Appeal No. UKEAT/0328/16/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 18 May 2017
Hand down on 7 June 2017

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE

(PRESIDENT)

SITTING ALONE

DR CLAUDIUS D'SILVA APPELLANT

MANCHESTER METROPOLITAN UNIVERSITY & OTHERS

RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR R DE MELLO (of Counsel) Direct Public Access Scheme
For the Respondents	MS J CONNOLLY (of Counsel) Instructed by: Addleshaw Goddard LLP 1 St Peters Square Manchester M2 3AE

SUMMARY

Procedural fairness/automatically unfair dismissal

The Tribunal adopted the correct approach in law (by reference to Taylor v OCS Group Ltd) in assessing the nature and effect of a procedural failing at the disciplinary hearing stage in the context of the disciplinary process as a whole and having regard to the seriousness of the misconduct. It made findings open to it as a matter of fact and law.

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

Introduction

1. This appeal by Dr C D'Silva ("the Claimant") involves a challenge to the judgment promulgated on 15 March 2016 of the Manchester Employment Tribunal (comprised of Employment Judge Little, Mr Lewis and Ms Brown) which unanimously dismissed complaints of unlawful race victimisation and unfair dismissal he pursued against his former employer ("the Respondent") and other named senior employees. Claims of unlawful direct race discrimination and breach of contract were dismissed on withdrawal and the Claimant was ordered to make a contribution to the costs of the Respondents to the claims. Although there were numerous issues to be adjudicated upon, the focus of this appeal is limited to conclusions reached by the Tribunal that a fair process leading to a fair dismissal was adopted by the Respondent.

2. The Claimant has had the benefit of representation by Mr R de Mello, both before me and below, and the Respondents by Ms J Connolly. I am grateful to them both for their measured submissions, both orally and in writing.

3. The appeal proceeds on three substantive and interrelated grounds which focus on the role of the Respondent's Director of Human Resources, Mrs Hemus and whether or not it was permissible for her to hear and determine the disciplinary misconduct allegation against the Claimant in the way that she did and its impact on the fairness of the dismissal. The grounds are as follows:

> (i) Ground one challenges the finding as to the suitability of Mrs Hemus to conduct the disciplinary hearing as perverse and wrong given her alleged bias and contends that if she was an unsuitable person to have conducted the disciplinary hearing that vitiates the fairness of the dismissal and raises the possibility that the dismissal was an act of victimisation because Mrs Hemus was influenced by the Claimant's protected acts.

(ii) Ground two challenges the Tribunal's decision that Mrs Hemus was the sole person responsible for the decision to dismiss the Claimant as wrong and unsupported by evidence. It contends that the evidence supported a conclusion that both she and Professor Kelleher took the joint decision to dismiss him.

(iii) Ground three challenges the power of the Vice Chancellor, Professor Brooks, to sub-delegate dismissal of the Claimant to Mrs Hemus and Professor Kelleher on a joint basis. It contends that the power to sub-delegate was limited to sub-delegation to Mrs Hemus and challenges as perverse the Tribunal's conclusion that Professor Kelleher's role was advisory only.

4. There is no reasons challenge in the notice of appeal and grounds as Mr de Mello accepts. To the extent that his written argument appears to advance a reasons challenge (based on Meek) this is not open to the Claimant and is considered no further.

5. There is a contingent appeal against the award of costs but this depends upon the Claimant succeeding on the substantive grounds and was not separately addressed by either side.

The factual background and findings by the Employment Tribunal

6. The Claimant was employed by the Respondent as a Senior Lecturer within the Science and Engineering faculty from September 1993 until his dismissal with effect from 1 June 2011. Over time he presented a number of claims to the Employment Tribunal. The claims the subject of this appeal were raised in 2011 and 2012 against both the Respondent and six named individuals.

7. These claims were heard and determined by the Manchester Employment Tribunal over seven days in February and March 2016. It is unnecessary for the purposes of this appeal to summarise the full history as found by the Employment Tribunal because the appeal is narrowly

focused on the finding that the Claimant's dismissal was fair by reference to the procedure followed by the Respondent, and possibly the finding that it was not an act of victimisation.

8. The Employment Tribunal referred to the earlier claims made by the Claimant against the Respondent and to the judgments of a number of other Employment Tribunals. In particular it referred to claims six and seven (determined by Employment Judge Sneath and lay members). The Sneath Judgment was sent to the parties on 30 December 2010 following a hearing in July and September 2010 and unanimously dismissed all claims made by the claimant including those of unlawful race discrimination.

9. The Employment Tribunal set out the penultimate paragraph of the reasons of the Sneath Judgment (paragraph 259) which concluded that the allegations of unlawful race discrimination made in those and the previous proceedings had not been made in good faith in the following terms:

> **"We accept that the Claimant brings ethnicity and race into practically every workplace dispute no matter how artificial. Those statements are false as we and previous Tribunals have found. We accept the characterisation of the Claimant as someone who uses discrimination as a convenient way of challenging a decision with which he does not agree, both in complaints and by use of the Tribunal system. We accept also that in making complaints, bringing claims and warning the Respondent not to victimise him, he intended to exert pressure on the Respondent to make more favourable decisions in the future, as evidenced by the 12 September 2006 letter. Finally, we agree with Miss Connolly's analysis that where the professoriate committee's decision is supported by external members, he impugns their independence without any evidence; where it is supported by referees, he impugns their independence without any evidence; and where a decision is upheld as non discriminatory by the Judiciary, he impugns their independence too without evidence. Accordingly we find that the allegations in these and previous proceedings were not made in good faith."**

On receipt of the Sneath Judgment the Respondent's Head of Employee Relations alerted Mrs Hemus to its receipt and contents. It was agreed an investigation was necessary as to whether the findings that the complaints had not been made in good faith brought into question whether

A the Claimant's conduct amounted to gross misconduct rendering his continued employment untenable.

B 10. The Claimant was invited to an investigation meeting conducted by Professor Dunleavy on 7 March 2011. He was represented and had the opportunity to make representations. He said that he would appeal the Sneath Judgment and disagreed with its conclusions. He contended that the Sneath Tribunal were "Zionists who stuck together".

C 11. The Tribunal accepted that Professor Dunleavy's decision that the matter should proceed to a disciplinary panel was in accordance with the Respondent's disciplinary procedure

D on the basis that "taken at face value, the available evidence appears to indicate… that an act of gross misconduct has taken place…".

E 12. Mrs Tracey, Deputy Head of Operational Services, wrote to the Claimant by letter dated 23 March 2011 inviting him to a disciplinary hearing and setting out the allegation to be considered, namely:

> **"that you entered Tribunal claims against the University which were found to be false and brought in bad faith…".**

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13. Before the disciplinary hearing took place (before Mrs Hemus) by letter dated 24 March 2011 the Claimant challenged the participation of Mrs Hemus in the disciplinary hearing. He

G alleged that she had a conflict of interest on the basis that she had "denied many of my grievances being heard by the Board of Governors".

H 14. Mrs Tracey replied by letter dated 28 March 2011. She rejected as incorrect his complaints about Mrs Hemus. She said that Mrs Hemus had not initiated a disciplinary hearing

but asked for an investigation to take place. Mrs Tracey said that it was appropriate and in accordance with the Respondent's disciplinary procedure for Mrs Hemus to participate as a member of the disciplinary panel.

15. The Claimant did not accept this and reiterated his objection to Mrs Hemus' involvement by letter dated 29 March 2011. He added that Mrs Hemus was the subject of a complaint by him to the Tribunal (referred to as "claim eight"). This had been presented on 4 October 2010. It was directed at the Governors who had not upheld his grievance. The Claimant's letter asserted that claim eight criticised Mrs Hemus' involvement in the grievance process as inappropriate; that she had failed to keep handwritten contemporaneous notes of certain meetings, interviews etc; and had failed to inform the Claimant that another individual had dropped his complaint against the Claimant.

16. Mrs Tracey responded by letter of the same date stating:

> **"your comments in relation to Mrs Hemus are noted but not agreed. I understand Mrs Hemus acted as secretary to the panel of the Board of Governors that heard your grievances last year. I do not accept that this precludes Mrs Hemus from participating in the disciplinary process.… Finally, in the interests of clarity I understand that Mrs Hemus is not a named respondent in your latest tribunal claim…".**

17. The Tribunal found that Mrs Tracey did not inform Mrs Hemus of the Claimant's objection to her involvement in the disciplinary process.

18. The Tribunal addressed Mrs Hemus' qualification for dealing with the disciplinary process as deriving from the Respondent's Staff Disciplinary Procedure December 2005, read in conjunction with its Articles of Government. Paragraph 5.1 of the Staff Disciplinary Procedure provides as follows:

"Dismissal

The Articles of Government confer on the Vice Chancellor the power to dismiss. Such power to dismiss shall, where appropriate, take immediate effect and be without prior notice or payment in lieu of notice.

The Vice Chancellor has the right to delegate this power. The member of the directorate with responsibility for personnel matters shall be the only person to whom this power is delegated. Where this delegated power is exercised, the dismissed member of staff shall have the right to make representations to the Vice Chancellor before the decision to dismiss is confirmed. Such representations to the Vice Chancellor may include personal representations, during which the member of staff may be accompanied…

After consideration of the representations the Vice Chancellor may confirm the original decision or substitute another decision…"

19. The disciplinary hearing took place on 31 March 2011. Mrs Hemus had the assistance of Professor Kelleher sitting with her as a disciplinary panel. At paragraph 8.22 of the Reasons the Tribunal found that there is no provision in the Staff Disciplinary Procedure for a panel under paragraph 5.1, however it accepted Mrs Hemus' evidence that it was the practice of the Respondent to have a panel and that she confirmed that the decision made at the hearing was hers alone.

20. No objection was made to Mrs Hemus chairing the disciplinary panel at the start of the hearing, but the issue was raised some way through the hearing, by reference only to Mrs Hemus's asserted role in relation to the grievance dealt with by the Board of Governors. This was said by the Claimant's representative, Mr Cairns, to raise a concern of bias and to be against the principles of natural justice. He was asked to clarify his objection and said that he was objecting to Mrs Hemus' involvement in the grievance which was considered by the Board of Governors. He said that this issue was still subject to an appeal and there would be further avenues to explore in any event. He said he felt the disciplinary proceedings were premature: (paragraph 8.23).

21. The Tribunal found that the Claimant's argument at the disciplinary hearing was that he should not be disciplined because of the findings of the Sneath Tribunal. He believed he had what he described as "legal immunity" and "automatic protection even if his claims were …. malicious". He explained that he was pursuing appeals to the Employment Appeal Tribunal in respect of the Sneath Judgment.

22. The disciplinary panel reserved its decision. By letter dated 8 April 2011, written and signed by Mrs Hemus as Director of Human Resources, the Claimant's contentions were addressed. Mrs Hemus said that she played no part in the decision of the Board of Governors which had previously considered the Claimant's grievance. She did not accept that her role in that process rendered her biased against the Claimant or otherwise made her unable to participate in the current disciplinary process. Under the heading "outcome" the letter said:

> **"The panel believes that in making and pursuing your spurious allegations against the University and a number of very senior members of its staff, you have brought about a complete breakdown in the trust and confidence which should exist between you and the University. It is clear to the panel that your actions have fundamentally and irretrievably damaged the employment relationship. The panel is therefore of the view that the conduct you have exhibited is wholly unacceptable and constitutes gross misconduct".**

The letter said that summary dismissal was regarded as the appropriate penalty. However, because the Vice Chancellor had delegated his dismissal powers to Mrs Hemus, the Claimant had the right to make representations to the Vice Chancellor under paragraph 5.1.

23. The Claimant exercised his right to make such representations. There was a hearing before Professor Brooks, the Vice Chancellor, at which he was represented and made representations. In addition to the material available to the disciplinary panel, he submitted further documents including several letters of commendation and support, a witness statement

from his lawyer and a written submission with five appendices. During the course of the hearing an issue was raised by the Claimant in relation to a Senior Lecturer, Mr Okojie, and following the hearing the Vice Chancellor made arrangements to interview Mr Okojie and the Claimant was ultimately present at that meeting.

24. The Vice Chancellor rejected the Claimant's representations by letter dated 31 May 2011. So far as concerns criticism of Mrs Hemus' role in the disciplinary panel, he said:

> **"Turning finally to the concerns you raised about the presence of the Director of HR, Gill Hemus, on the disciplinary panel. The disciplinary procedure makes it clear that no person exercising disciplinary authority shall have been responsible for the conduct of an investigation into the disciplinary matter under consideration. I am satisfied that this was the case. Professor Dunleavy was responsible for the investigation. Furthermore, the member of the Directorate with responsibility for personnel matters is the only person to whom my power to dismiss is delegated.**
>
> **I am aware that Mrs Hemus acted as secretary to the panel of Board of Governors that heard your grievances last year. I am also aware that she communicated to you that panel's decision not to uphold your grievances. She did not, however, participate in or contribute to the decision itself. Similarly, I understand that Mrs Hemus' role as the University's Director of HR means that she is aware of your Employment Tribunal litigation against the University. That said, Mrs Hemus has not participated in that litigation to date (either as a witness or a named respondent). I am confident in Mrs Hemus' integrity as a senior HR professional.**
>
> **In conclusion, I confirm that I am satisfied it was therefore appropriate for Mrs Hemus to act as chair of the disciplinary panel. I do not agree that there was a conflict of interest.**
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> **For completeness, I note that Mrs Hemus did not reach the decision to dismiss you on her own. She reached the decision with Professor Kelleher, the other member of the panel. My comments on whether or not their decision is the right one are set out in more detail below."**

The Vice Chancellor concluded that the conclusions of the disciplinary panel were reasonable and he adopted them. Moreover he went on to state:

> **"I am satisfied that your conduct is of such seriousness that action now under the University's internal disciplinary procedure is entirely appropriate…. I concur with the disciplinary panel that your fabrication of allegations against the University and some of its very senior members of staff has fundamentally damaged the trust and confidence which must exist between employer and employee.… I have considered the evidence you provided regarding your contribution to the work of the University… and I acknowledge that you have valuable research expertise. However I do not believe that this mitigates the seriousness of your actions. I am satisfied that your actions have fundamentally and irretrievably damaged the employment relationship and consequently believe the sanction of summary dismissal was and remains appropriate and reasonable"**

25. The Claimant exercised his right to appeal to the Board of Governors. A panel of three Governors heard his appeal on 14 July 2011. The outcome was notified to him by letter dated 26 July 2011. The Tribunal found that the panel were content that Mrs Hemus was the proper person to take the disciplinary hearing. It addressed the criticisms already made by the Claimant and an additional criticism in relation to an ACAS settlement discussion referred to by the Claimant. The panel concluded:

> **"Mrs Hemus did not carry out the investigation into the allegations against you nor did she make any decision to progress to a disciplinary hearing. Mrs Hemus did however, as you know, chair the disciplinary panel that heard the allegations of gross misconduct against you. This was entirely appropriate and in line with the University's disciplinary procedures. Additionally… Mrs Hemus did not sit alone. Professor Kelleher sat with her on the disciplinary panel that heard your case"**

The letter concluded:

> **"On the basis of review of the documentation, evidence and submissions, and having regard to the mitigation put forward by Mr Cairns, including your achievements during your career at the University, the panel has concluded that the decision of the disciplinary panel upheld by the Vice Chancellor, that you made untrue allegations, not in good faith, and that this amounted to gross misconduct, was correct. The panel also concluded that dismissal was the appropriate sanction and that summary dismissal was warranted and was reasonable in the circumstances."**

26. The Claimant's appeal was accordingly dismissed and that concluded the disciplinary process.

27. Following the conclusion of the disciplinary process, the Claimant pursued unsuccessful appeals (against the Sneath Judgment and the strike out decision in relation to claim eight) to the Employment Appeal Tribunal and ultimately, but not until 15 January 2015, further appeals to the Court of Appeal in relation to both decisions were refused. The appeal against the strike out of claim eight as having no reasonable prospects of success was described by the Court of Appeal as "totally without merit".

28. Against those (and other) factual findings, the Tribunal concluded that the Claimant was fairly dismissed for misconduct because he brought false claims in bad faith against the Respondent. The sanction of dismissal was held to be within the range of reasonable responses and fair.

29. So far as the suitability of Mrs Hemus to conduct the disciplinary hearing is concerned, the Tribunal found as follows:

> **"1. The first Respondent's disciplinary procedure and the Articles of Government confer on the Vice Chancellor the power to dismiss (paragraph 5.1 of the disciplinary procedure). However, as we have already noted, that power can be delegated, but only to "the member of the directorate with responsibility for personnel matters": in other words the Director of HR who, as the material time, was Mrs Hemus. Inevitably, having regard to her position, Mrs Hemus was aware of the Claimant's previous claims to the Employment Tribunal, and at least some of his grievances. With regard to the 2007 grievances we find that she had not decided those, and had only been the secretary to the panel of Governors who did determine them. Mrs Hemus accepted that she knew of the Claimant's eighth Employment Tribunal claim which was presented in October 2010. That claim was not made against her but she was adversely mentioned within it. We did not accept the Claimant's contention that it was Mrs Hemus who, on her own, instigated the disciplinary enquiry. We find that was a joint decision of Mrs Hemus and Mr. Gibbs; the latter having both brought the Sneath Judgment to Mrs Hemus' attention and had nominated Professor Dunleavy to conduct the investigation. We are satisfied that Mrs Hemus played no other part in the investigation process. Nevertheless, obviously she did conduct the disciplinary hearing with Professor Kelleher and did alone make the decision to dismiss.**
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> **2. We have made findings as to the objection raised by the Claimant to Mrs Hemus conducting the disciplinary hearing; that is his letters to Mrs Tracey on 24 March 2011 (page 577) and the 29 March 2011 (page 650) and her responses. In those circumstances we consider that a reasonable employer faced with such an objection would have ensured that the matter was discussed prior to the hearing with both Mrs Hemus and the Vice Chancellor. A reasonable employer would then have suggested to an employee in the Claimant's position that one option was for the disciplinary hearing to be conducted by the Vice Chancellor, but with the result that one tier of the appeal process would thereby be lost.**
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> **3. Ultimately, however, it is for the reasonable employer to determine who should conduct a disciplinary hearing, and not for the employee to choose his or her forum. We are mindful of the guidance given by the Court of Appeal in the case of Taylor v OCS Group Limited. In paragraph 47 of the judgment Employment Tribunals were instructed to consider the fairness of the whole of the disciplinary process:**
>
> **"If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care".**
>
> **In paragraph 48 the Court of Appeal went on to observe that:**
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> **"So, for example, where the misconduct which founds the reason for the dismissal is serious, an Employment Tribunal might well decide (after considering equity and the substantial**

merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct was of a less serious nature so that the decision to dismiss was nearer to the borderline, the Employment Tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee".

4. Bearing in mind that guidance, we observe that whilst being the sole decision maker Mrs Hemus had input and advice from Professor Kelleher and the Claimant had no objection to Professor Kelleher's involvement (apart from the sub-delegation point which we will deal with subsequently). Moreover, neither the Claimant nor his trade union representative raised any objection to Mrs Hemus at the commencement of the hearing on 31 March 2011 and when some way through the hearing that issue was raised, it was not raised in a particularly forceful way.

5. Having had the benefit of hearing from Mrs Hemus, the Tribunal find her to have approached her task with quite proper professional detachment. We also take into account that anyone who conducted the disciplinary hearing would have had to be made fully aware of the view which the Sneath Tribunal had taken with regard to the Claimant's approach to litigation against his employer. We also bear in mind that the Claimant had the right, which he took, to a two tier appeal process. Moreover this was not a borderline case. The conduct – making false allegations of race discrimination – was extremely serious.

6. It follows that whilst we do not consider that the first Respondent's treatment of the Claimant's objection to Mrs Hemus was ideal, nor do we consider that it rendered the dismissal unfair".

30. The Tribunal also made findings in relation to sub-delegation, again, as follows:

"This challenge is made on the premise that either the Vice Chancellor or Mrs Hemus delegated the decision to dismiss, or part of it, to the other panel member, Professor Kelleher. Clearly such a delegation, if it occurred, would be contrary to the Articles and disciplinary procedure. However, we find that this is not what occurred. The decision to dismiss remained vested in Mrs Hemus, it having been delegated to her, quite properly, by the Vice Chancellor.

We are satisfied that Professor Kelleher's role was advisory only. He was not a joint decision maker. We accept that neither the Articles nor the disciplinary procedure provide that there should be a disciplinary panel, but we find that this was consistently the practice of the University. The rationale was to ensure that appropriate checks and balances were in place. We consider that a reasonable employer was entitled to make such arrangements".

31. Having dealt with other criticisms made by the Claimant in relation to the fairness of the process and the decision, the Employment Tribunal held:

"Returning to the Burchell considerations, we conclude that the first Respondent did have sufficient material before it when it decided to dismiss, so that its initial concern that gross misconduct may have occurred was sustained. We find that it was a decision that was well within the band of reasonable responses. The first Respondent considered the references or testimonials which the Claimant had put before it. However, a reasonable employer was entitled to take the view that the University as an entity had lost trust and confidence in the Claimant due to his conduct, and that that state of affairs was not ameliorated by reason of the departure from the University of certain individuals who had had difficult interactions with the Claimant, nor that some individuals (see the testimonials at page 976 etc) had a high opinion of the Claimant as a colleague, scientist and teacher."

12. Overall conclusion

"It is therefore the unanimous judgment of the Tribunal that the Claimant was fairly dismissed and that his complaint of victimisation fails. The complaints of race discrimination and breach of contract having been withdrawn are dismissed."

The appeal

32. The Respondent is a Higher Education Corporation and a relevant institution for the purposes of the Education Reform Act 1998 and accordingly is required pursuant to s.125 to act in accordance with Articles of Government made by it, and to conduct disciplinary procedures in accordance with the Rules made under the Articles. The relevant Rules are those provided for by the Staff Disciplinary Procedure December 2005 (to which the Employment Tribunal referred) and as the Employment Tribunal accepted, paragraph 5.1 makes clear that the Vice Chancellor has power to dismiss and can only delegate that power to the Director of Human Resources, which was Mrs Hemus.

33. This statutory underpinning to the Staff Disciplinary Procedure is fundamental to the arguments advanced by Mr de Mello. First he submits that because the Vice Chancellor's power of delegation is limited to Mrs Hemus and permits no sub-delegation, any decision to dismiss made jointly by Mrs Hemus and Professor Kelleher was invalid and impermissible. The fact that the Respondent's practice was to appoint a panel to consider dismissals, as a matter of custom and practice, cannot affect that analysis since it is incompatible with the Staff Disciplinary Procedure and Articles of Government and is ultra vires. On that basis, he contends that the Employment Tribunal's finding that a reasonable employer was entitled to adopt a panel arrangement which departed from the Staff Disciplinary Procedure and Articles is perverse and wrong in law. This defect in the process could not be cured by subsequent stages of the dismissal process because of the seriousness of the defect (involving an ultra vires stage), the bias of Mrs Hemus and the fact that the Vice Chancellor did not start his stage of the process afresh but adopted the disciplinary panel's decision as his starting point.

34. Secondly, Mr de Mello submits that the finding of the Employment Tribunal that Professor Kelleher's role was advisory only and that he was not a joint decision maker is perverse. Mr de Mello took me through a series of documents, including the Respondent's ET3, the witness statements of Professor Kelleher and Mrs Hemus, the decisions of the disciplinary panel, the Vice Chancellor and the Board of Governors, and the witness statements of Professor Brooks and Mr N Harrison, the chair of the panel of Governors who dealt with the appeal. These documents are all broadly to the same effect: there was a disciplinary panel chaired by Mrs Hemus; the other panel member was Professor Kelleher, Deputy Vice Chancellor of the University; the panel considered the evidence and information produced both before and during the disciplinary hearing; the panel concluded that the conduct exhibited by the Claimant (in making and pursuing spurious allegations against the Respondent and a number of senior members of staff) was wholly unacceptable and constituted gross misconduct; the panel determined that summary dismissal was appropriate.

35. In her witness statement (at paragraph 23) Mrs Hemus described her role as chair of the disciplinary panel as follows:

> **"…although I chaired the hearing (on the basis that I had delegated authority to dismiss, it it came to that) I had a fellow member on the panel at the same level in the universities hierarchy as me, in order to make a combined decision. This is one of many checks and balances on decision-making which are put in place in disciplinary proceedings which could potentially result in dismissal".**

36. In his witness statement Professor Kelleher states that he sat on the disciplinary panel chaired by Mrs Hemus and together, he and Mrs Hemus found the allegations of misconduct to be well founded and that the appropriate sanction was dismissal without notice.

A

37. Against that wealth of consistent documentary evidence, Mr de Mello submits that the Employment Tribunal's decision that Mrs Hemus was the "sole decision maker" in the dismissal is perverse.

B

38. Thirdly, Mr de Mello submits that Mrs Hemus was an unsuitable person to conduct the disciplinary hearing on 31 March 2011 given her acceptance that she knew about claim eight and that it referred to her adversely. Even if the Claimant did not himself raise any issue about

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claim eight and the criticism within it of Mrs Hemus, she should have raised this issue herself, both with Professor Kelleher and the Vice Chancellor and moreover, Mrs Tracey should have raised it with both Mrs Hemus and the Vice Chancellor. The failure to do so and the mere

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naming of her in a critical way, leads to the conclusion that she and indeed the disciplinary panel she chaired with Professor Kelleher, was biased (whether on an actual or apparent basis). However, the Employment Tribunal failed to recognise this bias and procedural unfairness,

E

having failed to apply the correct legal test for bias when it concluded that Mrs Hemus approached her task with proper professional detachment, and failed to appreciate the procedural failings he relies on as summarised above.

F

39. Mr de Mello submits that if he is correct that the disciplinary panel decision was flawed, since both the Vice Chancellor and the Board of Governors adopted the disciplinary panel's decision and did not approach matters afresh or with a clean slate, the whole dismissal process

G

was flawed. The procedural failings at the disciplinary panel stage could not be cured by the review conducted by the Vice Chancellor or the appeal conducted by the Board of Governors.

H

40. Forcefully as these inter-linking submissions were made I do not accept them. My reasons for that conclusion are addressed below.

41. I agree with Ms Connolly that the starting point is to appreciate that the findings made by the Employment Tribunal in relation to the role played by Mrs Hemus in the disciplinary panel form part of the wider dismissal process that was considered as a whole by the Tribunal and ultimately assessed to be fair on a conventional application of well established principles.

42. I do not accept Mr de Mello's argument that the Court of Appeal's approach in Taylor v OCS Group Ltd [2006] ICR 1602 does not apply here. The fact that the procedural defect relied on by a claimant is underpinned by a statutory framework does not alter the requirement on tribunals to focus on the statutory test and look at the substance of what happened. The seriousness of the defect is plainly a relevant factor; and if the employer acts without apparent lawful authority, that is something a tribunal may consider relevant in assessing the seriousness of the asserted procedural defect. Procedural defects, whether underpinned by reference to statutory powers or not, form a necessary part of the focus on the test in s.98 ERA and fall to be considered as part of fairness as a whole, but that must be done in context and in light of the facts of the particular case.

43. The Claimant made an application for judicial review of the decision to dismiss (filed on 31 August 2011) but his application proceeded (inter alia) on the basis of an initial decision to dismiss by Mrs Hemus alone, raising no issue as to the role of Professor Kelleher, and alleging breach of the rules of natural justice because of apparent bias by Mrs Hemus as a person named in previous proceedings brought by the Claimant and accused of victimisation by him. The application for permission was refused on paper and again at a renewed oral hearing on 18 July 2012 where the Claimant was ordered to pay costs.

44. In Taylor v OCS Group Ltd the Court gave guidance on the proper approach to adopt where on claims of unfair dismissal criticism is made of an employer's disciplinary procedure, holding that tribunals should focus on the statutory test and look at the substance of what happened throughout the disciplinary process, rather than seek to categorise an internal appeal process as a rehearing or a review. The label does not matter. What matters is whether the disciplinary process as a whole is fair. If a tribunal finds an early stage of the process to be defective or unfair, subsequent stages will require particular careful examination but as the court made clear at [47] and [48]:

> **"… their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision maker, the overall process was fair, notwithstanding any deficiencies at the early stage".**
>
> **"… it should consider the procedural issues together with the reason for the dismissal as it has found it to be. The two impact upon each other and the employment tribunal's task is to decide whether in all the circumstances of the case, the employer acted reasonably in treating the reason it is found as a sufficient reason to dismiss. So, for example, where the misconduct which founds the reason for the dismissal is serious, an employment tribunal might well decide that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct was of a less serious nature, so that the decision to dismiss was nearer to the borderline, the employment tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee. …"**

45. A similar approach was adopted by the Employment Appeal Tribunal (HHJ Eady QC and members) in Adeshina v St George's University Hospitals NHS Foundation Trust [2015] IRLR 707 that the strict rules regarding apparent bias applicable to judicial processes are not applicable to internal disciplinary processes although actual bias giving rise to a breach of natural justice may have fundamental relevance to the question of fairness, and at [17] the Employment Appeal Tribunal continued:

> **"whether there is an appearance of bias may be a relevant factor in an unfair dismissal case; it will be something that will go into the mix for the Employment Tribunal to consider as part of fairness as a whole, as will the question whether the panel did in fact carry out the job before it fairly and properly, … the only thing that really matters is whether the disciplinary tribunal acted fairly and justly…"**

Although there was a subsequent appeal to the Court of Appeal, this aspect of the decision of the Employment Appeal Tribunal was not challenged.

Allegation of bias against Mrs Hemus

46. So far as the question of bias in relation to Mrs Hemus is concerned, this was expressly considered by the Tribunal. The Tribunal found that the objection made in advance of the disciplinary hearing by the Claimant was not pursued following receipt of the response from Mrs Tracey until halfway through the disciplinary hearing when Mr Cairns referred again to the role of Mrs Hemus but only in relation to her asserted role in the Board of Governors' decision to dismiss the Claimant's grievances. The Tribunal accepted that Mrs Hemus played no part in that grievance decision and served only as secretary to the panel of Governors. Implicit in that finding is a conclusion that there was no actual or apparent bias in this regard.

47. Nonetheless, the Tribunal accepted that Mrs Hemus was adversely mentioned in claim eight and knew about that claim, albeit there is no finding that she knew of the detail. The Tribunal found that a reasonable employer faced with an objection based on Mrs Hemus' involvement in the disciplinary hearing on this basis would have ensured that there was a discussion about the objection to her involvement, both with her and the Vice Chancellor. The Claimant could then have been offered the option of a disciplinary hearing conducted by the Vice Chancellor but with the result that one tier of the disciplinary process would have been lost. The Tribunal treated this as a procedural failing and addressed it in the context of the overall fairness of the dismissal process in line with the guidance in Taylor v OCS Group Ltd. There was no error in that approach.

48. So far as the substance of the Claimant's bias allegation against Mrs Hemus is concerned (which now relies solely on the mere fact of adverse mention in claim eight) I do not agree with Mr de Mello that the Tribunal found that there was actual or apparent bias. From the Tribunal's findings it is clear that claim eight was presented in October 2010. It named a number of individuals as respondents, but did not name Mrs Hemus. Claim eight was struck out as having no prospect of success in May 2011, and the Employment Tribunal found that the Sneath Judgment, not claim eight, was the catalyst for disciplinary action (paragraph 11.2 (f)). The Tribunal held that rather than being influenced by earlier claims including claim eight, it was the impact of the Sneath Judgment which operated on the mind of the Respondents, including Mrs Hemus. On the Employment Tribunal's findings, claim eight did not operate on her mind or influence her in any way for victimisation purposes, and the victimisation claim on this basis was accordingly dismissed.

49. The adverse criticism of Mrs Hemus in claim eight was that it was inappropriate for her as Head of Human Resources coordinating the University's defence in outstanding tribunal proceedings to "get involved in the Board of Governor's jurisdiction due to the conflict of interest and in the determination of which grievances were appropriate to go before the panel"; and that she failed to keep certain handwritten notes and excluded a complaint by another member of staff of harassment and bullying against the Claimant and then failed to inform the Claimant that that member of staff had dropped his grievance against the Claimant. It is not immediately obvious why the mere fact that these criticisms were made of Mrs Hemus should lead to the conclusion that she would have a predetermined view against the Claimant, or the appearance of a predetermined view against him.

50. Although the Tribunal made no express reference to bias, it found that Mrs Hemus approached her task with "quite proper professional detachment". Read fairly and in light of its other findings referred to above, this was a rejection of the allegation of actual (and in all likelihood apparent) bias against Mrs Hemus. Given the earlier conclusion that she had no substantive role (beyond a secretarial one) in the Board of Governors' handling of the Claimant's grievances (and by inference, no conflict of interest), given the apparently trivial nature of the second and third criticisms, and given that she was not actually influenced in any way by claim eight, which was struck out (all of which the properly informed, fair-minded observer would know) that conclusion was open to the Employment Tribunal.

51. Even if the decision is not to be read as rejecting apparent bias, the Employment Tribunal properly treated this aspect as a potential procedural defect to be evaluated in the mix of considerations going to the question of fairness. That was the correct approach. The Tribunal had regard to the fact that anyone with conduct of the disciplinary hearing would have had to be made fully aware of the Claimant's claims, his history of litigating against the Respondent and the material findings of the Sneath Judgment. The Employment Tribunal took account of the subsequent two tier appeal process available to the Claimant. Finally and particularly relevant, the Tribunal concluded that this was not a borderline case. The Claimant brought false unlawful discrimination claims in bad faith to manipulate and pressurise the Respondent and its senior employees. These were findings on the face of a judgment and little investigation was required. On any view the conduct was extremely serious.

52. Taking all these matters into account, the Employment Tribunal concluded that the dismissal was procedurally fair and I can detect no error of law or perversity in that approach.

53. Mr de Mello criticises the Tribunal's statement that it is for the employer to determine who should conduct a disciplinary hearing and not for the employee to choose his or her forum as perverse and unintelligible because the Staff Disciplinary Procedure had to be applied fairly and consistently and the objection to Mrs Hemus was not communicated to the Vice Chancellor before he delegated the disciplinary decision to her. This submission takes this observation out of context and views it in isolation. Properly read, the observation is not a finding in relation to the Respondent or an explanation for why the procedural defect did not render the dismissal process unfair, but a point of general application to be weighed in the mix together with the earlier finding that there was a procedural failing when the objection raised by the Claimant about Mrs Hemus was not communicated to her or to the Vice Chancellor. The Tribunal conducted precisely the assessment required of it, weighing such procedural defects as it found against the other findings in relation to the process as a whole, and assessing the fairness of the process as a whole. Again, I can detect no error of law or perversity in that approach.

Mrs Hemus as sole decision maker/sub-delegation

54. So far as concerns the perversity challenge to the finding that Mrs Hemus was the sole decision maker albeit that she had input and advice from Professor Kelleher as a member of the disciplinary panel, the Tribunal heard oral evidence from Mrs Hemus and Professor Kelleher. The Claimant has not sought notes of evidence and Mr de Mello accepts that I cannot go behind findings of fact made by reference to the oral evidence. Nonetheless, he contends that the oral evidence of Mrs Hemus stood alone and it was perverse to accept it in light of the overwhelming documentary material.

55. I disagree. The Tribunal found on the basis of the oral evidence of Mrs Hemus that the Respondent's practice was to have a disciplinary panel, rather than rely on a hearing before one

person alone, but that the decision to dismiss was that of Mrs Hemus alone. The tension between those two statements is also apparent in paragraph 23 of Mrs Hemus witness statement (referred to at paragraph 35 above). Ms Connolly submits that the tension can be resolved as follows. Paragraph 5.1 of the Procedure deals with the power and authority to dismiss. While it certainly restricts the exercise of dismissal powers to the only person to whom such delegated authority is given, namely the Director of Human Resources, it does not limit (whether expressly or by reference to paragraph 5.2) the ability of Mrs Hemus to exercise that power in conjunction with another senior member of staff. The Procedure therefore does not prevent another senior member of staff from forming part of a disciplinary panel, to consider the evidence and determine what allegations are proved and their seriousness and to reach conclusions about what sanction is appropriate. However, if dismissal is the appropriate sanction, the only person who can effect such a decision (other than the Vice Chancellor) is Mrs Hemus.

56. I accept this reading of the Staff Disciplinary Procedure which is to be understood in a practical and sensible way and not construed as a statute would be. It explains why the Respondent's usual practice in this situation was to have a disciplinary panel (as Mrs Hemus said in evidence to the Employment Tribunal) and how Mrs Hemus could say that she had sole delegated power to dismiss but the decision was made jointly by the disciplinary panel. Mrs Hemus and Professor Kelleher came to the same view that the Claimant ought to be dismissed but, in the final analysis, given the terms of the Staff Disciplinary Procedure and delegated dismissal powers, the decision to dismiss was hers.

57. Standing back from these particular points of challenge and returning to the judgment of the Employment Tribunal, having concluded that Mrs Hemus was the sole decision maker but

had input and advice from Professor Kelleher and having concluded that she approached her task with proper professional detachment and was not influenced in any way by claim eight, the Tribunal concluded that the overall process was fair. That conclusion was reached in accordance with the guidance given in Taylor v OCS Group Ltd and was an obviously permissible conclusion on the facts of this case. The Claimant had the benefit of two further hearings after the disciplinary panel had concluded its stage of the process. At the hearing before the Vice Chancellor new documents and representations were considered and a new witness was called (see paragraphs 8.35 and 8.36). Whatever label is applied to this hearing (rehearing or review) it is clear that it was a detailed hearing and that the Vice Chancellor investigated the matters raised, received evidence and representations and reached his own conclusions. I do not accept Mr de Mello's submission that the Vice Chancellor simply adopted the conclusion reached by Mrs Hemus without any real consideration or analysis. Moreover there was an appeal to a panel of Governors. Mrs Hemus played no part in the decision-making of that appeal panel, although she presented the findings of her investigation. Again, as the Tribunal found, the appeal panel itself concluded that the Claimant had committed the serious misconduct alleged and that the appropriate sanction was summary dismissal in the circumstances. Moreover, again as the Employment Tribunal found, this was not a borderline case. The findings in the Sneath Judgment that formed the basis of the disciplinary allegations are a matter of record. They are serious, and in the Employment Tribunal's view, entitled the Respondent to conclude that trust and confidence had been lost: see paragraph 11.10 (2) (vi) and 11.10 (3).

58. Moreover as Ms Connolly submits, it is clear that there was no challenge by the Claimant to the presence of Professor Kelleher as a member of the disciplinary panel during any of the internal stages of the disciplinary process, or in the ET1 (or indeed in the judicial

review claim form). The first time this issue was raised was at the substantive Employment Tribunal hearing. It is easy to understand how, in those circumstances, there was no real analysis by the Respondent of what was meant by references (in many of the Respondents' witness statements and documents, including those referred to by Mr de Mello during this appeal hearing) to the "disciplinary panel". This issue was first fully analysed in the Tribunal hearing itself when it was first raised, and was therefore only clarified at that point. In these circumstances I can well understand why the Tribunal took the approach that the documentary material did not preclude it from accepting the oral evidence of Mrs Hemus. In truth the two were not really inconsistent. There was evidence to support the findings made by the Tribunal which were permissible in the circumstances and not even arguably perverse.

59. Ms Connolly submits that in the alternative, even if the Tribunal was in error in relation to the approach to the bias allegation against Mrs Hemus and/or the finding regarding Mrs Hemus and Professor Kelleher and whether they exercised the power to dismiss as a joint panel (in breach of the rules about delegation), neither possibility would have altered the conclusion that the dismissal was fair:

> (a) If objection had been raised to Mrs Hemus' role in the process to the Vice Chancellor all that would have happened is that her stage would have been omitted and the Vice Chancellor and Board of Governors would have dealt with the process. There is nothing to suggest that the decisions reached by the Vice Chancellor and the appeal panel were anything but independent and procedurally and substantively fair. There is no independent challenge to their reasoning or conclusions.
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> (b) The exercise of the power to dismiss by two people rather than one is not provided for in the Staff Disciplinary Procedure. However, she submits that the question for the Tribunal requires a focus on s.98(4) ERA. She relies on the fact that the Claimant had and continues to have no substantive objection to Professor Kelleher's involvement and the Tribunal's own finding that his involvement ensured that appropriate checks and balances were in place. Moreover, the Tribunal accepted that this was the Respondent's usual practice in such cases and that a reasonable employer was entitled to adopt a panel approach. In all the circumstances (including the two further appeal stages and the nature of the misconduct alleged) she submits that it is difficult to see how the exercise of the power to dismiss by a panel of two rather than by

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> a single person could be inherently unfair in this case. This would not have altered the conclusion that there was no unlawful victimisation either; it would have reinforced it. There was no allegation of victimisation by Professor Kelleher (who was not named as a respondent) and no challenge at all to his conduct or approach. He was not involved in claim eight and there is no evidence that he was aware of it. Moreover, the Employment Tribunal found that he had no knowledge of the other alleged protected acts.

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60. I accept those arguments. I do not accept Mr de Mello's submission that it is too speculative and too unsafe to conclude that the same decision would have been reached on these alternative bases, or that the disciplinary hearing decision of Mrs Hemus infected the

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approach at the later stages. For all the reasons identified by Ms Connolly it is neither speculative nor unsafe to reach that conclusion, and there is no evidence to support the asserted infected approach. The hearings before the Vice Chancellor and the panel of Governors

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enabled full, fresh and independent consideration to be given to any points raised by the Claimant. Professor Kelleher's role and approach is not challenged in any way. As I have repeatedly emphasised, this was not a borderline case where less serious misconduct might well

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have resulted in a sanction less than dismissal. The misconduct allegations were serious and the Tribunal expressly held that little investigation was necessary: see paragraph 11.10 (2)(i); dismissal was plainly reasonable on the Employment Tribunal's findings.

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61. For all these reasons, whether taken individually or on a cumulative basis I do not consider that there was any error of law or perversity in the approach of the Employment Tribunal in this case. To the contrary, in a careful judgment, the Tribunal considered the claims

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pursued by the Claimant in accordance with the law and the facts and reached conclusions that were entirely open on the evidence. The appeal is therefore dismissed.

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