Case No: 2300298/2017

EMPLOYMENT TRIBUNALS

Claimant: Mr Derek Mills

Respondent: East Sussex Healthcare NHS Trust

Heard at: London South **On: 8 August 2017**

Before: Employment Judge Fowell

Representation

Claimant: Mr O Tahzib
Respondent: Mr T Ogg

JUDGMENT

The Claimant's complaint of unfair dismissal is upheld.

An order for reinstatement is made.

REASONS

1. By a claim dated 13 January 2017 Mr Mills brings a complaint of unfair dismissal against the respondent NHS Trust.

2. The basic facts are as follows. The claimant worked as a porter at Eastbourne District General Hospital. In May 2015 allegations were raised against him of kissing or trying to kiss a patient, which were reported to the police and the Trust's safeguarding team. The view of the police was that there should be no internal investigation as it might compromise their enquiry, and the Trust acceded to this request. Their safeguarding team also advised or required that the claimant be suspended during this police investigation. The police investigation led to a trial in February 2017 at which the claimant was acquitted.

3. Before this stage however, the claimant had been dismissed. In January 2016, a review was begun into whether the Trust could continue to afford the cost and disruption to service caused by his absence. An investigation concluded that the cost and disruption to services (to cite the main reasons) were too great, and this conclusion was upheld at a hearing on 28 September 2016, described as a disciplinary hearing, and subsequently on appeal.

4. The test of unfair dismissal is set out in section 98 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 [conduct] or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. …
>
> (4) Where the employer has fulfilled the requirements of subsection (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.

5. There was an agreed list of issues but the first and main question is the reason for dismissal – whether it was the original conduct issues or "some other substantial reason," namely the cost and disruption caused by the claimant continuing on suspension, and its likely duration. The prospect of adverse publicity for the Trust was also relied on to a lesser extent.

6. Evidence was heard over the first day of the hearing from Ms Amanda Howell, the Assistant Site Operations Manager, who carried out the investigation that led to the claimant's dismissal; Mr. Jim Harrington, the Hotel Services and Facilities Manager, whose decision it was to dismiss the claimant; Mr Chris Hodgson, Associate Director of Estates and Facilities, who upheld this decision on appeal, and from the claimant. On the second day of the hearing, Mr Kevin Hodge, the Site Operations Manager, also attended to give evidence in relation to remedy.

Findings of Fact.

7. Having set out the background in summary I will now set out my findings of fact. On 9 May 2015 allegations were raised by a patient that the claimant had behaved inappropriately on a number of occasions. According to this patient, the first incident occurred a few days earlier on 4 May. She was being transferred about the hospital and, she claimed, he kissed her on the cheek and said how nice it was to know someone at the hospital. She did not in fact know him and was surprised by the kiss. The second incident, she said, occurred on 7 May, when she was in bed, and he came up to her and tried to kiss her again, but jumped back because there were nurses about. The third occasion was on 8 May, and again she was in bed when he approached. He tried to kiss her on the lips, she said but she turned her head. He also stroked her hair, she said, and told her that she was one of those women who attracted men. That was her account.

8. She gave this account to the Ward Sister the next day, who reported them to the Head of Midwifery and Gyneacology, Ms Crowe, who in turn sent an

email to the Facilities Manager, Hotel Services, Ms Gorringe, the relevant senior manager (and Mr Harrington's predecessor). Ms Crowe also spoke to the patient herself, and according to her email two other patients confirmed her allegations and this confirmation was witnessed by another member of staff. Adult Social Services were then informed.

9. When the allegations were raised the claimant was not interviewed but was simply moved to work in the post room, away from patients. A safeguarding meeting was then held on 5 June 2015 at the offices of the Adult Social Care department of East Sussex County Council. Ms Gorringe was present from the hospital, together with a police officer, social worker and, the hospital's Safeguarding Lead, and the main outcome was to confirm that the police would take the lead in investigating matters. The minutes note that neither the patient nor the claimant should be spoken to until the Police had concluded their enquiries and this was the position that the Trust agreed to adopt.

10. By email in August 2015 the police advised that the claimant was to be charged over these incidents. The claimant was then suspended on 26 August and told the nature of the allegations.

11. A further safeguarding meeting followed on 21 October 2105, attended this time by Ms Howell. She had not previously had much involvement and attended mainly to confirm that the claimant had been suspended. Also there was the patient who had complained, who gave her account to the meeting. A report of some sort had already been prepared by an Emma O'Dowd, listed as an Enquiry Officer at the Trust and a social worker. The minutes quote from this report as follows:

> "On the information gathered during this enquiry, I would say on the balance of probability Mr Mills breached the professional standards expected of an employee…"

12. That appears to have been regarded as a sufficient enquiry for the purposes of the safeguarding meeting, although no further details of that report were provided to this hearing. Ms Howell confirmed that she regarded this as their finding, although she recognised that no investigation had taken place and the claimant had not been spoken to about the allegations by anyone. After that she felt she was just waiting for further instructions while the police made their enquiries.

13. As matters dragged on, the claimant was invited to a meeting on 19 November 2015 to review his suspension. This was with Ms Howell's manager, Mr Kevin Hodge. Afterwards the terms of suspension were confirmed again in writing, and the claimant had the clear understanding that his suspension would be continued until after his trial.

14. The approach of the Trust changed in the New Year. On 22 January 2016 a letter was sent to the claimant from Mr Hodge informing him that Ms Howell had been appointed to carry out an investigation. Precisely what was to be investigated was not explained clearly, perhaps reflecting some indecision on the part of the Trust as to whether they were considering the original allegations or the effect of prolonged suspension. It referred to the original allegations and stated that an investigation would take place under

the Trust's disciplinary policy, mentioning in particular the sections relating to breach of good conduct, gross carelessness which threatened the health and safety of a patient, or which rendered further employment impossible or which resulted in a loss of trust and confidence. But then it went on to set out further and different terms of reference, including the impact of his absence on service delivery, and the sustainability of keeping his role open. Even that division of emphasis was not maintained, since it also proposed a review of the circumstances "surrounding him being out of post for 8 months," and whether the charges affected his suitability. Ms Howell confirmed that she was unaware of the nature of her remit before this letter was sent, and only knew that she was to carry out the investigation. These details were provided later.

15. Then on 4 February 2016, about 2 weeks later, Mr Hodge sent a further letter to the claimant, stating that this approach had been reviewed, and that there would be no investigation. The reason for this change was unclear. Ms Howell said in her witness statement that it was because they found that the trial was set for April 2016, but this fact was mentioned in the first letter.

16. Whatever the reason, matters continued as before during the first half of 2016. On 20 July 2016 Mr Hodge sent a further letter to the claimant which again advised him that Ms Howell had been commissioned to carry out an investigation, again under the Trust's disciplinary procedure. Again, it mentioned the original allegation, his appearances in court so far in connection with them, and that Ms Howell would carry out a full investigation into these matters. It then set out a ten point list of matters which the investigation would cover, the main items of which were the effect of his absence on service delivery, the likely duration, whether he was likely to be able to make a return to work and whether there were any steps the Trust could take to bring him back into post. These were, to say the least, mixed messages. Ms Howell confirmed her understanding that the investigation was to cover whether the allegations were true or false, adding that that was the way HR were leaning at that point. There was no mention of the cost caused by his absence in this letter.

17. It was clear that Ms Howell was guided by HR advice throughout, and the next step in the investigation was a meeting, held in company with Ms Sam Healy, HR Manager, on 4 August with Mr Nigel Brant, the Portering Services Supervisor. It was his role to manage the porters and their workload.

18. That meeting was minuted and he explained that the claimant's role had been filled by another member of staff, whose work in turn was backfilled using overtime, agency, and bank staff. Mr Brant did not express any particular concern about the quality of the agency staff or say there was any difficulty in finding them. There was one other vacancy in the team of 23 or 24 at the time. A number of pointed questions were put to him by Ms Healy, suggesting that it was a small team, and that the claimant's absence must be having a significant impact, indicating that this was the preferred conclusion. This approach was criticised in cross-examination by Mr Tahzib and I find those criticisms were justified.

19. There followed a meeting with the claimant himself, also on 4 August 2016. The minutes record that Ms Howell told the claimant that they were not

there to discuss the allegations, regardless of what had been said in the previous letter. The discussion did go over his shift patterns, health, the progress in the court case and the claimant's protestations that he was innocent. It ended with the claimant setting out his understanding that he had to stay on suspension until after the court case as it was out of the hospital's hands. Ms Healey then explained that the investigation was to look at the impact his absence was having, to which the claimant said that he could understand that. Nevertheless I find that it was not clear to the claimant at that stage what exactly was being investigated, and he was anxious to set out his side of the story with regard to the original allegations.

20. An Investigation Report was subsequently prepared by Ms Howell in concert with HR. This too was criticised at the hearing in two main respects.

    a. It set out a conclusion at paragraph 4.2.3 that Mr Brant had said that it was difficult for the department to sustain his absence, although this was simply him agreeing to a statement from Ms Healy to that effect.

    b. It also set out a cost figure of £62,458. This was based on a short email Ms Howell received from the Finance Manager, listing the salary cost for the claimant and for the person covering his shifts. Adding these together and projecting the cost forward to the end of February 2017, a total figure of over £62,000 was arrived at. Ms Howell accepted that the figure was misleading, that only the extra costs should be used, not the claimant's own salary. No consideration was given either to the fact that only a small part of the total remained to be incurred, and the cost of the overall suspension was considered.

21. The conclusion of the report set out again the relevant sections form the Trust's disciplinary policy, including good conduct and trust and confidence, and stated:

> 5.1Mr Mills has been charged with a criminal offence, which finds him in breach of the Trust's Disciplinary Standards as outlined in [the above section]

22. Again, Ms Howell accepted that there had been in fact no investigation into any disciplinary matter and they had not found him to be in breach of the disciplinary policy.

23. The conclusion went on to say that trust and confidence had been irreparably damaged. Ms Howell was unable to justify or explain that conclusion either, stating that if he had been acquitted at the trial they would have to do a full investigation.

24. As a result of that investigation report, the claimant was invited to a disciplinary hearing with Mr Harrington on 28 September 2016. The extent of HR involvement in the process is shown by the fact that the letter inviting the claimant to the meeting was drafted and sent out on his behalf without any knowledge or involvement on his part. Again, that letter furthered the ongoing confusion over the purpose of the meeting by setting out the relevant sections from the disciplinary policy again and saying that it was a meeting under the disciplinary procedure to see whether he was in breach

of the disciplinary standards. It made no reference to such other points as the sustainability of his absence or the effect on service. In short, it is a standard invitation letter to a disciplinary hearing. Mr Harrington agreed that it was quite misleading.

25. Mr Harrington was fully aware that the intended purpose of the meeting was to consider such matters as cost and impact on service, not the question of guilt or innocence, but this awareness was not shared by the claimant or his Trade Union representative. Given the plainly misleading terms of the invitation letter that is entirely understandable.

26. The claimant brought with him a character witness and a supporting statement from his immediate manager, and believed that this was the meeting at which he could have his say about the original allegations. He was disappointed that no real interest was shown in his witness's evidence, and concluded that minds had been made up. This may well have reflected the fact that he and Mr Harrington were at cross-purposes. He felt Mr Harrington was not listening to him, but in fact the points he wanted to make were not relevant to the issues Mr Harrington set out to consider.

27. Following that meeting, the claimant was dismissed, and the reasons for dismissal were fourfold:

    a. the likely duration of further suspension;
    b. the effect on service;
    c. the cost; and
    d. the risk of adverse publicity.

28. Of these, Mr Harrington conceded that the publicity factor was the least relevant. The main reason was the effect on service. This is of course closely related to cost and may be regarded as the other side of the coin. The likely length of suspension is the key factor in assessing that cost/service impact, so in reality there was one main reason for the dismissal, covering these three aspects.

29. In forming his view on cost, he was aware from his own knowledge of the size of the departmental budget and the strains on it. The hospital was in special measures and there was anxious scrutiny of all costs. He too accepted that only the additional cost was relevant not the claimant's own salary. In looking at service impact however he did not confine himself to the investigation report but had his own, separate, meetings with Mr Brant and Mr Hodge, and spent some time looking at rosters. His conclusions on this issue were in fact based solely on those discussions and documents, gaining more detailed information about the turnover and quality of agency staff and the importance of the role for patient safety. This may have been a conscientious effort on his part but this was not raised with the claimant at the hearing. Some of these discussions took place at routine departmental meetings, but the main one took place after the disciplinary hearing and before he gave his decision.

30. Mr Harrington was concerned more generally about the approach being taken and also asked HR about the possibility of the claimant returning to a non-patient role. He obtained the number of the hospital's Safeguarding Lead, Angela de La Motte and called her to discuss the position. He said

that he was thinking of bringing the claimant back to work and she responded "quite robustly" that that was not something they could consider. Her email to him relates the content of their discussion:

> "… I write to reiterate the fact that in a criminal investigation, we cannot bring back a member of staff who is the alleged person responsible, even to work in a non patient facing role, without the permission of the Police. The Police lead on all criminal investigations and in those cases, Adult Social Care coordinates things.
>
> "CPS has taken this case to court now and therefore, the Police will not permit this member of staff to return to any role currently.
>
> "Further, the Safeguarding enquiry has upheld the allegation and in view of this, the Trust will not consider him returning to work in the event of the court case being dismissed. This is due to the nature of the allegation."

31. Mr Harrington understood from this that having had safeguarding advice the Trust had to follow it, and so a return to work was not an option. This was also the advice he had from HR. As a result, the claimant was dismissed and paid 3 months PILON.

32. An appeal hearing took place on 25 November 2016 chaired by Mr Hodgson. His main ground of appeal was that he had done nothing wrong, indicating again at least a confusion over the reason for his dismissal, or the purported reason. Mr Hodgson tried to explain at the outset of the hearing that they were not there to cover the legal case, but he added that he knew the claimant would refer to it and added, "in some respects I don't blame you for that." Mr Hodgson set out at length the reasons for dismissal and the discussion did turn to the issues relied on by the Trust - the question of cost; whether the figures had been exaggerated; and whether management had considered the imminence of the trial. Mr Hodgson added that he had spoken to the safeguarding lead and she had been quite explicit in her advice about the unsuitability of a return to work. The claimant continued to stoutly maintain his innocence.

33. Before the hearing, Mr Hodgson had also made enquiries about the safeguarding position, asked Mr Harrington about it and was shown the email quoted above. He then discussed that with the other panel members and regarded that avenue as closed.

34. In due course the claimant stood trial at the Crown Court before a jury and was acquitted. The patient who accused him gave evidence but her two witnesses were too elderly or infirm to attend, so the prosecution relied on the statements they made to the police at the outset. One of the ward sisters who was on duty at the time also gave evidence about what this patient had said. The claimant had another character witness and a work colleague from the Radiography department to support him. These details were all provided in response to questions from me by the claimant and no documentary evidence has been provided.

Conclusions

35. I was assisted by two detailed and helpful skeleton arguments from counsel and a number of cases, which I have considered, and since they are on the

Tribunal file there is no need to set out the rival submissions to any extent. In short, Mr Ogg maintained that the reason(s) for dismissal were those relied on in evidence, and Mr Tanzib contending that in reality it related to the original allegations.

36. My clear view, having heard all the evidence, is that the approach taken by the respondent was fundamentally misconceived. The claimant was dismissed because the Trust decided to suspend him over the disciplinary allegations and they then concluded that this suspension was unsustainable. The period of suspension was in their control. At any stage they could have decided that it would take too long for the trial to be heard and to *carry out their own investigation*. The reasons they did not do so were because of the views of the police and their own internal safeguarding team. They appear to have acted on the assumption that this was an absolute bar to carrying out an investigation, that it would be somehow unlawful to do so. That is not the case. The police have no power to compel an employer to continue to employ someone pending criminal investigations, let alone to compel them to suspend them on full pay while that process takes its course, and in fact no documentary evidence was provided that they attempted to do so. At its highest, this was a request from the police at the outset not to carry out any investigation. As to the views of the safeguarding team, this was partly an outside body too. The hospital had its own safeguarding Lead to refer to for advice and guidance, and safeguarding meetings were co-ordinated by Adult Social Care at the council, but again there is no formal power to compel the Trust to take any particular action. But even if it were the case that the Trust's hands were tied by these bodies, that would leave them with one remaining option of continuing the suspension, rather than attempting to short circuit matters in this way.

37. I was referred by Mr Ogg to the case of Secretary of State for Justice v Mansfield (UKEAT/0539/09/RN). There it was held at paragraph 25 that:

> "We consider that a decision maker forming a view on whether disciplinary proceedings should be continued alongside a criminal investigation has a wide discretion. It is unusual for a decision to postpone the disciplinary proceedings while continuing to pay the employee to be criticised on the grounds of delay."

38. That case concerned a long period of suspension in similar circumstances. The employer began an investigation but put them on hold at the request of the police. When the matter eventually came to trial no evidence was offered by the prosecution and the employee was acquitted. At that point the employer resumed the disciplinary process and he was eventually dismissed. The issue then was whether the dismissal was unfair because of the length of time in which the claimant had been suspended.

39. That is not the sort of situation in the present case. The Trust did not continue to suspend the claimant until the outcome of the trial and then carry out its own investigation. It dismissed him because of the effect on the Trust of its own decision to suspend him. The wide discretion is whether to carry out an internal investigation or to wait for the police.

40. It is relevant to that choice to consider, and if need be discuss with the

police, the extent to which their investigation might be compromised. There may be cases where it is more sensible to await the police investigation. They have wider powers and can interview those outside work. They have particular expertise in matters like IT. But here the events took place at the hospital over a short period of time. An investigation by the respondent that led to an dismissal would not dent the prospects of conviction, but it is not in fact the duty of the Trust to help the police in that aim. Material from any internal investigation would be discloseable to the Police and they have a duty to disclose it in turn to the defence. Equally, any investigation that led to acquittal and reinstatement might well affect the police view of the matter, but would in no sense contaminate the evidence. That however is by way of comment, without having been party to any discussions with the police. The point to emphasis is that such dialogue is an important part of acting fairly, and if necessary challenging the police view, having regard to the cost of suspension and other effects, rather than to acquiesce in this view from the outset.

41. The same considerations apply to safeguarding advice. The Trust has important safeguarding obligations to staff and patients, but it also has legal obligations as an employer to act fairly. The impact of suspension is not to be under estimated either. Mr Ogg's skeleton argument also referred very fairly to the remarks of Lord Justice Elias in another case involving an NHS Trust - Crawford v Suffolk Mental Health Partnership NHS Trust [2012] EWCA Civ 138, that suspension should not be a "knee jerk reaction":

> "It appears to be the almost automatic response of many employers 'to allegations of this kind to suspend the employees concerned, and to forbid them from contacting anyone, as soon as a complaint is made, and quite irrespective of the likelihood of the complaint being established. As Lady Justice Hale, as she was, pointed out in Gogay v Herfordshire County Council [2000] IRLR 703, even where there is evidence supporting an investigation, that does not mean that suspension is automatically justified. It should not be a knee jerk reaction, and it will be a breach of the duty of trust and confidence towards the employee if it is. I appreciate that suspension is often said to be in the employee's best interests; but many employees would question that and in my view they would often be right to do so. They will frequently feel belittled and demoralised by the total exclusion from work and the enforced removal from their work colleagues, many of whom will be friends. This can be psychologically very damaging. Even if they are subsequently cleared of the charges, the suspicions are likely to linger not least I suspect because the suspension appears to add credence to them."

42. Those remarks apply with some force here.

43. It was clear during the course of evidence that the managers involved had been placed in a difficult position by this approach, and that they were being steered down a path they felt uncomfortable with. This arose partly from the decision itself to investigate the consequences of suspension, and partly from the way it was done, with a false start to the process, misleading or confused letters inviting the claimant to the various meetings, and a confused investigation report. I am satisfied that even at the time of his dismissal the claimant was not sure of the reasons put forward and nor was his representative.

44. For completeness I would add that even if those conclusions are wrong for

any reason, and it was legitimate for the Trust to dismiss for the cost and other consequences of suspension, the justification was weak. I am concerned at the way the costs were assessed, based on somewhat crude figures giving a misleading total. Regardless of the precise figure, no real account was taken of the length of time until the impending trial, or even assessing that cost. There was no satisfactory evidence that his absence was having a significant impact on service delivery, and in any event the information on which Mr Harrington based his conclusion was obtained behind the scenes. I also found it revealing that both he and Mr Hodgson independently took it on themselves to enquire about the possibility of a return to work and to check the safeguarding advice to see if this was viable, indicating that they rather felt that would be a more sensible alternative than the course they were embarked on.

45. In short, the process followed, adapted as it was to a different and misconceived approach, was totally at odds with the appropriate procedure for handling a case of alleged misconduct, and so the dismissal must be regarded as procedurally and substantively unfair.

Remedy

46. The remedies available to an Employment Tribunal are set out at sections 113 onwards of the Employment Rights Act 1996, and the first question is whether to order reinstatement.

47. As noted above, Mr Hodge attended on the second day of the hearing and Mr Ogg applied to call evidence from him, his witness statement having been served the previous evening. I allowed this and he was questioned briefly by Mr Tahzib. Having heard that evidence and considered the submissions on each side I have decided to make an order for reinstatement.

48. Section 116 of the Act provides:

> (1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—
>
> (a) whether the complainant wishes to be reinstated,
>
> (b) whether it is practicable for the employer to comply with an order for reinstatement, and
>
> (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

49. The claimant did very much wish to be reinstated. He is 66 now and has been, on his account, anxious to clear his name throughout. He has not looked for other jobs, and feels that he would now struggle to gain employment with this hanging over him. It is also a well-paid position, earning over £30,000 per year with overtime.

50. As to the third limb, in the course of an alternative discussion about compensation Mr Ogg confirmed that no reduction was sought on the basis of contributory fault, and he did not seek to resile from that on this issue.

51. The remaining question is whether reinstatement is practicable. This is

often said on the basis that trust and confidence has broken down. I was referred to the case of United Lincolnshire Hospitals NHS Foundation Trust v Farren UKEAT/0198/16/LA which held:

> The statutory test laid down by section 116 **ERA** was one of practicability. The ET was required to reach a provisional view on this question (**McBride v Scottish Police Authority** [2016] IRLR 633 SC); practicability was something more than what might simply be possible, the order had to be "*capable of being carried into effect with success*" (**Coleman v Magnet Joinery Ltd** [1975] ICR 46 CA). The answer to that question was not determined simply by the fact that the Claimant had committed the act of misconduct in question, by the ET's rejection of the practicability of a reinstatement order or by its finding on contribution. The point was, however, put in issue by the Respondent's contention that it had lost trust and confidence in the Claimant - a matter that could plainly be relevant to practicability - because she (1) had committed the act of misconduct, and (2) had not been honest about that, either in the internal process or before the ET. To ask (as the ET had) whether the Respondent had established that the Claimant was in fact dishonest and to then apply its own conclusion to her honesty and trustworthiness was not the correct test. The ET had to ask (applying **Wood Group Heavy Industrial Turbines Ltd v Crossan** [1998] IRLR 680 EAT and **United Distillers & Vintners Ltd v Brown** [2000] UKEAT/1471/99) whether *this* employer genuinely and rationally believed that the Claimant had been dishonest. The ET having erred in its approach to the question of practicability, the appeal would be allowed on this basis and the Order set aside.

52. In this case, as is usually the case, the question arose because the employer had formed a belief in the claimant's guilt, but the Tribunal went on to find that the dismissal was nevertheless unfair. This authority therefore confirms that even then the Tribunal has to be satisfied that the respondent's view has to be genuine and not irrational.

53. In the present case I can see no proper basis for that view to be advanced in the absence of any real investigation. In any event, irrationality is not necessarily a very high test. A decision may be criticised as irrational when based on speculation or irrelevant considerations, as I find is the case here.

54. Clearly some suspicion of the claimant remains on the part of Mr Hodge. He felt that there had been a safeguarding investigation and pointed to the fact that the CPS thought it worth pursuing, that the claimant was blasé about the allegations and failed to understand their seriousness. This statement went beyond the position adopted by Trust earlier in the proceedings, that it was neutral on the question of the claimant's guilt, and it was not clear to me on what basis he formed this view, since he was not a party to any of the formal meetings under consideration, except for the discussions with Mr Harrington about rosters and service impact.

55. Mr Ogg also submitted that the claimant would have to be suspended immediately on his return and an investigation carried out, so reinstatement was not "capable of being carried into effect." It is not clear to me either that he would have to be suspended from all duties, bearing in mind the points made above by Elias LJ about automatic suspension, but if he was, that would allay Mr Hodge's concerns. Mr Mills would not be able to return unless exonerated by an internal process.

56. I do not therefore regard that suspension as incompatible with return. Any disciplinary process should not be particularly prolonged, and it would be inconsistent to find that the respondent could or should have kept the claimant suspended until after the trial and then to find that he could not now return to deal with the ensuing investigation.

57. I am also informed by the Trust that no DBS referral has yet been made over these allegations.

58. As to the availability of a vacancy, Mr Hodge gave evidence that a member of staff on a slightly different shift pattern had given notice yesterday, but he thought the employee concerned might wish to withdraw it. He accepted that the claimant could be accommodated with re-training and some rearrangement of hours and duties among existing staff. I note that there would be no obligation on the Trust to allow a member of staff to withdraw a resignation.

59. For all the above reasons I conclude in this case that reinstatement would be practicable and I shall make an order accordingly.

60. Section 114 of the Act sets out the particulars to be included in the order, which was largely resolved by agreement. The order is to take effect on **9 September 2017**, the date on which the existing member of staff's notice expires.

61. The parties agreed on the following basis for calculation:

    a. Between dismissal on 7 October 2016 and 1 April 2017, during which period the claimant would have remained suspended, payment at £388.63 net per week;

    b. From then to 9 August 2017, allowing for a 1% increase in the earnings accrued before his suspension, payment at £497.00 net per week;

    c. From then to 9 September 2017, allowing for a further 3.6% pay rise, payment at £514.89 per week.

62. Accordingly, the relevant calculations are:

    a. During the first period of 5 months and 25 days, the amount is £9,819.00

    b. During the second period of 4 months and 8 days, the amount is £9,184.00

    c. During the third period of exactly 1 month, the amount is £2,232.00

63. This amounts to a total of £21,235.00

64. The parties also agreed that credit had to be given for the claimant's pay in lieu of notice in the sum of £5,058 based on the first hourly rate above, leaving a net figure of **£16,177.00**

65. These net figures did not include any deduction for national insurance contributions, since the claimant is now over 65 and so none are payable.

66. The schedule of loss did however reveal that for the same reason he has been drawing his NHS pension. There is no provision for deduction of pension in section 114 of the Act, but it was accepted on his behalf that credit should be given for these amounts. On reinstatement the Trust will need to appraise the pension provider of the new position, and matters will need to be regularised in discussions between them, but I have no power to make an order affecting the NHS pension scheme, a third party.

67. Having resolved these points I make the following order:

ORDER

1. The respondent shall reinstate the claimant to his former position of employment and shall thereafter treat him in all respects as if he had not been dismissed.

2. The respondent shall pay to the claimant the sum of £16,177 in respect of any all benefit which he might reasonably be expected to have had but for his dismissal, including arrears of pay, for the period between the date of termination of employment and the date of reinstatement. This sum takes into account the wage increases he would otherwise have received and gives credit for the payment in lieu of notice he received on dismissal.

3. The order must be complied with by 9 September 2017.

Employment Judge Fowell
Date: 10 August 2017