off sick by his GP. In that letter he was informed of the commencement of an investigation into the incidents on 17 and 19 August. The letter is at page 319-321 of the bundle. In the letter he is informed that the allegation is in relation to allegations under the Respondent's code of conduct and is that "("his") behaviour was experienced as seriously threatening, aggressive and offensive towards a service manager and a head of service". The dates are cited although the first date was incorrectly stated.

71 The Claimant says that during his suspension he had to attend work regularly to meet with HR. He says that on one of those occasions he asked Natalie Wright about raising a grievance against Briege Gilhooly. He says that Natalie Wright told him that he was not able to file a grievance until the investigation was completed. He says that he also raised concerns about Briege Gilhooly's behaviour in both the investigatory and disciplinary meetings but that his concerns were ignored.

72 Natalie Wright says that she could not recall the Claimant raising any matter about a grievance but her normal advice would be to wait until the conclusion of the disciplinary investigation. The Claimant did not ultimately raise any grievance against Briege Gilhooly.

73 Sarah Marshall was appointed to investigate the allegations. Brigitte Jordaan says that the decision to appoint Sarah Marshall was made after discussion with Sheila Durr and HR. In evidence before the Tribunal Sarah Marshall said that she had no involvement with the Claimant previously and that this was her first investigation.

74 Sarah Marshall worked part-time and she said that there were some absences during the course of the investigation which affected the time in which it was completed.

75 Sarah Marshall interviewed the Claimant who attended with a work colleague. He was asked to provide his version of events of the incidents. That interview is at pages 411 to 416 of the bundle. In that interview the Claimant said that during his discussions with Briege Gilhooly he said something to the effect about the situation looking "botched" if he followed her suggestion. He said that he did not swear or shout during the encounter. During the interview he said that the situation would not happen with a female worker. During his interview he said that he did not consider that he had responded in an unprofessional manner and said that Briege Gilhooly had treated him differently to others. He did admit saying that when she left the room he had said something to the effect about telling her to go and tell the teacher.

76 The Claimant also described the incident on 19 August with Brigitte Jordaan. In relation to the incident with Briege Gilhooly the Claimant says that he did not say she was being sexist but something about what was being said by Briege Gilhooly would not be said by a male manager to a female manager. He was asked by Sarah Marshall if he wanted anyone else to be interviewed and said no.

77 Sarah Marshall also interviewed Briege Gilhooly who described how the Claimant had come around to her desk and was angry and irate and accused Briege Gilhooly of not listening to him and then indicated that her suggestion was a "botch" up. She says that the Claimant was being disrespectful and she asked him to return to his desk and had then suggested moving to a meeting room. She described the Claimant's voice as still raised. She says that she stood up while the Claimant sat down and he kept shouting at her to sit down and called her a "passive aggressive bully". She says that she thought the Claimant's behaviour was shocking in a professional environment and that she thought the Claimant was out of control. The notes of the meeting are at pages 420-423 of the bundle.

78 Sarah Marshall interviewed Brigitte Jordaan who described the incident on 19 August in similar terms to her email. She says that when she tried to discuss the case concerning the family with the Claimant that the Claimant said that she was talking over him as Briege Gilhooly had done. She said that the Claimant was angry and she had to ask him to go back to his desk on three occasions. She also said that the Claimant could get rattled on other occasions and that his voice was louder than others but that he was capable of rational debate. But that on this occasion there was suppressed anger. The notes of that meeting are page 426-428 of the bundle. It is noted at page 428 that when Brigitte Jordaan is discussing the suspension she raises issues about the workforce being predominantly female and about the Claimant being line managed by women. She says that she has to take a line on how women are treated and what is aggressive behaviour. She also refers to managing conduct in a workforce where a social worker is being aggressive to a Head of Service and showing a lack of respect.

79 In evidence before the Tribunal, Brigitte Jordaan said that when she was being interviewed about this matter she was trying to explain how in an office environment aggressive behaviour and allegations of bullying and sexism come across. She says that although she referred to female employees this was because there were actually more female employees in the department but that the claimant's behaviour was irrelevant whether it was male or female in an office environment. She said that the Claimant had crossed the line with his behaviour. She also said that she was not the person who had made the decision to suspend, but that it was her line manager.

80 Sarah Marshall interviewed Katherine Mawdsley. The notes of her interview are at page 429-430. Katherine Mawdsley confirmed as she had previously indicated in her email that the Claimant appeared to be having a difficult conversation on the telephone earlier that day. She indicated that the claimant would often appear to have difficult conversations and would have an angry tone and his voice would be raised. She also says that other social workers were shocked when they heard the conversation the Claimant was having on 17 August on the telephone. She says that with the incident with Briege Gilhooly, the Claimant's voice got louder than normal and that he appeared angry. She says that there was a sharp tone to his voice with Briege Gilhooly and that he was red in the face.

81 Sarah Marshall also interviewed Cindy Quaye the Unit Coordinator. The notes of her interview are at page 431-432 of the bundle. She said that she had also witnessed the incident and heard the Claimant say something to the effect that that was out of order a number of times. She thought she heard the word "sexist" being

said as well. She says that Briege Gilhooly tried to defuse the situation. Cindy Quaye also described this as a normal situation for the Claimant. She said that the Claimant had behaved worse at unit meetings and interjected sometimes with a raised voice when Catherine Isaacs was speaking. She said that the way the Claimant was arguing with Briege Gilhooly was not appropriate. She did say that she had a difficult relationship with the Claimant.

82 Sarah Marshall also interviewed Catherine Isaacs as part of the investigation. During the course of that interview she discussed the supervision records; the claimant's appraisal and unit meetings. Catherine Isaacs said that she had a mixed relationship with the Claimant and that there was not a good relationship between the Claimant and Cindy Quaye. She also said that she was aware of a formal complaint being made about the Claimant before he moved to that unit. She described the Claimant as challenging in an aggressive way, but she never felt that he was aggressive towards her.

83 In that interview, a discussion took place about the supervision notes as to when they were signed and/or agreed. Catherine Isaacs said that she had not had feedback in relation to them until September and accepted that they were signed at the time when the Claimant was in fact suspended. Catherine Isaacs said the Claimant was under pressure with the case concerning the family and under some pressure to do write ups. The notes of her interview are at pages 433-437 of the bundle.

84 Lorraine Robinson the HR manager said in evidence to the Tribunal that she met with Sheila Durr on a regular basis to review cases and suspensions and that the Claimant's suspension was reviewed as part of that discussion.

85 On 26 October 2015, Sarah Marshall wrote to the Claimant to inform him about the delay in the investigation and indicated that she hoped the report would be completed by the beginning of November. She did not write any further to him to update him on the subsequent delays in the investigation.

86 Sarah Marshall sent a draft report to Natalie Wright her HR support on 22 December 2015. The report was dated 30 November 2015, but no explanation was given by Sarah Marshall to the Tribunal as to why the report took almost a month to be sent to HR.

87 In the report at pages 384 to 385 Sarah Marshall sets out her findings. She concludes that the Claimant's conduct in his discussions with Briege Gilhooly on 17 August was inappropriate and unprofessional. She says that this unprofessional presentation continued when he approached Ms Jordaan on 19 August 2015. She also notes that, as a social worker, there is an expectation that he would conduct himself at all times in a professional manner. Ms Marshall also notes that the Claimant's presentation has been perceived by others to be aggressive and that this has been addressed with him in supervision. She goes on to find at paragraph 7.4 that he has breached the code of conduct at paragraph 3.4 in relation to the incidents of 17 and 19 August 2015.

88 At clause 7.5 of her findings Sarah Marshall states that she does not find that the Claimant committed an act of gross misconduct in that she states that she has found no evidence that he seriously demeaned or offended the dignity of others or abused their position.

89 Clause 8 sets out her conclusions. She concludes that the claimant has breached the code of conduct. She also notes that his communication style has been a matter of concern for some time. She notes that he needs to manage personal feelings of frustration. She also notes that he comments that he has not been adequately supported. The conclusions are set out at page 385 of the report and at 386 she makes recommendations to refer the Claimant to a disciplinary hearing.

90 On 6 January 2016, Natalie Wright emails Sarah Marshall regarding the report and raises concerns about clause 7.5. She asks her to remove that clause. She says that it is up to the hearing panel to decide whether an act of gross misconduct has been committed. That email is at page 367 of the bundle.

91 In evidence before the Tribunal Natalie Wright says that she asked Sarah Marshall to remove that paragraph because the paragraph dealt with disciplinary sanctions. She said that investigatory reports would not usually refer to disciplinary sanctions.

92 Sarah Marshall responded to the email and agreed to remove clause 7.5, but said that she still thought that this was a written warning case. Her email is at page 366 of the bundle.

93 The investigatory report was not ultimately finalised until early January but it remained dated 30 November 2015.

94 The final report is at pages 393-460 of the bundle. It includes copies of all the interviews which Sarah Marshall conducted. Those are appendices to the report, as is the Claimant's appraisal and supervision notes. The report also attaches copies of the Respondent's disciplinary procedure and code of conduct.

95 The Claimant was invited to a disciplinary meeting and sent a copy of the report including all the appendices. That letter is dated 8 January 2016. It states that the allegation is one of gross misconduct. It states that the Claimant's behaviour was experienced as seriously threatening, aggressive and offensive towards a service manager and a head of service on 18 (it should have been 17th) and 19 August 2015 respectively. It refers to the Respondent's code of conduct disciplinary procedure. It also states that as the allegation is one of gross misconduct the Claimant's job may be at risk. The letter states that the Claimant has a right to be accompanied to the hearing which is fixed for 18 February 2016. The letter is at pages 389-390 of the bundle.

96 The Claimant attends the disciplinary hearing on 18 February 2016 with his colleague Norman Saggers. Mr Saggers is a trade union representative but attended as a colleague because the Claimant was not in the union at the time of the allegations. The meeting was chaired by Sarah Wright, who had no previous involvement in the case, with a HR representative present.

97 Sarah Wright was not provided with a copy of the draft report containing paragraph 7.5 and nor was the Claimant. Sarah Marshall made no reference to that paragraph in presenting the case at the disciplinary hearing.

98 At the disciplinary meeting, the Claimant was given the opportunity to present his case. The Claimant's representative submitted that there was no aggression or violence. He questioned why copies of the supervision notes and appraisal were included, which he said the Claimant had not seen. The Claimant's representative said that this was not a case of gross misconduct and that the Claimant was under stress at the time because of a case involving a challenging family.

99 The notes of the disciplinary hearing are at pages 497-504. The meeting lasted over two hours with a couple of adjournments.

100 At the outset of the meeting the Claimant's representative objected to the suspension notes being included. It is noted at page 502 of the bundle that the Claimant did appear to get frustrated when he was asked if the supervision notes had been fabricated. He said that he was not saying they were fabricated or that there was anything in them but that he had not seen them and did not think they should be included.

101 During the course of the disciplinary hearing the Claimant raised an issue about Briege Gilhooly's behaviour during the incident. He was told that the disciplinary hearing was to consider his behaviour in relation to the incidents in question.

102 During the course of the disciplinary hearing the Claimant was asked to give his account of the incidents. He indicated that that was not necessary because he had given his account in the investigatory meeting. At page 502 it is noted that he said he did not know why he was being asked about this and what was the point of this meeting.

103 During the hearing the Claimant was asked about the incident. He did not admit that he had behaved inappropriately or unprofessionally in relation to either incident, but he did admit that he wished that they had not take place.

104 Sarah Wright said that during the disciplinary meeting the Claimant accused her of not listening to him and became hostile in his responses. She said that she found the Claimant to be rude, argumentative and dismissive towards her in the meeting and was not respectful. She refers to this further in her letter of dismissal and confirmed this in evidence before the Tribunal.

105 In evidence, both the Claimant and his representative said that the Claimant was not rude or dismissive but that he was frustrated and dejected during the meeting. Both the Claimant and Mr Saggers suggest that Sarah Wright was dismissive in the approach that she adopted to the meeting and left the Claimant feeling frustrated.

106 In evidence before the Tribunal Mr Saggers said that he did not expect the Claimant to be dismissed. He said that the incident did not involve any physical violence or protected characteristics. He said that it was just a workplace disagreement, but indicated that the Claimant's behaviour would warrant some form of disciplinary sanction like a warning.

107 At the end of the disciplinary meeting, Sarah Wright said that she would review the evidence and give a decision in writing within 10 working days (page 504 of the bundle).

108 On 25 February 2016, Sarah Wright wrote to the Claimant informing him of the outcome of the disciplinary hearing. That letter is at page 491-495 of the bundle. She concluded that the Claimant had committed an act of gross misconduct and dismissed him on that basis. She considered that the gross misconduct related to both incidents. She also refers to discussions in the disciplinary hearing about asking the Claimant to provide an account of the incidents and reflect upon his behaviour. She notes that it was difficult sometimes to illicit a response from the Claimant. She also notes that she had concerns about the Claimant's behaviour during the disciplinary meeting which she thought corresponded with the behaviour that he had exhibited in relation to those incidents.

109 In the letter of dismissal she refers to the interviews and comments made by Katherine Marshall, Cindy Quaye and Catherine Isaacs.

110 In the letter of dismissal, Sarah Wright goes on to refer to the fact that she has reviewed the Claimant's personnel file and found the email from Alison Bishop regarding a similar type of incident. She says that during the disciplinary hearing that she had found that the Claimant's behaviour was consistent with the behaviour that was described about him in relation to the incidents. She says that she has taken account of the stress that she notes that the Claimant would be under in relation to the family, but concludes that e should be summarily dismissed.

111 The Claimant was given a right of appeal to appeal against the decision.

112 The Claimant was sent the letter of dismissal by post on 25 February 2015. In evidence before the Tribunal he said that he did not receive the letter until 29 February 2016, which would be consistent with normal delivery of post.

113 He appealed against the decision to dismiss him. His letter of appeal is dated 8 March 2016 and is at page 507 of the bundle.

114 On 28 April 2016, the Respondent acknowledged the Claimant's appeal and fixed an appeal hearing for 24 June 2016. They advised him of his right to be accompanied and asked him to provide any documents or evidence in support of his appeal five working days before the appeal hearing. That letter is at page 501 of the bundle.

115 The appeal hearing was then rescheduled to 22 July 2016 as the Claimant's representative is not available. The letter rescheduling the appeal hearing is dated 4 July. Again the Respondent reminds the Claimant to produce any documents five working days before the hearing. That letter is at page 511 of the bundle.

116 The appeal hearing was then rescheduled again on 22 July. In the letter of 2 August 2016 re-fixing the hearing for 17 August, the Claimant is again reminded that he must produce any documents or evidence five days before the hearing. That letter is at page 514 of the bundle.

117 The appeal hearing was then rescheduled again to 16 September 2016. Again the Claimant is asked to produce any documents or evidence five working days before the appeal hearing.

118 Some of the delays with regard to the rescheduling of the appeal hearing were due to the Claimant or the Claimant's representative' s availability, but most of the delays relate to the Respondent's unavailability. We note that it takes over six months for the appeal hearing to be heard.

119 In the meantime, the Claimant has issued proceedings to the Tribunal in August 2016.

120 On 12 September 2016, the Claimant sought to submit an appeal statement. That email is at page 517 of the bundle. The documents in the grounds of appeal are at page 518-530 of the bundle. Those grounds of appeal are very similar to the particulars of claim form submitted by him in this Tribunal.

121 The Claimant also submitted an addendum to those grounds of appeal which is at pages 531-535 of the bundle. In the addendum, he complains about the delay in the proceedings and the impact of this in particular relating to his suspension. He also raises an issue about not being able to raise a grievance about Briege Gilhooly's behaviour. Furthermore, he complains that the evidence does not constitute gross misconduct. He says that there are witnesses he would have wanted to bring and he also objects to the inclusion of documents by Catherine Isaacs.

122 In the addendum, he also complains about documents being considered referring to other investigations regarding his alleged behaviour. He complains about the inclusion of the email from Alison Bishop. He says in conclusion that the decision to dismiss him was harsh and that he should be given a fair opportunity to respond to the allegations.

123 The Respondent refused to allow the Claimant to submit the documents because they were outside the five day period referred to in the letters referred to above. The HR department wrote to the Claimant to inform him of this on 13 September 2016.

124 The appeal hearing eventually took place on 16 September 2016. Ilona Sarulakis chaired the meeting and was supported by an HR representative. The Claimant attended with a friend Bryony Jones. The notes of the meeting are at pages 538-544 of the bundle. Sarah Wright also attended the meeting to present the management case.

125 At the outset of the appeal hearing, Ilona Sarulakis said that she had received the additional documents which the Claimant had submitted. She said that she had read them, but was not going to include them because they had not been sent in time. There then followed some discussions as to how these documents were going to be considered. The Claimant started to read the documents but was stopped on a number of occasions and was asked to sum up parts of the document for the appeal hearing which he attempted to do. An adjournment took place. After the adjournment

Bryony Jones tried to summarise parts of the grounds of appeal which the Claimant had submitted and wanted to rely on. Those matters are set out at page 541 of the bundle namely inter alia as follows: concerns about the suspension being initiated by Briege Gilhooly; there being no evidence or gross misconduct or that the managers had felt threatened by the Claimant's behaviour; no opportunity for cross-examination; no account being taken of the Claimant's version of events; several pieces of evidence being presented which the Claimant had not had the opportunity to respond to; and that no reason was given for not considering alternatives to dismissal.

126 During the appeal hearing the Claimant said that he was stopped from being able to put his case and was being shut down. He said that he tried to put this behaviour in context in relation to the behaviour of Briege Gilhooly. The Claimant said that he had not received the code of conduct until he was invited to the disciplinary hearing and he thought gross misconduct was disproportionate.

127 During the appeal hearing, Sarah Wright indicated that the Claimant had been offered counselling previously, but the Claimant said in evidence before the Tribunal that it had not been formally offered.

128 The Claimant's representative also made notes from the appeal hearing which are at pages 544(a-f) with a handwritten version at page 544(g-o).

129 At page 544(e) it is noted that Sarah Wright refers to another disciplinary. She appears to be referring to the incident with Alison Bishop, when she says that the Claimant was offered counselling. In evidence before the Tribunal, Sarah Wright acknowledged that she thought that there had been a previous disciplinary concerning the Claimant and that this may have been mentioned at the appeal hearing.

130 The Respondent wrote to the Claimant following the appeal hearing to inform him of the outcome. That letter is dated 29 September 2016, and is at pages 545-548 of the bundle.

131 In the letter, the appeal officer rejects the Claimant's submission that the sanction was too severe. She concludes on the basis of the evidence that the Claimant's behaviour was unacceptable and unprofessional. She also refers to how she viewed the Claimant's behaviour at the appeal hearing and indicated that she thought the Claimant was reluctant to listen and appeared irritable. She said that the Claimant's representative had to interrupt him at times to try and get eye contact.

132 Bryony Jones' evidence was not contested. Her evidence was that the Claimant might have been frustrated but was not irritable. She thought that the panel was dismissive of the Claimant. She said that she did try and make eye contact with the Claimant, because she thought that he was feeling distressed and she was trying to keep his spirits up.

133 In evidence before the Tribunal, Ilona Sarulakis acknowledged that her refusal to allow the Claimant to read his prepared statement may not have set the right tone for the appeal hearing.

134 This Tribunal has also had the opportunity to observe the Claimant during the course of the hearing. We acknowledge that the process is distressing for any person having to appearing in front of a Tribunal. We did however at times find the Claimant was somewhat pedantic in answering questions put on cross-examination and on occasions by the panel. By way of example we note that when he was cross-examined about whether he used the word botch he said that he did not say "botch" but something like "botched up".

135 We also noted that the Claimant's evidence was at times inconsistent in relation to a number of matters. In evidence before the Tribunal, he denied calling Briege Gilhooly a bully. However, that is what it is noted he said in his investigatory interview (which he did not largely contest) and in his own witness statement to the Tribunal. He also denied on cross-examination calling Briege Gilhooly sexist yet that is what is contained at paragraphs 56 and 57 of his witness statement. Furthermore, the Claimant's evidence was not clear about whether he did say to Briege Gilhooly that she was "sexist". When it was put to him on cross-examination he seemed to suggest that he thought he was being treated differently than a female manager would be by a male manager but he was not sure he actually said it.

136 We also note that the Claimant accepted in evidence before the Tribunal that his behaviour was inappropriate and unprofessional, but did not do so in either the investigatory interview or the disciplinary hearing.

137 We noted that he was also reluctant at times on cross-examination to answer questions about the specific incident other than he did not recall some of the details, yet he had set it all out in minute detail in his witness statement to the Tribunal.

Submissions

138 At the outset of her submissions the Claimant's representative withdrew a number of the Claimant's complaints, namely those numbered 2-4 of this judgment. She provided written submissions and expanded on those submissions.

139 The Claimant's representative submitted that the dismissal was unfair on a number of bases. She said it was substantially and procedurally unfair: she referred to the delay; the amendments to the report and the inclusion of a number of factors which were outside the matters investigated.

140 The Claimant's representative also submitted that this was not an act of gross misconduct and that the Claimant should not have been summarily dismissed.

141 The Claimant's representative argued that it was victimisation because of the comment made by the Claimant that Briege Gilhooly was sexist and that was why Briege Gilhooly had made the complaint about him in the first place, which led to him being suspended and then subsequently dismissed. She also referred to the comments made by Brigitte Jordaan in her investigatory interview about the Claimant working with a number of female employees in an office environment.

142 The Claimant's representative further submitted that the Claimant was entitled to his wages for the period until he received the letter of dismissal. She filed a number of cases, namely those referred to at numbered paragraphs 15-21 in the judgment in support of her submission in that regard.

143 The Respondent's representative did not file any written submissions.

144 The Respondent's representative submitted that there was no unlawful deduction of wages. He referred to an authority, but did not have any details of that or any other cases that he wished to rely on as authorities. Both parties were given the opportunity to file further written submissions on this point. As noted above the Claimant's representative filed a number of cases, but the Respondent's representative did not file any further submissions or submit any cases for the Tribunal to consider despite requesting that the Tribunal give him the opportunity to do so. He submitted that the issue was a matter of a breach of contract and that the consideration was as to what was properly payable under law.

145 The Respondent's representative submitted that the dismissal was fair and that it did relate to the two incidents on 17 and 19 August 2015. He submitted that the investigation was reasonable. He further submitted that the decision was not outside the band of reasonable responses bearing in mind the position the Claimant held at the council where he would have to come across difficult situations on a regular basis.

146 The Respondent's representative further submitted that misconduct did amount to gross misconduct and that the Respondent did consider other potential sanctions. He referred to a number of cases as referred to paragraphs 7-12 and 14 of the judgment.

147 In relation to the complaint relating to victimisation, the Respondent's representative said that it was not clear if the Claimant was in fact even saying that he had done the protected act because it was not clear from his evidence whether he had actually used the word "sexist". In any event the Respondent's representative submitted that the Claimant had said he had also called Briege Gilhooly a bully. He submitted that the reason why Briege Gilhooly had complained about the Claimant was not because of the sexist comment if it was even said, but because of the Claimant's general behaviour which undermined her. It could have been as much to do with him allegedly calling her a bully as any other comments.

148 He also submitted that he was not suspended or dismissed because of the alleged allegation relating to the protected act, but because of the Claimant's aggressive and undermining behaviour towards two senior managers on 17 and then on 19 August.

149 He also reserved his right to pursue a claim for costs with regard to the withdrawal of a number of the Claimant's claims as referred to above.

Conclusions

150 The Claimant was dismissed for his behaviour on 17 and 19 August when he was aggressive, raised his voice and undermined his manager and then a more senior manager.

151 Misconduct is a fair reason for dismissal under section 98(2) of the Employment Rights Act 1996.

152 This Tribunal finds that the Respondent undertook a reasonable investigation into the allegations. They interviewed all the potential witnesses including the Claimant. Although the Claimant suggested in the appeal hearing that there were other witnesses who should have been interviewed, he did not do so during the investigatory meeting nor has he put forward any witnesses that he suggests should have been interviewed as part of the process.

153 This Tribunal finds that the dismissing officer did have reasonable grounds to believe that the Claimant had committed an act of misconduct. She accepted the evidence of the two managers, whose interviews as part of the investigation were consistent with their email accounts of what occurred in relation to both incidents. One of those emails was contemporaneous with the incident which occurred on 17 August 2015. There was also corroborating evidence in the form of evidence from two other witnesses to the first incident. Further, the Claimant did to an extent admit his misbehaviour.

154 Accordingly this Tribunal finds that the Respondent did have reasonable grounds to believe that the Claimant had committed an act of misconduct. However this Tribunal does not find that a fair and reasonable process was followed for the following reasons:-

154.1 The investigation which was not complex took over four months to complete during which time the Claimant was suspended. The Tribunal considers that this was an unacceptable delay. Furthermore the investigating officer could provide us with no explanation as to why there was a delay of almost a month after she had produced her initial report before she sent it. We also note that the appeal hearing took over six months to complete, most of which delay was due to the Respondent's fault.

154.2 The HR manager who was supporting the investigation asked the investigating officer to amend the report. She said that this was to remove any reference to sanction. However what she asked the investigating officer to do was to remove the whole of paragraph 7.5 which referred to both sanction and findings of fact. We find that the removal of the second part of that part of the report was both substantially and procedurally unfair insofar as it deprived both the dismissing officer and the Claimant (the latter whose case and that of his representative was specifically that his conduct did not amount to gross misconduct) of the opportunity to question the investigating officer properly about her findings of fact and conclusions. It raises the question as to whether questions would have been raised by the dismissing officer if she had been made aware of those findings of fact. Submissions or questions would certainly have been raised by the Claimant and/or his representative bearing in mind their view of the case. The investigating officer attended the disciplinary hearing but made no reference to these

findings of fact during the course of her presentation of the case. We find that the input of HR into the report made the process substantially fair and we have noted the case of *Chabbra* in that regard.

154.3 The dismissing officer took account of previous allegations which were not raised with the Claimant either in the investigatory meeting or in the disciplinary hearing. In particular she reviewed the Claimant's personnel file and found an email from Alison Bishop which referred to an earlier incident. The Claimant was not given the opportunity to comment on this evidence before it was taken into account. This was a clear breach of the ACAS code. This failure was not rectified at the appeal as is noted from our comments in the next paragraph.

154.4 The dismissing officer appeared to have been under the misapprehension that the Claimant had received some form of disciplinary action as a result of his behaviour in relation to the incident with Alison Bishop. This was suggested during the course of the appeal hearing. However he had not in fact received any disciplinary sanction for this matter. Indeed only an informal warning was given. The Claimant actually had a clean disciplinary record.

154.5 Further the Respondent effectively took into account an informal warning which if had been a formal warning would have been disregarded in normal circumstances.

155 For these reasons the Tribunal considers that the dismissal is unfair.

156 We went on to consider whether dismissal was within the band of reasonable responses. The Tribunal had some difficulties with this dismissal and were concerned that it was potentially harsh in the circumstances. However, we reminded ourselves of the case of *Iceland* and had to consider whether a reasonable employer in those circumstances would have dismissed. We took account of the fact that the Claimant was working in a difficult environment in social care work, where he would regularly encounter difficult situations and where it was necessary to follow instructions from his managers even if he did not agree with those instructions. We also noted that the Claimant had to a degree admitted (albeit that he did not do so during the course of the investigatory, disciplinary or appeal hearings) his behaviour was inappropriate and unprofessional and accepted that he had raised his voice and effectively undermined two senior managers. On that basis taking account of the area of work in which the Claimant was operating we find that the dismissal was within the band of reasonable responses. Dismissal was in those circumstances a reasonable response, albeit that we consider that in some cases a respondent would not have dismissed on those facts.

157 We went on to consider whether the misconduct amounted to gross misconduct. We took account of the wording of the disciplinary procedure and code of conduct, and noted the behaviour on 17 August 2015 when the Claimant became aggressive, raised his voice and undermined a manager, who had to try and settle the situation down and then was concerned enough to immediately report the incident. We consider such behaviour did amount to gross misconduct particularly as we note that a similar, albeit not so serious incident occurred only two days later with a more senior manager with

whom the Claimant had a good working relationship. Accordingly we consider that the Respondent would have been entitled to summarily dismiss the Claimant for gross misconduct if, contrary to our conclusions, it had been a fair dismissal.

158 In relation to the Claimant's complaint of unlawful deduction from wages, we find that although the Respondent told the Claimant that he was summarily dismissed on 25 February 2016, they did not communicate that dismissal to him until 29 February 2016, when he received the letter informing him of his dismissal. We have noted the various cases provided to us by the Claimant's representative. We note that despite relying on authorities, the Respondent did not provide any authorities in support of their submissions. All the authorities produced by the Claimant's representative support the view that the effective date of termination is the date that an employee is notified of his/her dismissal which we find to be 29 February 2016, namely the date that he received and read the letter. We further note that the Respondent stated in the disciplinary hearing that they would notify the Claimant of their decision, so clearly they did not envisage that the Claimant would be dismissed until they had told him that he had been dismissed. We consider that it was open to the Respondent to have reconvened the disciplinary hearing or have informed the Claimant of their decision verbally or ensured that any letter was hand delivered to him. Accordingly, we find that as the Claimant was not dismissed until 29 February 2016, he is entitled to any wages properly payable to him up until that date.

159 In relation to the complaint of victimisation, it is not clear to the Tribunal from the Claimant's own evidence whether he did do a protected act. He says that he called Briege Gilhooly "sexist" which on the face of it could amount to an allegation that Briege Gilhooly had contravened the Equality Act 2010. Therefore there would have been a protected act. However, the Claimant's own evidence was unclear about whether he did actually make that comment or whether he thought it at the time. His evidence is inconsistent on the point as on cross-examination he denied making the comment, yet his witness statement to this Tribunal is that he did make the comment.

160 However, this Tribunal finds that, even if the Claimant did make that comment, we do not find that Briege Gilhooly complained about the Claimant because he made such a comment, indeed she was not entirely clear herself whether the comment had been made. What is clear to this Tribunal is that Briege Gilhooly complained about the Claimant because of his behaviour on the date in question. In that regard, she was concerned about him raising his voice, being aggressive, and undermining her. We have also taken into account that during the incident the Claimant also accused Briege Gilhooly of being a bully. Both the Claimant and Briege Gilhooly seemed to agree that there were some sort of comment made about the Claimant accusing Briege Gilhooly about being a bully and the concerns about the claimant's behaviour seemed to be more consistent with that comment than any comment of a sexist nature

161 In support of his victimisation claim, the Claimant relied on comments made by Brigitte Jordaan in her investigatory meeting about the female working environment in the Respondent's office. We found Brigitte Jordaan to be a clear and credible witness. We accepted her explanation about those comments, which were not made in isolation and did not refer to the alleged comment which the Claimant relies on as the protected act. We noted she was made aware of the incident on 17 August, but that it was only after the incident occurred with her on 19 August that she escalated the matter to

consider suspension. We accepted her evidence that it was her manager who made the decision to suspend and that she was simply asked to meet the Claimant to inform him as his line manager. This Tribunal does not find that the reason why the Claimant was suspended or subsequently dismissed was because of any alleged protected act, but was because of his behaviour towards both her and Briege Gilhooly on two separate incidents in August 2015.

162 We find that the reason for the Claimant's dismissal was because of his behaviour on 17 and 19 August towards two senior managers and not because of any alleged comment which he might have made about Briege Gilhooly being sexist, or any suggestion of an alleged sexist attitude to males in that office environment. In that regard, we note that the Claimant did not raise any grievance about this matter at any stage albeit that he indicated that he wanted to do so.

163 Accordingly we do not find that a complaint was raised against the Claimant so that he was suspended or dismissed because of a protected act. Accordingly his complaint of victimisation fails.

164 At this stage, we have not heard any submissions on whether the Claimant would have been fairly dismissed in any event or whether he contributed to his dismissal. However, we do take the view that there is evidence which suggests an element of contribution in relation to this matter which the parties will need to address.

Employment Judge Martin

23 May 2017