



EMPLOYMENT TRIBUNALS

Claimant: Dr. C Sharpe

Respondent: Portsmouth Hospitals NHS Trust

Heard at: Southampton **On: Tuesday, 20 and
Wednesday 21 June 2017**

Before: Employment Judge M. Salter

Representation:

Claimant: Mr. I. Wheaton of counsel

Respondent: Mr. M. Brewer, solicitor

RESERVED JUDGMENT

It is my judgment that the Claimant was unfairly dismissed. The Claimant's Basic Award and Compensatory Award shall be reduced by 100% to nil, and there should be no Financial Penalty ordered under s12A of the Employment Tribunals Act 1996

REASONS

Introduction

1. These are my reasons for the above judgement in the above claims. There was insufficient time at the end of the hearing for me to deliberate and then deliver my judgement and reasons and so I reserved my judgment.
2. In this judgment numbers in squared brackets refer to pages in the bundle of documents I was provided with by the claimant and which all parties agreed I should use. I will return to the bundle in more detail below.

Background

The Claimant's case as formulated in her ET1

3. The Claimant is Dr. Catherine Sharpe ("Dr Sharp"). Her complaint, as formulated in her Form ET1, presented to the tribunal on 19th October 2017 is, in short, that she was unfairly dismissed.

The Respondent's Response

4. The Respondent: Portsmouth Hospitals NHS Trust (" the Trust"), in its Form ET3, dated 21st November 2017, contended the Claimant's dismissal was on the grounds of capability and was fair.

Case Management to date

5. As is usual in cases of this type the claim, when presented, was made subject to standard direction's and a hearing listed. The directions included a limitation on the number of pages in the bundle, a word count imposed on witness statements and a two-day hearing listed in February 2017. These were varied and a bundle of over 400 pages was produced.

Final Hearing

6. The matter came before me for Final Hearing. The hearing had a two-day time estimate.
7. The Claimant was represented by Mr. I Wheaton of Counsel; the Respondent by Mr. M. Brewer, solicitor.

Particular Points that have arisen

8. At the outset of the first day Mr. Wheaton made an application to admit full copies of MHRA Inspection reports concerning inspections on 11th and 12th December 2012 and 2nd and 3rd June 2015 as the full documents were not in the bundle; the papers in the bundle were, in effect, was the executive summary of the reports. After Mr. Wheaton made the application, Mr. Brewer agreed to it.

The Issues

9. There had been no Preliminary Hearing in this matter and the issues had not been identified. Helpfully, at the outset of the hearing, Mr. Wheaton provided a list of issues. Before I commenced my reading, I discussed this list with the parties and the following were identified as the relevant issues for me to determine. The issues are:

1. Was the Claimant fairly dismissed?
2. Did the Respondent carry out a reasonable investigation? In discussion, the Claimant clarified that this relate to the alleged threat of loss of the MHRA licence, when there was, in fact, no risk of loss.
3. Was the reason for dismissal based on a genuine belief formed by the dismissing officer or based on the inappropriate influence of the Investigating Officer?
4. Was the dismissal based on all the evidence available to the decision maker or did the investigating officer suppress evidence which would have assisted the Claimant?
5. Was the decision to dismiss within the band of reasonable responses?
6. Did the Respondent follow a fair procedure? Here the Claimant clarified she was contending the Respondent did not put all relevant material before the dismissal meeting.
7. Did the Respondent follow a fair appeals procedure: The Claimant clarified this point in that she was contending that Mrs. Cooper, the investigating officer, drove the appeals hearing.

The Ambit of the Final Hearing

10. It was agreed that I would initially hear evidence limited to liability, contributory fault, Polkey and that which was necessary for me to consider making a financial penalty under s12A of the Employment Tribunals Act 1996.

Documents and Evidence

Witness Evidence

11. I heard evidence from the following witnesses on behalf of the Respondent: Amanda Cooper, the Director of Medicines Optimisation & Pharmacy, who was latterly the Claimant's line manager; Mrs. Jenny Kynes, the Head of Nursing of the Musculoskeletal Clinical Service Centre, who heard the meeting at which the Claimant was dismissed and, finally Mrs. Alison Fitzsimons, the Respondent's General Manager and Head of Professions who heard the Claimant's appeal against dismissal.
12. I heard evidence from the Claimant on her behalf.
13. All witnesses gave evidence by way of written witness statements that were read by me in advance of them giving oral evidence. All witnesses were cross-examined.

Bundle

14. To assist me in determining the claim I had before me an agreed bundle originally consisting of some 417 pages prepared by the Respondent, although as set out

above, after the unopposed application of the Claimant a further 28 pages were added. For ease I put these at the back of the bundle. My attention was taken to a number of these documents as part of me hearing submissions and, as discussed with the parties at the outset of the hearing, before commencing their submissions, I have not considered any document or part of a document to which my attention was not drawn. I refer to this bundle by reference to the relevant page number.

Other Documents

15. As set out above I was provided with a reading list and list of issues prepared by the Claimant. At the close of the hearing the Respondent provided me with a written submission.

Submissions

16. Both parties made oral submissions in closing. Mr. Wheaton's submissions focused, as the evidence had, on the allegation that the Respondent was at risk of losing the MHRA licence. He explained that the dismissal was both substantively and procedurally unfair. The substantive unfairness he contends is the lack of evidence to substantiate the belief in the Claimant's performances giving rise to a risk that the licence would be lost. The procedural failings, he said were manifest, and included a failure to follow policy as the minutes show the purported decision makers in the process were not, in fact the sole decision makers with Ms. Christine Stevens, HR Manager, taking part in the decision-making process when, according to the minutes and what the Claimant was told she would only be present to take notes. He argued that there should be no reduction for contributory fault, and if there were to be a Polkey reduction (which, again there should not be) it should be a minor one

17. Since the Respondent's submissions were helpfully set out in writing it is unnecessary to repeat them here.

The Material Facts

General

18. From the evidence and submissions I made the following finding of fact. In this decision I do not address every episode covered by that evidence, even where it is

disputed. Rather, I have set out my findings that I consider to be necessary in order to fairly determine the claim and the issues to which they gave rise.

The Parties

19. The Claimant is a medical doctor and was employed by the Trust. The Trust has over 6,000 employees.
20. The Claimant was employed from 4th February 2008 until her dismissal for poor performance on 15th July 2016. At the time of her dismissal she was employed as a Quality Assurance Manager in the Respondent's Pharmacy Manufacturing Unit ("PAM")

The Claimant's Role

21. The Claimant was employed as the PAM's Quality Assurance Manager: it was her job to ensure that the standards required by the Medical and Healthcare Regulatory Agency ("MHRA") were met and that the Respondent's PAM met the relevant quality standards. This is a senior management position. The Claimant worked with a team of other staff and had management responsibilities for those staff.
22. I find as a fact that part of the claimant's responsibilities was the quality assurance of the PAM.

The PAM and MHRA

23. The PAM generates over £800,000 in revenue for the Respondent per annum as the Trust is able to sell the drugs produced to other healthcare establishments. The drugs produced also can be used by patients of the Trust.
24. The PAM is regulated by the MHRA. The MHRA grants licences to those PAM's who meet the relevant standards. Such licences are granted after inspections. These inspections normally occur every two-years, although if the MHRA has concerns, or an inspection reveals deficiencies, the timetable can be accelerated and inspections can take place more regularly.
25. Deficiencies, if found, are graded "Critical", "Major" or "other".

26. The Respondent's PAM was set up in 2008 and was inspected in 2010, 2012 and 2015. The 2010 inspection identified no "Critical" or "major" deficiencies, but nine "Other" ones.
27. In March 2012 the Respondent had concerns over the Claimant's performance in so far as it related to the management of her team. It commenced informal capability procedures. At the time the Claimant's line manager was Mr. Jeremy Savage. The concerns raised related to the Claimant's ability to communicate with her team. The concerns continued as did the performance process in 2013 and the first half of 2014. There are very few notes regarding this informal process but a summary of the process was contained in a document dated 20th May 2014 [56]. Despite the lack of contemporaneous documentation. I find that this process did occur.
28. In December 2012 the MHRA inspected the Trust's PAM [418 page 2 of 12]. The 2012 Inspection noted one deficiency it graded as "Major" and six as "Other". The "Major" deficiency had developed since the 2010 inspection. This deficiency was broken down into 6 parts [61]:
- 2.1.1 *The site failed to utilise the recall process for IIR 12/005 even though this was mandated by existent processes*
 - 2.1.2 *The investigation of IIR 12/005 failed to provide sufficient information to justify the causal factor hypothesis of a (sic) externally contaminated settle plate from the grade A zone*
 - 2.1.3 *Investigation IIR 12/018 demonstrated significant failure of the artwork approval system however no review of the systematic failure was conducted. The formal system was not followed as required and no root cause analysis was performed.*
 - 2.1.4 *There was no formal CAPA system in place.*
 - 2.1.5 *Whilst several IIR investigations had been opened in respect to failed checks at various stages, the site had failed to adequately record the root causes and proposed CAPA. In addition whilst changes were being deployed, no change control or other suitable record had been raised to manage the process.*
 - 2.1.6 *there was no post implementation review of changes made through the change control of IIR process to assess the success of the actions deployed*
29. CAPA stands for "corrective and preventative actions".

30. The 2012 Inspection recommended the Respondent's PAM be re-inspected in 24 months time, which is the norm [418 internal page number 12 of 12]. As it was the next inspection did not take place until the 2nd and 3rd June 2015 [418 internal page number 2 of 16]. Mr. Savage records that, in his view, the MHRA inspection "went quiet well" [56]
31. Having seen no improvement in her performance, the Respondent, on 20th May 2014 the commenced formal capability management procedures in relation to the Claimant. There are, again, no notes of this meeting, but it is recorded in a letter from Mr. Savage to the Claimant dated 10th July 2014 [66]. This letter records that the Claimant identified health issues as well as a family bereavement as being reasons why she had not made progress in dealing with the performance issues identified in the informal procedure. A Performance Improvement Plan ("PIP") was issued and the dates for attainment were set as 30th November 2014 [68], some six months later. This PIP largely focussed on team relationships and improvement of management. It did however require evidence of "Steps taken towards MHRA inspection" [68, third column, top row].
32. Before this date came, however, Mr. Savage left the Respondent and Mrs. Amanda Cooper, took over responsibility for the Claimant and her performance management. They met on 7th October 2014 and a letter [69] records that meeting. It is notable that on [70] the letter records the Respondent as stating the Claimant had "not managed to improve your performance to the required standard". The letter noted that there was an impending MHRA inspection [70 second paragraph]. Mrs. Cooper couldn't say whether, when forming the view that the Claimant was failing in relation to the MHRA inspection, she (Mrs. Cooper) had seen the full reports or just the summary letters
33. A further performance meeting was held on 12th November 2014. A letter [71] records this meeting. Again, there is mention of the "forthcoming MHRA inspection" but nothing more concerning this. The letter does record however, continued difficulties in the Claimant's relationships with other staff and other failings to achieve the PIP's requirements.

34. The Claimant was absent from work from November 2014 until July 2015 with cancer.
35. In June 2015 there was a further MHRA inspection [77]. The 2015 inspection, similarly to the 2012 inspection found one "major deficiency and six "other" deficiencies. The 2015 deficiencies are set out at page [78] and I will not, for reasons of space, set them out here. Suffice-it-to-say that they repeat the lack of any CAPA process (2.1.1), that there was a lack of management and investigations of deviations (2.1.2), that the management of change control was deficient (2.1.3) and that the quality management review did not capture all aspects of the quality system (2.1.4).
36. Throughout this time, and indeed after the inspections, the PMU continued to produce drugs for patients as its licence remained in place.
37. An absence review meeting was conducted on 22nd June 2015 [82]. A phased return to work was identified as being appropriate. The Claimant agreed to take her accrued annual leave once she was fit to return to work.
38. In due course the Claimant returned to work after taking her leave. She returned in August 2015. At the end of the phased return a further meeting was conducted wherein the Claimant's duties were discussed.
39. On the 16th October 2015 a formal capability review meeting was held [85] refers and records, in relation to the June 2015 MHRA meeting that Amanda Cooper had

"concern[s] that the MHRA deficiencies identified in the previous visit were unresolved. The MHRA report states that the management of the quality system was deficient in that there was no formal system in place for capturing and tracking corrective and preventable actions (CAPA), which is a repeat of previous findings."
40. The letter then sets out a timetable of meetings with a formal review meeting in six weeks' time, the purpose of which is to review the formal stage of the

capability policy and to determine whether to move onto the next stage. The letter states that the next stage (stage 3) could lead to the Claimant's dismissal.

41. On 23 November 2016 Mrs. Cooper sent the Claimant an email setting out in some detail the matters discussed at the meeting on 16th October [93], and setting a date for the follow-up meeting as the 27th November 2015 [94]. This meeting did not take place as the claimant was suspended pending investigations into her conduct. The allegations arose out of a complaint from a member of the Claimant's team. An investigation ensued and the Claimant's suspension was lifted on 7th April 2016 as the investigation report "does not support any further action under the Disciplinary Policy" [98]. The Report did, however, highlight concerns over the management and communication in the team as well as capability issues raised under the formal performance process. The Claimant was to and did return to work on 18th April 2016.
42. On 21st April 2016 the Claimant was informed that Step 3 of the capability procedure would be invoked. Pending this meeting the Claimant was placed in an alternative role in the Respondent's Radiology department [100].
43. The letter informing the Claimant of the location for the capability meeting was sent on the 10th May 2016 [102]. The letter was accompanied by the Respondent's capability procedure and the "Management Case" [206-231]. Part of this concerned the potential loss "safety and financial risk to the trust" [206]
44. On 16th May 2016 the Claimant presented a detailed and comprehensive response [104-205]. This report contained the letters summarising the MHRA inspections, however it did not contain the full reports.
45. The meeting took place on 19th May 2015 [232]. The Claimant was represented by Mr. Steve Thomas of UNITE. After hearing the representations the meeting was adjourned to give Mrs. Kynes time to consider the outcome. I find as a fact that the Claimant had a full opportunity to engage in the meeting and, in fact did do so.

46. Ms. Kynes confirmed to me that she did not thoroughly read the MHRA reports, but instead “skim read” them, but did thoroughly read the deficiencies. She accepted that it was Mrs. Cooper who told her the licence was at risk. This was evidence Mrs. Kynes did not question as Mrs. Cooper was the Senior Pharmacist. She confirmed in cross-examination however there was nothing in the MHRA reports identifying a high risk of losing the licence, that assertion came solely from Mrs. Cooper.
47. Mrs. Kynes says that she was also concerned there was no formal CAPA system in place. The Claimant’s position was that there was, albeit under a different name.
48. The outcome was notified to the Claimant by way of letter dated 25th May 2016 [303]. The outcome letter focussed on two elements: the risk to the MHRA Licence and the claimant’s “ability to lead and manage a team” [305]. There was also an allegation of risk to patients as a result of the lack of capability [305 bottom hole punch]. The decision was taken to dismiss the Claimant if no suitable alternative employment was found within her 8-week notice period.
49. The Claimant appealed her dismissal [307-369], and by way of letter dated 20th June 2016 [370] the Claimant was called to an appeal hearing on 7th July 2016 [370] Mrs. Jenny Kynes was identified as being the manager responsible for presenting the management case.
50. The meeting did not take place until the 9th August 2016.
51. The appeal hearing focused mainly on the risk to the MHRA licence.
52. From the minutes of the meeting [404] it appears Mrs. Cooper, the investigating officer, made most of the submissions on behalf of the Respondent, this is despite it not being her decision to dismiss the Claimant. Further, the HR Representative at the disciplinary hearing, Ms. Christine Stevens, is repeatedly recorded as referring to the decision maker collectively, e.g. on [411] she is recorded as being asked a question by Ms. Fitsimons:

AF: Did you consider any other sanction?

CSt: *We didn't. we believed the risk was so high that our only option was dismissal pending redeployment which we were unsuccessful"*

My emphasis

53. There are other examples of Ms. Stevens seemingly indicating that she was involved in the decision process, or of Ms. Stevens fielding questions as to the decision or the process adopted. Mrs. Kynes, in her evidence to me disputes that Ms. Stevens was involved in the decision process, rather that she (Ms. Stevens) was there to give advice on process and take notes and it "was not her place" to discuss with Mrs. Kynes who she believed.
54. Further, Ms. Cooper, despite not supposedly being involved in the decision-making process itself, takes the major role in explaining the process to the appeal panel as well as the decision arrived at by the panel.
55. The Appeal decision was confirmed to the Claimant by way of letter dated 12th August 2016 [416]. The appeal letter, sets out in brief terms that the Claimant's appeal is rejected owing to Ms. Kynes not hearing anything "substantial" that warranted overturning the original decision. It is also noted that Ms. Kynes felt a fair procedure had been followed, after a thorough and fair investigation and that the "original panel" had acted fairly and reasonably.
56. The Claimant dismissal took effect on 15th July 2016.

The Law

57. It is for the Respondent to show the reason for dismissal and that it fell within one of the potentially fair reasons for dismissal. (s98(1)).
58. Section 98(2) of the Employment Rights Act 1996 ("the 1996 Act") states it is a potentially fair reason for dismissal if it:

"related to the capability....if the employee for performing work of a kind which he was employed by the employer to do"
59. Pursuant to s98(3) of the 1996 Act capability means:

"assessed by reference to skill, aptitude, health or any other physical or mental quality..."

60. When assessing the fairness of a dismissal s98(4) of the 1996 Act states:
- (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.
61. I remind myself I should not substitute my view for that of the employer but should consider whether the employer's handling of the process, and the application of dismissal as a sanction for the reason found, were within the band of reasonable responses open to it: (Alidair Ltd v Taylor [1978] IRLR 82).
62. In judging the overall fairness of a dismissal, I should consider the “end-to-end” process, including the appeal stage. However, this does not mean that any defect of fair treatment that may occur leading up to the initial decision to dismiss is bound to be irrelevant, so long as a fair appeal process has been granted. There will be some cases where the unfairness arising at the first stage is so serious and fundamental, that the end-to-end process remains unfair.
63. The modern authorities on this point eschew the over-technical approach of distinguishing between appeal by way of review and re-hearing, or corresponding technical distinctions about the circumstances in which defects in fairness at the initial stage can or cannot be put right on appeal. I ultimately, always have to decide the fairness of a given dismissal, applying the words of section 98(4) and the statute makes no particular provision in relation to appeals.
64. I also am to look at the individual failing identified by the Claimant, but then also take a step back and look at the process in the round and see whether the process applied falls outside the band of reasonable responses.

Conclusions on the Issues

65. In order to make these conclusions I took time assessing and looking through my notes of the cross-examination as well as the written statements and documents; I considered with care the submissions, the legal provisions and guidance in case law. Having made the findings of fact set out above, I returned to the agreed issues in this case, which I have set out above as they were set out in Mr. Wheaton's note, albeit I addressed them in a different order when considering my decision.
66. I should also state that no limitation point applies in this matter: the Claimant's claims were presented in time; and it has not been contended that there is a jurisdictional bar (such as non-compliance with ACAS mandatory conciliation) nor that the Claimant did not qualify for protection from unfair dismissal (e.g. she was an employee and had been dismissed).

Was the reason for dismissal based on a genuine belief formed by the dismissing officer or based on the inappropriate influence of the Investigating Officer?

67. Based on the legislative provision, the first step for me in any complaint of unfair dismissal, where the fact of dismissal is admitted is to consider whether the terms of s98(1) ERA have been satisfied by the employer that the reason for the dismissal was one of the potentially fair reasons set out within that statutory provision.
68. I remind myself that for the purposes of this part of s98(1) the employer is not required to prove that the factual basis upon which the decision is based is correct, or even that they had reasonable grounds for believing that to be so. That comes later under section 98(4).
69. The Claimant did not assert that there was any other reason for dismissal. Because the onus is on the Respondent to show its reason, she was not obliged to put forward an alternative case.
70. The burden is on the employer and what they are required to establish is that the reason which existed in their mind at the time they decided to dismiss was some set of facts which falls within one of the categories set out in s98(1). Usually this is

not particularly difficulty. Again, it is normally found, and the present case is no exception, that evidence of what the employer said at the time of dismissal, as being his reason for deciding upon that sanction, is the best evidence of the actual reason. In this case, I consider that the Mrs. Kynes did, at the relevant time, genuinely consider that the Claimant was not achieving the standards the Respondent required. As such this she had a genuine belief in the Claimant's capability, as set out in the 1996 Act. I arrive at this conclusion as there was a long running capability process spanning several years and the management of the Claimant by two separate managers (Mr. Savage and Mrs. Cooper). Indeed, by the time Mrs. Cooper became involved the matter had already progressed to the formal stage. The failings were consistent and were across two separate MRHA reports.

71. This body of material was, as such, sufficient to satisfy me that the reason or principal reason for the Claimant's dismissal was capability in relation to her management of the team and the PAM.

Did the Respondent carry out a reasonable investigation?

72. I considered whether the employer had conducted a reasonable investigation. I did this by looking firstly at the nature of the investigation with a view to determining whether it accorded with what a reasonable employer would do, and then to consider whether such a hypothetical reasonable employer would have felt able to form a genuine belief that the Claimant was guilty of what was presented as being the reasons for her dismissal.
73. The reasonableness of the scope of such an investigation will vary from case to case according to what is probably an infinite variety of circumstance. Section 98(4) does not involve the test of reasonableness in a completely general sense. The determination of whether the dismissal was fair or not is to be carried out "having regard to the reason shown by the employer". That is clearly a reference to what has been found to be the reason under section 98(1); and further under sub-section (b) of section 98(4) it "depends on whether in the circumstances...the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing..."

74. The "it" in that sentence is clearly a reference to the "the reason shown by the employer".
75. The Claimant before me focussed her evidence and questioning on the Respondent's contention that, owing to the Claimant's failure to meet the require standards, it risked losing the MHRA licence. I heard very little about the team management side of the capability issue; such an approach mirrored what occurred in the disciplinary and appeal hearings.
76. The Respondent's evidence on the risk to the MHRA licence however, I find, lacking and I found the evidence of Mrs. Kynes in this regard unconvincing. Mrs. Kynes confirmed such evidence of a risk of loss of the licence was not to be found in either of the MHRA's reports but rather came from an assertion of Mrs. Cooper. In her evidence Mr. Kynes states she thought there was a risk in the future of losing the licence, but she had not read the full report at the time she dismissed the Claimant. She accepted this is not what the dismissal letter stated [303] when it says that the Claimant's failures "had" placed the MHRA licence in jeopardy (i.e. the risk was present at that time). The MHRA reports themselves made no mention of a risk to the licence at all, and Mrs. Kynes confirmed she simply accepted Mrs. Cooper's word that there was a risk. This risk was clearly disputed by the Claimant at the hearing and yet the Respondent did not investigate what the risk was, or where the evidence supporting this risk was to be found. I find that a reasonable employer would have conducted such an investigation.
77. In this regard I find that the Respondent did not conduct a reasonable investigation into the risk of losing the licence.
78. However, I remind myself that the Respondent's case went beyond this and highlighted the Claimant's failing of management of her team over a prolonged period of time and a failure to improve. Throughout the performance process efforts were made by the Respondent to assist the Claimant with her management. However, they failed and, indeed, it was a complaint from the team that lead to the Claimant's suspension from the end of 2015.

79. I have seen the PIPs and the records of meetings, all of which satisfy me that the Respondent did reasonably investigate the Claimant's performance, they gave her a reasonable opportunity to improve and support her to a reasonable extent in an effort for her to improve.
80. In relation to the allegation of failure to perform adequately as a manager I am satisfied that the Respondent had a reasonable belief that the Claimant was failing to meet the standards the Respondent required of its senior managers and that those beliefs were formed after a reasonable investigation, at the capability hearing.

Was the dismissal based on all the evidence available to the decision maker or did the investigating officer suppress evidence which would have assisted the Claimant?

81. I do not find that Mrs. Cooper "suppressed evidence" as was alleged. However, I do find, as set out above, that the Respondent did not conduct a reasonable investigation when assessing the prospect of the MHRA licence being lost.

Did the Respondent follow a fair procedure?

82. Here the Claimant clarified she was contending the Respondent did not put all relevant material before the dismissal meeting. I do not think that this goes much beyond the point I have found above that the Respondent failed to reasonably investigate the allegation of the licence being at risk.
83. In so far as this allegation relates to the Claimant's management style I do not find this complaint well founded. The Respondent's attempts to performance manage the Claimant and to improve her management style fall well within the margin of appreciation that is afforded to employer's and no material has been identified that was not put before Mrs. Kynes or the appeal panel in this regard.
84. So far as the actual procedure is concerned there has been no challenge that, for instance, the Respondent failed to provide a fair framework within which the hearings took place: for instance it is not alleged the Claimant did not know the charges she had to meet or that she was given insufficient time to prepare for the hearings.

Did the Respondent follow a fair appeals procedure?

85. The Claimant clarified this point in that she was contending that Mrs. Cooper, the investigating officer, drove the appeals hearing. With Mrs. Stevenson also providing the explanation for the decision to dismiss. This is certainly what appears from the minutes of the appeal. I consider that this occurred as Mrs. Kynes was unable to explain her findings to the appeal panel in a convincing manner. I find that this is an unusual approach to take at an appeal hearing and one which a reasonable employer would not have taken: a reasonable employer would have had the dismissing manager explain their decision.

86. I find also that the Appeal hearing did not rectify the errors I found occurred in relation to the dismissal hearing and the evidence of the MHRA licence being at risk (or, lack thereof).

Was the decision to dismiss within the band of reasonable responses?

87. As far as the Respondent's case went regarding the Claimant's ability to manage her team: the Claimant occupied a senior position within the Respondent, she had gone through performance management procedures for a prolonged period of time and did not improve. She had managerial responsibility for staff and for the PAM.

88. I remind myself it is not for me to decide what I would have done in these circumstances if I were the employer; my remit is to consider whether a reasonable employer could have dismissed an employee in the circumstances that existed in relation to the Claimant. In this situation, I find that a reasonable employer could have dismissed an employee occupying the role which the Claimant occupied when she was failing to manage her team appropriately and had failed to improve this over a period of time.

Was the Claimant fairly dismissed?

89. What, therefore was the principal reason for the Claimant's dismissal: looking at the material I have before me it appears the decision to dismiss was a composite one, in that the allegations are of failure to manage and the risk to the licence are not being advanced as being wholly separate and each justifying dismissal in their own right (see the Respondent's closing submissions paragraph 33: "The reason

for the decision...." (singular)). As such I must bear in mind what the Respondent did in fact consider and whether having regard to the totality, dismissal was reasonable.

90. I find that the dismissal was not fair (both for the particular matters raised by the Claimant as well as on a general global assessment of the process) owing to the failings in relation to the investigation into the loss of licence. This was clearly, in my opinion, the most serious of the alleged failures of the claimant and the Respondent's failures to investigate this reasonably render the dismissal unfair, even when a fair, albeit possibly harsh, sanction was imposed for the claimant's management failings.

Contributory Fault and Polkey

91. if a dismissal is unfair then the case of Polkey v AE Dayton Services Limited [1988] ICR 142 (HL) enables me to assess the percentage chance that the claimant would have been fairly dismissed, and reduce any Compensatory Award accordingly. Finally, if the claimant has caused or contributed to her own dismissal, the Basic and Compensatory Awards can both be decreased under sections 122 and 123 of the 1996 Act . For the basic Award this is to the extent it is just and equitable due to any conduct of the Claimant before dismissal, and for the Compensatory Award this is to the extent that it is just and equitable in light of any finding that the claimant caused or contributed to her own dismissal.
92. Having found that the claimant was unfairly dismissed for the reasons I have given, I come to consider how those matters impact on remedy.
93. I turn first to what lawyers call the Polkey principle. This involves a consideration by me of what would, or might, have happened, had matters not been handled in the way that I have found rendered the dismissal unfair. Authority establishes that the findings that I make about that can have a bearing on whether.
94. The question, more precisely, which I had to consider, was whether, had the matters which led to my finding that the dismissal was unfair, not been handled

unfairly, the Claimant would or might in any event have been fairly dismissed. I am concerned here with the lack of evidence of the risk to the MHRA Licence.

95. How would, or might, matters have unfolded? There is always an element of speculation when I am asked to reconstruct what might have been, but the authorities remind me that I must do my best to come to some view on this, drawing what I can infer from the evidence and information available to me, about what did actually occur.
96. Doing the best I can, taking everything into account, I concluded that, had the Claimant not been treated unfairly, in regard to the MHRA Licence, she would still have been dismissed for the lack of improved performance. This was, as a say, well within the definition of "capability"
97. The next question is this: would such a dismissal have been fair? Specifically, would it have been reasonably open to the Respondent to make the findings that it did and impose the sanction of dismissal for the conduct found? For the reasons I have set out above and on the basis of the relatively unchallenged evidence before me as to the performance management element of the process, I consider that the dismissal would have occurred anyway, at the same time that it did
98. Given all the material that was available in the internal process, and taking account of the evidence that might have been further given had the unfairness not occurred I consider that the disciplinary and appeal panels would have been reasonably entitled to come to the same view of this material that they in fact did, and to have made the same findings, as to what occurred.
99. In all the circumstances, I concluded that the decision to dismiss, which I found would still have been taken on the alternative scenario which I am now considering, would have been within the band of reasonable responses, and would have been a fair dismissal. This means that any Compensatory Award will be reduced to zero. An element of compensation for loss of statutory rights will not be appropriate as, had the Claimant been dismissed for poor management alone she would have received no such remedy.

100. As far as contributory conduct is concerned, the Claimant was blameworthy for her dismissal insofar as she had been given opportunities, training and mentoring in an attempt to improve her relationships with her team, however, these were unsuccessful as the Claimant was unable to improve, and so formal performance procedures were commenced by the Respondent. These procedures have not been challenged before me and were not the focus of the Claimant's challenge at the meeting where she was dismissed or on appeal. I have not found that the process was unfair either in substance or its procedural form.
101. I am therefore left with the conclusion that the Claimant was wholly to blame for her dismissal on grounds of capability as it relates to her management style and, as such, consider that s123(6) of the 1996 Act obliges me to consider making a reduction for contributory fault as it applies to the Compensatory Award in the amount I consider just and equitable. I make a reduction of 100% for contributory fault.
102. Under s122(2) of the 1996 Act I am required to consider the application of contributory fault to the Basic Award. Here, where an employee's conduct prior to dismissal was such that it would be just and equitable for me to reduce the Basic Award I shall do so to an amount I consider just and equitable. It does not automatically follow that the amount of a reduction to the Basic Award is the same as the amount of a reduction to the Compensatory Award; and so I have considered these processes separately. However, in this matter, I consider that the level of reduction to the Basic Award should be the same as that of the Compensatory Award. I do so as, on my findings, the Claimant would have been fairly dismissed in any event for her failings to manage her team adequately. As such she would not have been entitled to a Basic Award. In such circumstances it would not be just and equitable for her to receive a Basic Award.

Financial Penalties

103. I have considered the power under s12A of the Employment Tribunals Act 1996 to impose on the Respondent a financial penalty. I consider that the Respondent has breached the Claimant's rights to which the claim relates: it unfairly dismissed her.

104. I consider that there are aggravating circumstances in this matter in that the Respondent is a large organization with a dedicated HR function and that the failings are not subtle or hard to discover.

105. However, even in these circumstances s12A provides me with a discretion to make a financial penalty. I have considered all the facts and have decided not to order a penalty be paid. I do so as I bear in mind that the Claimant would, on my findings, have been fairly dismissed for capability reasons at exactly the same time and on exactly the same facts as were presented to the respondent at the internal hearings and before me.

CONCLUSION

106. The Claimant's claim for unfair dismissal is well founded and I make a declaration to that effect. The Claimant's Basic Award is to be reduced by 100% on grounds of contributory fault and her Compensatory Award is also to be reduced by 100% on grounds of contributory fault and under the principle in Polkey.

107. In light of these findings the remedies Hearing, provisionally listed for 4th December 2017 is vacated and the directions for progression of this matter to that hearing are set aside.

Employment Judge Salter

Date 21 August 2017

JUDGMENT & REASONS SENT TO THE PARTIES ON

24 August 2017