Zd RESERVED REASONS

EMPLOYMENT TRIBUNALS

Claimant	**AND**	**Respondent**
Dr A Nabili		Norfolk Community Health and Care NHS Trust

Heard at: London Central **On**: 12 September 2017

Before: Employment Judge D A Pearl (sitting alone)

Representation
For the Claimant: Mr J Da Rocha (Solicitor)
For the Respondent: Mr S Cramsie (Counsel)

JUDGMENT

The judgment of the Tribunal is that the Claimant was unfairly dismissed.

REASONS

1. This was the remitted hearing by order of the Employment Appeal Tribunal of 20 June 2016. The appeal was allowed "to the extent that the claim for unfair dismissal is remitted for rehearing in light of determination by a newly constituted Employment Tribunal of the reason for and reasonableness of the decision to proceed with a disciplinary hearing in the absence of the Claimant in the circumstances and their effect on the fairness of the dismissal for the purposes of Employment Rights Act 1996 section 98(4). All other findings of fact and conclusions … are to stand".

2. The other facts and conclusions referred to were set out by E J Postle in his reasons sent to the parties on 24 February 2015.

3. In resolving the liability issue of unfair dismissal I have heard evidence today from Ms Weeks, a member of the disciplinary panel that met on 19 April 2011. I have also had regard to the documents in two bundles running to some 900 pages as well as to some further materials that have been handed up.

4. The factual background to the question I have to determine is in all material respects agreed. Those facts are helpfully summarised in paragraphs 7 to 19 of Wilkie J's judgment in the EAT on 18 February 2014 and they begin with the Respondent's suspension of the Claimant from clinical practice on 7 April 2010. As to E J Postle's relevant findings, he dealt with the initial suspension from practice on 29 October 2009 at paragraph 4.7 on page 715. The Claimant returned to practice under supervision on 1 March 2010 and, as I noted, she was suspended or excluded again from clinical practice because of concerns about her performance and patient safety on or about 7 April 2010. It was about two months later that the Respondent discovered that the Claimant had been undertaking work during her period of suspension for the Royal Berkshire Hospital in Reading. This struck managers as contravening the terms of her formal exclusion letter dated 21 April 2010 (pages 259-260).

5. She put in what amounted to a witness statement on 15 December 2010 (pages 333-336). By March 2011 there was a formal investigation report available: pages 373-380. This annexed the transcript of an investigatory meeting that had taken place with the Claimant on 22 December 2010 (pages 381-397).

6. It was then decided that the matter needed to be taken to a disciplinary hearing and this was communicated to the Claimant by letter dated 31 March 2011 and she was asked to send in any written statement or documents within about a week. Papers were then sent to her on 5 April 2011 and she was informed of the composition of the panel. On 6 April the representative, Mr Milbourne, a Senior Employment Advisor at the BMA, asked for permission for the Claimant to attend an event at the Royal College. This was granted.

7. On 14 April Mr Milbourne wrote to the Respondent (Mr Green), acknowledged the documents that had been sent and said that the Claimant had had to leave the country to look after her mother who was ill. He sought compassionate leave. He asked for the hearing to be vacated and rescheduled. In an email two days earlier to Mr Milbourne the Claimant said it was very important for her to attend the disciplinary hearing; and she had asked for a postponement. She referred to the nature of the disciplinary hearing and potential dismissal and mentioned that her career was in question. I note in passing that these last points, which were important to the Claimant and have some bearing on my decision, were omitted from paragraph 4.18 of Mr E J Postle's reasons.

8. On 15 April 2011 Mr Green for the Respondent granted compassionate leave and agreed to postpone the hearing, commenting that he would have to plan the date around the panel so as to avoid undue delay, or words to that effect. On the same day, about six hours later, he wrote again and said that he had now discussed the matter with the HR Director and had checked the availability of the panel in the "near future". "The panel would like to proceed with the hearing and therefore have requested that Dr Nabili either make arrangements to attend the hearing in person or warrant her representative to act on her behalf and attend the hearing to make representations on the case at hand." If she did not attend the panel expected to receive "representations and evidence" to support why she was not there (and an example was given of a

doctor's note about the mother.) If neither could attend, the panel requested written representations.

9. In the hour before this volte-face there are internal emails on 15 April. Ms Weeks asked whether the matter could not go ahead in the Claimant's absence because things had taken such a long time to progress. An HR employee, responding to the panel, said that following a discussion with Mr Milbourne it was decided that he would attend but that the Claimant would not. As Wilkie J noted in his judgment, the internal suggestion that Mr Milbourne would attend on 19th is not entirely borne out by the email that Mr Green sent to him on page 355. In any event, by the morning of 19 April the Claimant was already in Iran and at either 8.45 or 9.45 am Mr Milbourne wrote to the Respondent (including the Chair of the panel) noting that there had been a change of stance with regard to the postponement. He stated that the panel would be aware that Dr Nabili was unable to return to the country and, due to the short notice, no preparation had been possible for the disciplinary hearing. It was also said that Dr Nabili was unable to give the matter her full attention because it was a very stressful time for her within her family. He again stated (as the Claimant had, in effect, also stated in the email to him) that the nature of the allegations and the potential serious consequences for her demanded "a realistic opportunity to prepare for and attend the hearing and to present her case." He asked again for the matter to be put off and for the hearing to be rescheduled.

10. The notes of the meeting show that it started at 9.30 am and finished at 10.30. Therefore, regardless of the time that this latter email was sent, it would have arrived at least 45 minutes before the conclusion of the meeting and it had been sent to Mr Green and Ms Cullen who had been involved for HR as well as to the panel Chair. The first entry in the notes of page 358A shows that the Chair, Mrs Wilson, said that the Claimant and representative would both not be attending. To my mind, this in itself is slightly curious if she had not had sight of the email, but an explanation may be, as I was told by Ms Weeks, that Mr Green was coming in and out of the meeting and conveying all sorts of information. In any event, it must have been known that they would not be coming and her next words are not entirely explained. "I advised the panel to take a tactical approach and proceed with the hearing." She then went on to say that Mr Green was speaking to the representative. The meeting decided to proceed in the Claimant's absence and Ms Weeks's evidence was clear. The view of the meeting was that they needed to come to a decision. She agreed that by 9.30 it was known that there would be no representation and the panel knew that the Claimant was abroad. Her view was that it was a perfectly simple matter. "To my mind, it either was yes or no. It was a simple, straightforward decision." It would not be a difficult one to take. I am left in no doubt that the matter was seen in very black and white terms. The panel could not see any realistic defence to the two charges and they simply wanted to get it over and done with, almost certainly to avoid the further inconvenience of having to reschedule the meeting which Ms Weeks thought would take another six to eight weeks.

Conclusions

11. The parties are agreed that the essence of the question that I have to ask is whether the decision to proceed in the Claimant's absence at the disciplinary hearing was within or outside the band of reasonable responses available to a reasonable employer in these circumstances. Section 98(4) asks whether the Respondent acted reasonably in treating the reason for dismissal as a sufficient reason, in all the circumstances of the case and having regard among other matters to equity. The question that has been remitted by the EAT is what at one time used to be regarded as "procedural fairness" as opposed to substantive fairness. These distinctions are not particularly helpful and it is important to adhere to the words of the statute.

12. In my view, the answer is relatively straightforward and this is not a decision that is in any sense marginal. At the disciplinary interview the Claimant stated that she believed she could do work elsewhere without having to advise the employer. A little further on in the interview she went on to say she was at home and she regarded the time as being her own. It is clear from the way in which the questioning proceeded that there was some scepticism about the honesty of the replies that the Claimant was giving, but she was undoubtedly saying that she had not been dishonest. This point was also adverted to by Slade J at page 11A of the judgment in paragraph 26. There is no clear reason for concluding that the panel thought that the Claimant's attendance would be futile, but even if that was the joint view no reasonable employer in my judgment could have adopted such a stance.

13. For the reasons that the Claimant first set out in the email to Mr Milbourne, and which he then later repeated on 19 April, this was a hearing of great significance for the Claimant as a doctor. There is no reason to conclude that Mr Milbourne had agreed to attend. On the contrary, his assertion that he could not prepare the case for the Claimant who was abroad, and that she needed to attend herself, seems to be eminently sensible. There had been an initial agreement to postpone for these reasons and there is no criticism anywhere in the case of the Claimant for having gone abroad to attend to her sick mother. The change in stance came about as a result of enquiries raised internally by panel members. In my view it is an unattractive argument to seek to blame the Claimant for not having put in further written representations or not having made other arrangements. It is evident that she was preoccupied with family affairs and the request made on her behalf by Mr Milbourne on the day of the hearing is precisely what I would have expected a competent representative to say.

14. Bearing in mind these factors, and the importance of permitting the Claimant to give her own explanation (as the Respondent's own policies say) I am of the clear view that no reasonable employer could have refused this request to reschedule the disciplinary hearing. The amount of inconvenience involved to the panel members does not seem to me to compare with the prejudice that the Claimant would suffer if she could not be heard in her own defence. There were ambiguities around the drafting of the letter whose terms she was said to have breached by working for Royal Berkshire without consent. There were questions of honestly thrown up by some of her answers as to which, apparently, there was some documentary evidence that might need to be considered from third parties.

Over and above all of this, the consequences of a dismissal for gross misconduct and knowingly breaching the instruction that she had been given were severe. I have regrettably come to the conclusion that this panel put its own convenience ahead of all other factors and acted in a cavalier fashion with regard to a decision that could (and possibly did) end the career of a Consultant in the NHS. It is to my mind clear beyond any doubt that this was such an unreasonable decision that it falls well outside the band of reasonable responses open in such circumstances; indeed, I hold that no reasonable employer could have refused the postponement. In my view this is plainly a procedural flaw of considerable significance and it is such as to render the dismissal unfair within the terms of section 98(4).

Employment Judge Pearl
28 September 2017