mf

EMPLOYMENT TRIBUNALS

Claimant: **Mrs D Davis**

Respondent: **East London NHS Foundation Trust**

Heard at: **East London Hearing Centre**

On: **5-8 & 12 February 2018**

Before: **Employment Judge Russell (sitting alone)**

Representation
Claimant: **Ms L Hudson (Counsel)**
Respondent: **Mr S Keen (Counsel)**

JUDGMENT

The claim of unfair dismissal fails and is dismissed.

REASONS

1 By a claim form presented on 13 August 2015, the Claimant complains of unfair dismissal. The Respondent resisted the claims.

2 On 2 November 2015, the Claimant was given leave to amend to include allegations of harassment related to race. That claim was withdrawn when the matter came before Employment Judge Houghton at a hearing commencing on 26 April 2016. Regrettably due to a number of difficulties, including the unavailability of the Judge, it was not possible to conclude the first hearing of the case.

3 At a Preliminary Hearing on 10 November 2017 the case was re-listed for a full merits hearing to start afresh before a Judge sitting alone. Counsel were concerned that unfairness may arise if witnesses gave evidence in the new hearing which differed from their evidence in the Houghton hearing. It was agreed that this would be resolved by reference to the notes of evidence previously taken by Judge Houghton and Counsel in the first hearing. This was the course adopted in the hearing and it worked well as there were no significant differences between the notes taken by Counsel and Judge Houghton.

4 The issues to be decided were agreed as follows:

The Final Warning (28.05.2014)

4.1 Was the warning manifestly inappropriate (or did Mr Dean Henderson act in bad faith) in concluding that:

a) C's admitted use of the words 'falsify' and 'scapegoat' breached R's email policy?

b) Mr Bill Williams issued a reasonable request by insisting that C cancel her pre-arranged meetings on 23 November 2012 to have a meeting with him?

c) C acted vexatiously on 19 November 2012 by telling Mr Williams "you will not bully me"?

d) C displayed aggressive and unprofessional behaviour on 9 April 2013?

4.2 Did Sarah Wilson cause Dean Henderson to impose the final written warning so that it would be easier for C to be dismissed at a later date?

4.3 R contends that the allegation that Mr Henderson acted manifestly inappropriately was withdrawn at the previous hearing.

The Dismissal

4.4 Pursuant to **British Home Stores Ltd v Burchell** [1978] IRLR 379:

a) Did R hold a genuine belief that C had knowingly provided a factually inaccurate reference?

b) Did R have reasonable grounds for that belief?

c) Was R's investigation within the range of reasonable responses?

(i) Did R fail to contact SG regarding her conversation with C on 9 July 2014:

(ii) Did R fail to ascertain the reasons that SG gave on her application form to the other NHS Trust for leaving her employment with the Respondent?

d) Applying the principles in **Davies v Sandwell Metropolitan Borough Council** [2013] IRLR 374 was C's dismissal within the range of reasonable responses? C submits that:

(i) R did not consider C's mitigation that she trusted that which SG told her re her reason for leaving the Trust;

(ii) R did not consider disciplinary sanctions apart from dismissal?

(iii) R relied on a warning that was manifestly inappropriate (for the reasons set out above)?

5 I heard evidence from the Claimant and Ms Odewale (formerly CYP-IAPT Data Manager) on her behalf. For the Respondent I heard evidence from Ms Wilson (Director of Specialist Services), Mr Henderson (Borough Director), Mr McGhee (Service Director – Mental Health Care for Older People), Mr Hill (Director of Estates, Facilities and Capital Development) and Ms Gibbs (CAMHS Performance Lead). I was provided with an agreed bundle of documents and read those pages to which I was taken during the course of evidence.

Findings of fact

6 The Claimant commenced employment with the Respondent as an Operational Manager in Child and Adolescent Mental Health Services (CAMHS) Tower Hamlets on 5 September 2003. The Claimant was responsible for providing day-to-day operational management between four to seven clinics, including the management, appraisal and supervision of secretarial and administrative staff. There was no evidence of problems in her working relationship with colleagues and managers before January 2008.

7 The Claimant reported to the General Manager who in turn reported to the Director of Specialist Services. Until sometime in 2007, this was Mr Green. The Claimant enjoyed a good working relationship with Mr Green, whom she regarded as knowledgeable and supportive, with an open and constructive management style. When Mr Green left in 2007, there was no immediate appointment of a new General Manager. Instead, the Claimant and her colleague, Mr Dermot Ryall, managed the service.

8 In September 2008 Ms Sarah Wilson was appointed as Director of Specialist Services. In November 2008, Mr Bill Williams was appointed General Manager.

9 In 2008 the Tower Hamlet CAMHS was due to move from the Royal London Hospital to new premises at Greatorex Street. Before he left, Mr Green had told the Claimant that she would have her own office in the new location. The final draft room allocation at Greatorex Street was produced in October 2008 and placed the Claimant in a shared office with secretaries and administrators. The Claimant considered this unsuitable due to the confidential aspects to her work. On 15 October 2008, the Claimant wrote to Mr Robert Dolan the CEO of the Respondent, copied to Ms Wilson. Mr Williams was not included in this correspondence because his employment had not yet commenced. In her email, the Claimant set out her concerns and suggested that the proposal was "**unacceptable and I believe it was done deliberately to cause upset**"; she requested a private office.

10 The move took place on 5 January 2009. The Claimant was still not allocated a private office and was expected to hot desk in the open plan office. Unhappy with the arrangements, the Claimant found a vacant room (R10) in which she placed her desk. Mr Williams and Ms Wilson were not content with this arrangement and asked her to move out. Mr Williams did not have his own desk or officer at Greatorex Street either

and would, on occasion, visit the Claimant's office in R10 and use her desk. The Claimant described this in evidence as bullying and harassing.

11 In an email on 12 January 2009, the Claimant informed Mr Williams of her unhappiness at being asked to vacate the office and stated: "**I am not prepared to be bullied and harassed by Sarah Wilson and yourself**".

12 At a meeting on 13 January 2009, it was agreed that the Claimant would swap rooms with Dr Ruma Bose. Mr Williams' letter confirming the discussions recorded:

> "**At the end of the meeting I raised with you the fact that in an email you had referred to harassment and bullying. I stated that I took such matters extremely seriously and handed you the Trust's bullying and harassment policy. You declined to take this stating you were familiar with the policy and that you were seeing your union representative tomorrow**."

13 There were no further problems in the working relationship until late 2009 when the Claimant says that Mr Williams began to sit at her desk, making her feel uncomfortable.

14 On 4 February 2010, the Claimant used the harassment policy to make a formal complaint against Mr Williams saying that over the past three months she had been constantly inconvenienced in her office, his visits to her office had become stressful and overbearing and she felt constantly monitored. On 14 January 2010 it had been agreed that Mr Williams would try to reduce his use of the Claimant's desk when at Greatorex Street. In her complaint, the Claimant said that Mr Williams had breached personal and professional boundaries, showed her no respect and was actively intimidating and harassing her because:

(i) On 29 January 2010, Mr Williams telephoned to ask when she would be arriving at her office as he wished to use it.
(ii) On 2 February 2010, Mr Williams asked her colleagues as to her whereabouts as he wished to use her office.
(iii) On 3 February 2010 she became aware that Mr Williams had used her office after she had left for the day.
(iv) On 4 February 2010 Mr Williams was in her office when she arrived at work.
(v) On another occasion when she was working late, Mr Williams wanted to find out what time she would be leaving.

15 The Claimant's then trade union representative had a conversation with Ms Wilson who was keen to resolve the problems. Ms Wilson was said to have been very sympathetic but felt that Mr Williams would need to use an office on occasions. Ms Wilson met the Claimant and both she and Mr Williams agreed to formal mediation.

16 The mediation meeting took place on 31 March 2010. On 6 May 2010, the Claimant emailed Ms Wilson to indicate that she would not be proceeding further with her complaint against Mr Williams as there had been a marked improvement in his attitude and behaviour; he was rarely present in her office and the ongoing working relationship was more acceptable.

17 There were no further problems until August 2011 when the Claimant had to take emergency leave. The Claimant notified Mr Williams and Ms Wilson that she was unable to attend work due to an emergency situation but gave no further detail. In her email, the Claimant asked Ms Wilson for a meeting to discuss workload. Ms Wilson suggested that the Claimant speak to Mr Williams about workload in the first instance. The Claimant's response was that she:

> "**would not exhaust myself any further in discussing this with Bill and to be honest with you I am sick and tired of all the ongoing harassment, bullying, sexism and racism since new management has taken over the service in 2008.**
>
> **I know Bill is very quick to try and pull the wool over your eyes and try to be Mr Innocent. If this is not resolved, I would like to point out categorically, my next step is Robert Dolan and the Employment Tribunal."**

18 Mr Williams was surprised by the gravity of the allegations came as a surprise was keen to hear and address her examples of harassment, bullying, sexist and racist behaviour which he took seriously. Mr Williams told the Claimant did not accept her allegations and found her comments offensive. Ms Wilson also told the Claimant that the allegations were extremely serious and needed to be discussed further. The serious nature of the allegations and the way in which they were expressed by the Claimant led Ms Wilson to decide that there should be an investigation. Ms Wilson noted that this was not the first time that the Claimant had made such allegations against Mr Williams; those most recently in 2010 had been withdrawn following mediation. In the event it was agreed with the Claimant that there should be a meeting with Ms Wilson and Mr Williams to discuss the allegations.

19 At the meeting on 20 September 2011, as recorded in a letter dated 6 October 2011, the Claimant accepted that the allegations made in her letter did not reflect her experience of working with Mr Williams and she did not wish to proceed with the investigation into her allegations as she felt that they had now been addressed. I accepted Ms Wilson's evidence that she regarded the earlier successful mediation and this informal resolution as positive outcomes rather than indicative of bad faith or manipulation. This was an interpretation favourable to the Claimant and inconsistent with the Claimant's case that Ms Wilson was seeking to secure her dismissal.

20 The Claimant confirmed on 12 October 2011 that this was an accurate record of the meeting and thanked Ms Wilson for taking time to listen to her. The Claimant now says in evidence that she was surprised that her complaint was dealt with informally given that previous mediation had not worked. I do not agree that the approach adopted by Ms Wilson was inappropriate. The 2010 mediation had resolved matters to the Claimant's satisfaction; there had been no further problems until these matters in 2011; the Claimant agreed to the meeting and expressed satisfaction with the outcome at the time. At the time, the Claimant did not say, as she does now, that her allegations required formal action.

21 At or about the same time in autumn 2011, the Claimant attended a meeting in which another employee, Mr Burroughes, expressed concern that reasonable adjustments were not being made to office arrangements to take into account his disability. After the meeting, Mr Burroughes sent an email in intemperate and unprofessional terms. The Claimant and a number of other recipients regarded his

comments as racist. The Claimant in evidence also alleged that the email was sexist although she was unable to identify anything to support that allegation.

22 The Claimant forwarded the email to Ms Wilson and to HR for further action. Ms Wilson regarded the email as very offensive and confrontational and decided that there should be a disciplinary investigation. Ms Wilson requested that staff stop discussing the email amongst themselves whilst the matter was investigated. I accept her evidence that she was trying to manage fairly a difficult situation for all concerned and not to brush it under the carpet. When the investigation concluded that there should be a disciplinary hearing, Mr Burroughes raised a grievance against Ms Wilson, Mr Williams, the Claimant and another person. In November 2011, whilst the disciplinary hearing was still pending, Mr Burroughes retired. On balance, whilst the Claimant and her colleagues were not kept well informed as to the process of the investigation and the reasons for delay, I find that the Respondent took the allegations seriously and regarded the use of unprofessional inappropriate and offensive language by Mr Burroughes as a disciplinary matter.

23 Again the working relationship appears to have improved and there were no further significant difficulties until in or around April 2012. At this point the Respondent was changing its database system for patient details and clinical activity to a new system called RIO. The data was used to determine whether the Respondent had met performance targets which could affect its entitlement to payment. Clinicians were responsible for obtaining and entering relevant data onto the system. The Claimant was the lead for RIO data. She was responsible for collating and analysing the data and for ensuring data integrity, including encouraging clinicians to provide full data. Inevitably there were teething difficulties and data anomalies and there were ongoing concerns about the high number of inconsistencies in the data. Ms Julia Yu was the lead on data for another system, IAPT. IAPT data was not part of the Claimant's responsibility but she managed an administrator who was involved in that process; moreover the Claimant and Ms Yu were required to collaborate as both systems concerned data.

24 The working relationship between the Claimant and Ms Yu was not entirely positive. By November 2012 the Claimant was concerned that data presented to Ms Yu was not being accurately reflected in reports produced by the latter. In a series of emails on 31 October 2012, the Claimant challenged Ms Yu as to why entries were being flagged as breaches of data requirements when appropriate explanations were included in the comments box. Ms Yu continuing to regard the matters as breaches.

25 On 16 November 2012 the Claimant sent an email to Ms Gibbs, performance lead with overall responsibility for system reporting, copied into Mr Williams, Dr Bose, Ms Yu and a Mr Peter Cox:

> "**Dear Sarah**
>
> **Following on from Julia Yu's email and the constant falsification of RIO data for Tower Hamlets CAMHS, I am writing to inform you that I will be making formal complaint about the presentation of data and information that is reported back from Julia, irrespective of us giving her current data and uploading the current information on RIO, she ignores what is given and what is stated in the comment box on the system and sends out false information**."

26 Mr Williams was concerned by the way in which the Claimant had expressed herself. He sought to convene a meeting on 23 November 2012 to be attended by Ms Yu, the Claimant, himself and Ms Gibbs. The Claimant declined the invitation. Mr Williams asked her to suggest some alternative dates, stating that the meeting should happen that week. The Claimant replied that she was unable to do that week and provided dates in the following week. Mr Williams emailed and asked why she was unable to make the meeting on Friday as he had initially proposed. He acknowledged that she had told him that she had a meeting with other operational managers but he asked the Claimant to prioritise the meeting with Ms Yu and Ms Gibbs. The Claimant objected and ended her email: "**will you NOT BULLY ME**". Mr Williams was unhappy with the Claimant's response. He informed her that this was not the first time that she had accused him of bullying, that leadership would be ineffective if senior managers were not able to approach colleagues with legitimate requests; he was not prepared to allow this to happen and had met with Ms Wilson to ask that the Claimant's allegation be formally investigated.

27 On 21 November 2012, Ms Wilson wrote to the Claimant expressing concern that this was the third time in three years that she had accused Mr Williams of bullying her. On each occasion, she had then either withdrawn the allegations or accepted that they had been resolved informally or formally through mediation. For this reason, she could not allow repeated allegations of bullying to be addressed informally and nor was mediation appropriate. Ms Wilson commissioned a formal investigation under the Dignity at Work policy. The Claimant thanked Ms Wilson, stating that she found it extremely helpful that there would be a formal investigation. The Claimant and Ms Wilson agreed that Mr Ryall would be the Claimant's line manager whilst the formal investigation was undertaken. The Claimant asked that an additional person look at the outcome of the investigation. Ms Wilson agreed and suggested that another Director be appointed to consider any recommendations. The Claimant's reply was that she was not seeking to replace Ms Wilson, simply to add another person.

28 The Dignity at Work investigation was undertaken by Mr Charles Scott (Head of Administration for Forensic Services). The Claimant and Mr Williams were both interviewed and the investigators considered statements which they had submitted, the relevant email exchanges with Ms Yu, the correspondence about the earlier complaints of bullying and email statements provided on behalf of the Claimant by her colleagues, Mr Huntley and Ms Walker-John.

29 The investigation report was produced in February 2013. It is a detailed document, setting out the background to the investigation, the evidence received and the conclusions reached. The report considered the definition of bullying and the difference between fair management and unacceptable management behaviour. Inevitably such a definition requires an objective assessment of conduct which may subjectively be viewed differently: what is described as firm, fair and consistent management by one person might be seen as bullying and unfair by another. The report set out the Claimant's explanation that she had informed Mr Williams in advance of her diary commitments and her belief that, as a senior manager, her ability to organise her own diary should be respected. It contrasted Mr William's evidence that the Claimant had said that she did not need to tell him what she was doing, had failed to prioritise the meeting and made a complaint of bullying which formed part of a

pattern of vexatious accusations of racism, sexism and bullying over the years in which he had managed her.

30 The investigators' findings were that: (i) the Claimant's email to Ms Yu was aggressive and her use of the phrase "constant falsification of RIO data" breached the Respondent's Network, Internet and Email Usage Policy which required that emails be concise and business like, avoiding discriminatory, offensive or libellous language; (ii) Mr Williams' request to prioritise the meeting was a reasonable request given his position of authority and the serious nature of the Claimant's emails; (iii) the language and tone of other emails sent by the Claimant was not business like; and (iv) the Claimant's claims of bullying was a response to what appeared to be reasonable management requests. The report recommended consideration of disciplinary action and suggested that management look at ways to improve the strained nature of the working relationship between the Claimant and Mr Williams. In conclusion, there was no case to answer of bullying against Mr Williams but a possible case for misconduct against the Claimant.

31 Whist the Dignity at Work investigation was ongoing, the Claimant met Ms Yu and Mr Ryall on 18 January 2013 to discuss her "falsifying data" email. At the meeting the Claimant confirmed that she was withdrawing the statement and not pursuing a formal complaint against Ms Yu. Ms Yu accepted the retraction. Both women expressed a desire to return to their previously good working relationship. In a later interview in the investigation into a grievance raised by the Claimant, Mr Ryall stated that the Claimant apologised in this meeting. The letter confirming the outcome of the meeting, however, did not refer to an apology.

32 On 3 April 2013, Mr Williams asked the Claimant for help with some data returns; he later asked her and others to ensure that an IAPT upload was completed by a certain date. The Claimant's response on 11 April 2013 was to email Mr Williams to the effect that she did not know what he was talking about, that there was nothing for her to discuss with Mr Ryall and that she would "**also appreciate if this scapegoating is stopped**". The email was copied to a number of people, including Ms Yu and Mr Ryall. Mr Williams was concerned by the Claimant's apparent resistance to his management request and the language and tone of her email. He forwarded it to Ms Wilson for further investigation describing it as part of a pattern of making unfounded allegations to deflect attention from reasonable management requests.

33 On 9 April 2013 there had been a further disagreement between Ms Yu and the Claimant in the office at Greatorex Street. Ms Yu's account is that the Claimant took exception to her presence in the office to train the administrator, became aggressive and rude, refused to apologise for her unacceptable behaviour and walked out of the room. Ms Yu accepted that she had slightly lost her temper when the Claimant would not listen to her explanation of why she was in the office. The Claimant's account was that Ms Yu had a personal vendetta against her; she said that she had suggested training be arranged on a different day, that Ms Yu had responded in an aggressive and abrupt manner, she had asked Ms Yu not to address her in that tone and then left the room. Ms Yu subsequently sent in a formal complaint about the Claimant's conduct on this occasion. The Claimant's case is that Ms Yu had a personal vendetta against her.

34 At a meeting with Mr Paul James on 12 April 2013, the Claimant was informed of the outcome of the investigation. Mr James did not consider it surprising that Mr Williams' request to prioritise his meeting had been held a reasonable management request; he believed that the Claimant had seriously misunderstood the right of her managers to insist even if she did not agree with the prioritisation. Mr James considered that the Claimant's email to Ms Yu could be viewed as offensive and libellous. Mr James explained that he would feed back the contents of the report to Ms Wilson who would decide what further action would be taken which could include formal disciplinary action for not complying with a reasonable request and/or falsely accusing Bill Williams of bullying and/or of sending offensive and libellous emails. Mr James suggested that the Claimant to reflect upon the conclusions of the investigation report and write to Ms Wilson to set out any lessons that had been learnt. He continued:

> "**At the very least I feel you need to understand that your managers do have the right to decide how you use your time at work and you cannot make serious accusations of bullying without good cause. Moreover if you make vexatious or unjustified accusations of bullying again in the future I fear that it will have very serious consequences for your future."**

35 In her response to Ms Wilson, the Claimant recognised the need for further clarity and advice; firstly on improving the relationship with Mr Williams, secondly in identifying clear processes or mechanisms for providing accurate data and finally how she should respond if bullied in the future. Absent is any self-reflection upon her actions or acknowledgement that her allegations of bullying had been comprehensively rejected.

36 Ms Wilson met the Claimant on 13 May 2013 to discuss what should happen in light of the investigation report. Ms Wilson expressed concern about the recent "scapegoating" email and the disagreement with Ms Yu on 9 April 2013. The Claimant's evidence is that Ms Wilson told her that: "**I want you out of Tower Hamlets CAMHS by Friday**" because her communication and conduct were affecting the service's performance and she would therefore be temporarily relocated. The Claimant's case is she felt this gave her insufficient time to organise her affairs and that Ms Wilson was abrupt. In her oral evidence, the Claimant for the first time expanded her allegation to one that Ms Wilson had used foul language. Ms Wilson gave evidence in an open and straightforward manner, accepting candidly where her evidence was confused (for example about the Claimant's attendance at an away day which is not relevant to the issues). Ms Wilson denied using foul language or saying that she wanted the Claimant out; rather she told the Claimant that she would be moved temporarily as an alternative to suspension pending the disciplinary hearing but the Claimant declined to move. Ms Wilson accepts that she was reasonably firm in face of the Claimant's adamant refusal to move to the proposed role or within the proposed timescale. On balance, I prefer the evidence of Ms Wilson to that of the Claimant whose evidence I considered embellished in the re-telling.

37 A letter dated 13 May 2013 confirmed the decision to hold a disciplinary investigation into allegations that: (i) the Claimant's emails were in breach of the Respondent's policy, by accusing Ms Yu of falsifying data and Mr Williams of scapegoating her; (ii) she had failed to follow a reasonable management instruction to attend a meeting with Mr Williams on 23 November 2012; and (iii) she had vexatiously

accused Mr Williams of bullying her on 19 November 2012. Furthermore there would be a preliminary investigation into the alleged incident on 9 April 2013. The letter confirmed that the Claimant would be temporarily relocated on the same grade with no change to her salary.

38 On 28 May 2013, the Claimant raised a formal grievance against Ms Wilson and Mr Williams complaining that they had discriminated against her since around 2009. The substance of the grievance overlapped significantly with the proposed disciplinary investigation but also included the instruction that she temporarily relocate. The Claimant regarded the suggestion by Ms Wilson that her communication and conduct were impacting on the service and performance as false and unfounded.

39 Ms Carrie Battersby was appointed to investigate the grievance. Her report dated 2 October 2013 considered in detail the Claimant's complaints and the supporting evidence, including contemporaneous emails and lengthy investigation meetings with the Claimant, Ms Wilson and Mr Williams. Ms Battersby found no evidence to support the grievance. She considered that the disciplinary allegations against the Claimant demonstrated concern about her interpersonal relationships and that the Claimant struggled to recognise a reasonable management instruction from a more senior manager. Ms Battersby did not accept that there had been conscious and deliberate attempts by either Ms Wilson or Mr Williams to crush the Claimant's self-esteem and frustrate her out of a job (as the Claimant alleged), rather there had been a number of supportive management actions taken. Although she accepted that there was a need for further clarity about responsibility of managing IAPT data, Ms Battersby regarded the complaint as vexatious and the Claimant's reaction as disproportionate and inappropriate.

40 A grievance hearing took place on 19 December 2013. Dr Navina Evans (Director of Operations and line manager of Ms Wilson) accepted the conclusions of the investigation report. She informed the Claimant that her grievance was not upheld and that there would be a further disciplinary investigation into the conclusion that the complaint against Mr Williams was vexatious. Dr Evans agreed with Ms Battersby's recommendation that the role of commissioning manager for the disciplinary process be assigned to a manager other than Ms Wilson. It is indicative of the Claimant's willingness to allege bad faith without proper foundation that she regards Dr Evans as deferring to Ms Wilson (her junior) simply because Dr Evans referred to the courtesy of checking that the report should be sent and a meeting arranged to discuss its conclusions.

41 The Claimant appealed the grievance decision. On 17 March 2014, Mr Mason Fitzgerald rejected the appeal. Whilst the Claimant disagreed with Ms Battersby's findings, Dr Evans had been entitled to accept the investigating officer's point of view and that this was a matter that the Claimant could contest as part of the disciplinary process.

42 Mr Dean Henderson (Service Director) was appointed to be the disciplinary commissioning officer and Ms Christine Tacey as investigating officer. The Claimant did not object. The Claimant had not previously worked with either and, in evidence, accepted that she had no complaint about their appointment.

43 An investigation report was produced by Ms Tacey in January 2014. It considered a large number of documents including a statement provided by the Claimant as well as interviews with the Claimant, Ms Yu, Ms Gibbs, Mr Williams, Dr McCutcheon, Ms Kelly, Dr Bose and Ms Keating and the results of the earlier investigations. The report sets out in detail the Claimant's explanations for her use of the words "falsification" and "scapegoating" in her emails, she gave a history of her problems with office space which led to her earlier complaints against Mr Williams and denied that she had acted vexatiously, she had not failed to follow a reasonable management request for a meeting as she had other meetings already planned and, finally, Ms Yu was to blame for the argument on 9 April 2013. The report also considered the evidence from Ms Yu, Ms Wilson and Mr Williams which disagreed with that of the Claimant. The report also included evidence about 9 April 2013 from the administrator (who stated that the Claimant had not been rude or shouted) and other witnesses present (who described the Claimant as being very cross, irritated, demonstrating aggressive body language and being dismissive of Ms Yu). Having considered all of this evidence, and in five pages of reasoning, Ms Tacey concluded that there was primary evidence in support of the allegations which warranted a disciplinary hearing.

44 The disciplinary hearing took place on 15 May 2014 before Mr Henderson. He outlined the allegations and the process to be followed. Ms Tacey on behalf of the Respondent confirmed that she intended to call only one witness, Ms Yu. The invitation letter had suggested that Mr Williams would be present at the hearing. Nevertheless the Claimant did not object to Mr Williams' absence and agreed that the hearing proceed.

45 Mr Henderson heard evidence from Ms Yu. She was questioned by and on behalf of the Claimant. Ms Tacey took Mr Henderson through the contents of her investigation report. The Claimant refuted the allegations and called two witnesses in support. The Claimant was given a full opportunity to explain her use of language in her emails. Mr Henderson asked the Claimant whether, on reflection, the words "scapegoating" and "falsifying data" were inappropriate. Her reply was: "**yes but I didn't see it as being offensive at the time**". The Claimant said that it was unfair to treat this as a disciplinary matter as it had already been resolved by mediation and an apology given to Ms Yu in meetings in November 2012 and January 2013.

46 Mr Henderson asked whether when asked by a line manager to attend a meeting, it was a reasonable request. The Claimant replied: "**yes in the future will prioritise but I did say that I wasn't aware that others had accepted the meeting, he didn't tell me they had**". The Claimant accepted that her allegation of bullying had not been upheld. She told Mr Henderson that in future she would follow reasonable instructions and requests from her manager to do something within her job description. The only allegation disputed in substance by the Claimant was her conduct in the argument with Ms Yu.

47 In her summing up at the disciplinary hearing, the Claimant's position was that she understood that the language used in her emails was offensive, that there had been a misunderstanding about the management of work and in future she would prioritise her manager's requests, that she had used the term bullying loosely and that she had not been aggressive or rude to Ms Yu. By contrast, at this Tribunal hearing

the Claimant does not accept that the management request was reasonable because she had been through her diary with Mr Williams and he knew that she had meetings nor does she accept any longer that her choice of words in the emails was inappropriate. Although harsh, her case is that the phrase "**falsifying data**" was intended only to mean that the data was inaccurate; moreover, she was entitled to refer to scapegoating as she was being wrongly blamed for something for which she was not responsible. The Claimant's evidence is that she only made the concession at the disciplinary hearing because she was told by Ms Tacey that her words were offensive. Whether or not this is the case, the Claimant's stance before Mr Henderson was a clear and unequivocal acceptance that her choice of words was inappropriate and the management request reasonable.

48 By letter dated 28 May 2014, Mr Henderson issued the Claimant with a final written warning for misconduct. In reaching his decision, Mr Henderson relied heavily on the Claimant's admissions at the hearing. On the falsification email, Mr Henderson did not agree that the earlier meetings with Ms Yu meant that the matter had been concluded already. In his mind, the resolution of a problem in the working relationship between colleagues was different from whether the conduct causing the problem warranted disciplinary sanction. Mr Henderson did not accept that the Claimant had apologised to Ms Yu as she claimed; he was not provided with notes of Mr Ryall's interview in the grievance investigation only with the letter dated 20 February 2013 recording the outcome of the meeting which did not refer to an apology.

49 In considering the scapegoating email, I accepted Mr Henderson's evidence that he took into account the Claimant's view that she had been wrongly blamed for the failure of others but nevertheless decided that it was not appropriate to use the word scapegoating as it was emotive and accusatory in tone, not professional, inflaming the situation rather than adding clarity regarding her responsibility. Mr Henderson considered the word in the context of the email as a whole, finding it accusatory and aggressive.

50 Mr Henderson recognised that the Claimant perceived Mr Williams' management as bullying and that she continued to feel aggrieved, however the allegation had been investigated and was not upheld. Mr Henderson considered the history of earlier accusations of bullying which had been withdrawn or been found to have no case to answer. I accept Mr Henderson's evidence that he considered the definition of "vexatious" contained within the grievance policy. He was satisfied that the Claimant had used the grievance process unnecessarily and without merit when she made her third bullying allegation. Mr Henderson did not consider the earlier allegations to be vexatious as they had not been tested by investigation. On balance, Mr Henderson considered that the Claimant's bullying allegation on 19 November 2012 may be an attempt to intimidate Mr Williams and concluded that it was vexatious.

51 When asked in evidence why he concluded that the Claimant's allegation was vexatious rather than simply mistaken, Mr Henderson said he considered whether there was any reasonable basis to make the allegation and concluded that there was not; it was not reasonable to accuse her line manager of bullying simply because she was instructed to prioritise a meeting. Mr Henderson concluded that this was done deliberately to unsettle Mr Williams.

52 On the balance of probabilities, Mr Henderson preferred the account given by Ms Yu of the disagreement on 9 April 2013 (including her admission that she had lost her temper slightly in response to the Claimant's behaviour). On balance, Mr Henderson found that the Claimant had displayed aggressive and unprofessional behaviour. Having heard her in the disciplinary hearing, Mr Henderson formed the view that the Claimant was someone who was not prepared to take responsibility for her own actions but instead sought to blame somebody else. This was consistent with the impression given by the Claimant in her evidence to this Tribunal.

53 Having decided that each of the allegations of misconduct was proven, Mr Henderson considered sanction. He took into account the Claimant's previously unblemished conduct record, the nature and seriousness of the misconduct found and the Respondent's practice on sanctions in similar cases. The combined weight of these factors led Mr Henderson to issue a final written warning to remain on file for 12 months from the date of the hearing. Finally, Mr Henderson acknowledged that the Claimant's working relationship with Mr Williams had broken down irretrievably such that it was not feasible for the Claimant to return to CAMHS Tower Hamlets and she would be found a permanent comparable role elsewhere.

54 The Claimant's case at Tribunal is that Mr Henderson was improperly influenced by Ms Wilson. Mr Henderson and Ms Wilson both denied this. I found both to be impressive witnesses who gave evidence which appeared sincere and measured. Emails in the bundle showed Ms Wilson commending the Claimant's handling of disagreements with other staff and being genuinely keen to resolve earlier problems. I do not accept the Claimant's case that Ms Wilson wanted the Claimant to be dismissed, far less that she caused Mr Henderson to impose a final written warning to achieve that aim.

55 The Claimant appealed against the final written warning by letter dated 14 June 2014 as being too severe and not adequately addressing her explanations, particularly her problems working with Mr Williams. On 24 July 2014, the Claimant provided further details: it was biased for Mr Henderson to prefer the evidence of Ms Yu when the Claimant insisted that she had not displayed any aggression and her colleagues confirmed her history of professionalism and good conduct. The appeal was heard by Mr Gilluley. The appeal was not successful and the final written warning was upheld by letter dated 19 September 2014.

56 On 10 July 2014, the Claimant provided a reference to another NHS Trust in respect of a former employee, "SG". The Claimant had line managed SG until 2009 when she moved to a different team. SG told the Claimant that she would be the second referee, that her current line manager had already given a reference and her reason for leaving the Respondent was career progression. None of this was true. In fact, SG had been dismissed for gross misconduct on 30 October 2013.

57 The other Trust sent the Claimant its standard reference template for completion and the Claimant gave the following information:

Post Held:	**Team Administrator/Medical Secretary**
From:	**2003 to 2014**
How long have you known him/	**11 years**

Her?	
In what capacity?	**Please choose: Manager**
Reason for leaving	**Please choose: If other, please state: Career progression.**

58 The Claimant ticked boxes to express her view that SG was excellent or good in a number of areas of competence, reliability and conduct. The Claimant confirmed her belief that SG had the qualities suitable for the post and that she would re-employ her as a Senior Administrator. In the box for further comments, the Claimant wrote: "**[SG] possesses very good interpersonal skills, she is a good team player and works well at different levels. She is always willing to help and is dependable**". The reference was signed by the Claimant on 9 July 2014 giving her position as manager.

59 In August 2014, the Respondent's fraud team were alerted by an external source that SG was working for the other Trust. SG's line manager to October 2013 was asked and confirmed that she had not provided a reference. The fraud team confirmed that the most recent line manager, Mr Ryall and HR had not been approached by the Claimant to discuss the reference request. The Claimant was not interviewed as part of the fraud investigation. The fraud team's initial report dated 23 October 2014 concluded that in breach of the Respondent's policy, the Claimant had failed to check the information and had provided a reference which was in some respects wrong and in others misleading. The report attached a copy of the second version of the policy for providing employment references. The bundle of documents at this Tribunal contained both the first and second versions of the policy. It was not clear which version was in force at the relevant time. I did not consider it necessary to resolve the dispute. Whilst there were some differences, both stated explicitly that employees who are not line managers to the employee requesting the reference are under no circumstances permitted to provide a reference (other than in circumstances which do not apply to the Claimant's case). Both policies advise that in case of uncertainty, the person giving the reference should contact HR. Both policies warned breach would be regarded as misconduct potentially resulting in disciplinary action up to and including dismissal.

60 In light of the fraud report, the Claimant was required to attend a disciplinary hearing to answer an allegation that she had breached the Respondent's policy by knowingly providing a factually inaccurate reference for SG to the other Trust, stating that she was SG's manager from 2003 until 2014 and that SG's reason for leaving was career progression. Upon receiving the invite letter dated 27 October 2014, the Claimant contacted Mr Ryall to explain that she had relied in good faith upon the information provided to her by SG, did not see what she had done wrong and suggested that there were individuals at the Respondent with a personal vendetta against her; the implication being that this allegation arose from that vendetta.

61 Ms Lesley Smith, a manager in a different team who had no prior involvement in any of the earlier investigations, was appointed to investigate. The Claimant produced a detailed statement refuting the allegation as she had relied upon the information given by SG and had provided a reference which was factual at the time. Ms Smith interviewed the Claimant and produced an investigation report on 13 January 2015. The Claimant's statement, notes of the investigation meeting, the fraud report and a copy of the reference were attached as appendices. Ms Smith concluded that the

Claimant had provided the reference without seeking advice despite the five year gap between the end of her management of SG and the reference request and, overall, the information given was incorrect and/or misleading. By letter dated 28 January 2015, the Claimant was invited to attend a disciplinary hearing.

62 A disciplinary hearing chaired by Mr Michael McGhee took place on 30 April 2015. The Claimant explained that she had been misled by SG upon whose information she had relied in good faith. The Claimant said that the reference was not false as after 2009 she had seen SG "**now and then, not very often**" and so continued to know her until 2014, albeit she would not have seen SG after her dismissal on 20 October 2013. When asked why she had put 2014 instead of 2009, the Claimant said that it was a misunderstanding. The Claimant was asked why, if she was referring to her experience in 2009, she did not say so. At one point, the Claimant said that she had given the reference in all honesty but could see how ambiguity and misrepresentation had come in. It did not cross the Claimant's mind to speak to HR nor cause her any concern that SG had not worked for her in five years and they had not spoken since her dismissal. The meeting resumed at 11.56 for the parties to give their summaries. There was then a break for deliberation and the decision was given at 12.41. Taking into account the time required for the summaries, I accept the Claimant's evidence that the break was no longer than 30 minutes.

63 Mr McGhee informed the Claimant that he had decided to uphold the allegation of misconduct. Mr McGhee acknowledged that the reference had been given in good faith but it was misleading in its use of the present tense, its failure to state that she had only managed SG until 2009 despite several opportunities to do so and it the reason for leaving was wrong. As such, he concluded that there had been a breach of the reference policy and also an act of fraud by false representation.

64 Mr McGhee's evidence was consistent and credible despite extensive and at times semantic questioning in cross-examination: the information in the reference was in part untrue and in part unreliable, it was given without being checked for accuracy, the Claimant's use of the present tense suggested an ongoing line management which did not exist and the nature of the Claimant's explanations as to how she could give the reference based on only very limited contact since 2009 did not hold water. Mr McGhee's strong belief that the Claimant was not telling the whole story "tipped the balance" and caused him to find the allegation against her proven.

65 In cross-examination about the reference, the Claimant appeared reluctant to answer questions about her ability to provide an opinion on SG's performance and conduct given that she had not managed her for the preceding 5 years and had only very limited contact with her in that time. When pressed, the Claimant said that she was relying upon her position as previous line manager. Similarly when asked whether she accepted that the reference read objectively is misleading, the Claimant initially avoided the question before finally stating that she did not think that it was a misleading reference. Having had the opportunity to hear the Claimant's explanations at Tribunal, I accept that Mr McGhee was entitled to find that her reasons at the disciplinary hearing were not acceptable and cast doubt upon her credibility.

66 Having told the Claimant that the allegation of misconduct was upheld, Mr McGhee informed her that the appropriate sanction would be a final written warning.

As the Claimant already had a live final written warning on file, his decision was to dismiss with pay in lieu of notice. In reaching his decision on sanction, I accept Mr McGhee's evidence that he considered whether or not this misconduct was similar to that for which the Henderson warning had been imposed. Mr McGhee's genuine belief was that there was a clear link; both related to the Claimant's judgment and her ability or willingness to comply properly with the Respondent's policies and instructions. Both were relevant to whether or not the Respondent could continue to trust the Claimant. The mere fact of the earlier warning did not automatically mean that the appropriate sanction was dismissal. Mr McGhee did take into account as mitigation the fact that the Claimant had been misled by SG however this was insufficient to warrant a sanction short of dismissal given the seriousness of providing a misleading reference.

67 The notes of evidence from the Houghton hearing record that on that occasion the Claimant accepted that Mr McGhee genuinely believed that she had deliberately given a false reference and committed an act of misconduct. By contrast, the Claimant's case before me was that Mr McGhee may have been influenced by Ms Wilson as they were members of the same directorate. The Claimant accepted that she had no proof but that "anything was possible". I accept Mr McGhee's evidence that he had very limited contact generally with Ms Wilson. Their departments were very separate; Ms Wilson had been working in the Bedford part of the Respondent since November 2014, they had at most fortnightly meetings with other directors to deal with operational matters. There was no discussion between Mr McGhee and Ms Wilson about the disciplinary decision and, on balance, I accept that he was in no sense influenced by Ms Wilson when deciding that there had been misconduct and that the appropriate sanction was dismissal.

68 By letter dated 7 May 2015, the decision to dismiss was confirmed and detailed reasons given for Mr McGhee's conclusion as set out above.

69 The Claimant appealed against her dismissal and, in particular, the finding of fraud. The Claimant asserted a failure to take her mitigation properly into account, that there was a witch-hunt against her and that the timing of the allegation was deliberate to coincide with the expiry of her final written warning.

70 The appeal was chaired by Mr John Hill and took place on 9 July 2015. Mr Hill explained the process which would be followed. The Claimant was given a full opportunity to set out her case. The findings of the investigation report were considered. Mr McGhee set out the management case, including his reliance upon the Claimant's use of the present tense in the reference when reaching his decision. The Claimant did not ask Mr McGhee any questions about this. The Claimant was given another opportunity to set out her explanations in defence of the allegations; again these were that she had made a genuine mistake in accepting what she had been told by SG, whilst she had provided a factually inaccurate reference, this had not been done deliberately and, essentially, she had been the victim. In addressing sanction, the Claimant did not accept that the Henderson final written warning was justified and therefore disagreed with Mr McGhee's conclusion that her conduct record was not unblemished. The Claimant did not address Mr McGhee's reliance upon her use of the present tense in the reference.

71 Mr Hill considered all of the evidence and concluded that the allegation had

been properly investigated, the procedure fair and that the Claimant had had ample opportunity on the reference form to indicate her position, relationship and knowledge of the application, not least in the comments box. Mr Hill did not accept that it was sufficient mitigation that the Claimant had trusted SG and relied on what she was told on the telephone. The Claimant should have checked the facts and no matter what SG had said, the reference was false and misleading in the way in which the Claimant had worded it to give the impression of ongoing management responsibility. The Claimant had provided no adequate explanation for wording the reference in such a way when she had not been SG's line manager since 2009. Mr Hill admitted in evidence that he did not give consideration to the Claimant's length of service but he did not accept that it was unblemished in any event because of the earlier final written warning. Mr Hill did not accept that this was part of a witch-hunt as the Claimant had alleged and he did not consider it necessary to re-open a disciplinary matter which had been fully concluded at the time. Mr Hill checked with HR about sanctions in previous cases. Overall, Mr Hill was satisfied that the sanction of dismissal was appropriate ("the punishment fit the crime" as he put it in evidence).

72 The appeal succeeded only to the extent that the finding of fraud was overturned, nevertheless the Claimant had still committed an act of misconduct which warranted the sanction of dismissal in light of the earlier final written warning.

Law

73 The employer must show a potentially fair reason for dismissal within section 98 of the Employment Rights Act 1996. The Respondent relies upon conduct within section 98(2)(b). The legal issues in a conduct unfair dismissal case are well established in the case of **BHS –v- Burchell** [1978] IRLR 379, namely:

> (1) did the employer genuinely believe that the employee had committed the act of misconduct?
> (2) was such a belief held on reasonable grounds? And
> (3) at the stage at which it formed the belief on those grounds, had the employer carried as much investigation as was reasonable in all the circumstances of the case?

74 Section 98(4) of the Employment Rights Act 1996 requires the Tribunal to determine whether the Respondent acted reasonably or unreasonably in treating any such misconduct as sufficient reason for dismissal in accordance with the equity and substantial merits of the case. This will include consideration of whether or not a fair procedure has been adopted as well as questions of sanction.

75 In an unfair dismissal case it is not for the tribunal to decide whether or not the claimant is guilty or innocent of the alleged misconduct. Even if another employer, or indeed the tribunal, may well have concluded that there had been no misconduct or that it would have imposed a different sanction, the dismissal will be fair as long as the **Burchell** test is satisfied, a fair procedure is followed and dismissal falls within the range of reasonable responses (although these should not be regarded as 'hurdles' to be passed or failed).

76 The range of reasonable responses test or, to put it another way, the need to

apply the objective standards of a reasonable employer, applies as much to the adequacy of an investigation as it does to other procedural and substantive aspects of the decision to dismiss, see **Sainsbury's Supermarkets Limited v Hitt** [2002] IRLR 23, CA. What is reasonably required of an investigation must be looked at as a whole and will depend upon the gravity of the charges, the extent to which the employee disputes the factual basis of the allegations concerned and the nature of the defence advanced by the employee.

77 The test for the range of reasonable responses is not one of perversity but is to be assessed by the objective standards of the reasonable employer rather than by reference to the tribunal's own subjective views, **Post Office –v- Foley, HSBC Bank Plc –v- Madden** [2000] IRLR 827, CA. There is often a range of disciplinary sanctions available to a reasonable employer. As long as dismissal falls within this range, the Tribunal must not substitute its own views for that of the employer, **London Ambulance Service NHS Trust v Small** [2009] IRLR 563. However, the range of reasonable responses test is not a test of irrationality; nor is it infinitely wide. It is important not to overlook s.98(4)(b) the provisions of which indicate that Parliament did not intend the Tribunal's consideration of a conduct case to be a matter of procedural box ticking and it is entitled to find that dismissal was outside of the band of reasonable responses without being accused of placing itself in the position of the employer, **Newbound –v- Thames Water Utilities Ltd** [2015] IRLR 734, CA.

78 Relevant factors in the overall assessment of reasonableness under s.98(4) include, amongst other matters going to the equity of the case overall:

63.1 the conduct of an employee in the course of a disciplinary process, including whether they admit wrongdoing and are contrite or whether they deny everything and go on the offensive.

78.2 disparity of treatment or inconsistency;

78.3 Mitigating factors. These include length of service and disciplinary record.

79 Section 98(4) requires consideration of whether a reasonable employer could reasonably take any earlier warning into account when deciding to dismiss the employee. In such a case, it is not the function of the Tribunal to re-open the warning and decide whether or not it should have been issued. It is legitimate for an employer to rely on an earlier final warning providing that it was issued in good faith, that there were at least prima facie grounds for imposing it and it was not manifestly inappropriate, **Davies v Sandwell Metropolitan Borough Council** [2013] EWCA Civ. 135 per Mummer LJ at paragraphs 20 to 24.

80 Where the vital element of the good faith or otherwise of a previous warning is seriously questioned, the Tribunal should hear and determine the matter, **Way v Spectrum Property Care Limited** [2015] EWCA Civ 381.

81 In deciding whether the dismissal was fair or unfair, the tribunal must consider the whole of the disciplinary process. If it finds that an early stage of the process was defective, the tribunal should consider the appeal and whether the overall procedure

adopted was fair, see **Taylor –v- OCS Group Limited** [2006] IRLR 613, CA per Smith LJ at paragraph 47.

82 The Tribunal must have regard to the ACAS Code of Practice which sets out basic principles of fairness to be adopted in disciplinary situations, promoting fairness and transparency for example in use of clear rules and procedures.

Conclusions

Final Written Warning

83 At the Houghton hearing, Ms Hudson prepared a note setting out the matters relied upon by the Claimant in respect of her contention that the final written warning had been issued in bad faith by Mr Henderson. In summary, it contended that the warning was manifestly inappropriate for five reasons: (i) resurrecting the falsifying email when it had been resolved with Ms Yu; (ii) the word scapegoating was not objectively inappropriate as the Claimant was in fact being unfairly blamed; (iii) Mr Williams' meeting request was not reasonable; (iv) there was no evidence or finding by the Respondent that past complaints of bullying were vexatious; and (v) the panel failed to consider Ms Yu's behaviour on 9 April 2013 and motives for complaining against the Claimant. The note confirmed that the bad faith argument was based upon the conduct of Ms Wilson who sought to instigate disciplinary proceedings and influence the decision makers and/or Mr Williams who harassed and bullied the Claimant. At this Tribunal hearing, the Claimant confirmed that the allegation against Mr Henderson was bad faith and improper influence by Ms Wilson, not by Mr Williams. Essentially, the Claimant maintains that Mr Henderson did not take her side of the story into account and could not have done so given the decision that he reached.

84 The Claimant says that Ms Wilson caused Mr Henderson to impose the final written warning in order to make it easier for her to be dismissed at a later date. The alleged desire to ensure dismissal is not consistent with Ms Wilson's suggestion that another Director be appointed to consider any recommendations arising from the first investigation nor the Claimant's position at the time that she did not want to replace Ms Wilson in that investigation. Ms Wilson did not want the Claimant to be dismissed and had been supportive of the Claimant in a number of issues, including praise for resolution of a problem with another colleague. In her witness statement dated 23 March 2016, the Claimant's complaint is that Mr Henderson reached the wrong conclusion and that no consideration was given to things from her perspective; there is no allegation of improper influence by Ms Wilson. There was no evidence from which I could find or infer any improper influence by Ms Wilson. The decision to redeploy the Claimant from Tower Hamlets CAMHS is not consistent with a desire to dismiss her from the Respondent but rather with a desire to give her a fresh start given the problems which had arisen. I have accepted the evidence of Mr Henderson that the decision was his alone.

85 In considering the four separate allegations of misconduct before him, I have found that Mr Henderson carefully considered the evidence including that presented by the Claimant. The Claimant says that Mr Henderson could not possibly have reached his decision if he had properly taken into account her evidence. I disagree. The Claimant's case at disciplinary was essentially an admission of the conduct alleged, an explanation that she had not realised at the time of the conduct that it was wrong but

she did now and would change her behaviour in the future. It was only on the Yu allegation that she denied any wrongdoing. Mr Henderson was entitled to rely upon those concessions, as he did consistently despite Ms Hudson's attempts in cross-examination to revisit in minute detail the substance of the allegations.

86 Furthermore, as I have found, Mr Henderson did not rely solely upon the Claimant's concessions but also considered the broader substance of the allegations. He was satisfied that any informal resolution in the working relationship between Ms Yu and the Claimant was not the same as a resolution of the Respondent's concern about conduct; he did not accept that the Claimant had apologised. He decided that even if the Claimant had been wrongly blamed, it did not excuse her emotive and accusatory "scapegoating" email which was unprofessional. Ms Hudson submitted that there is nothing discriminatory, offensive or libellous about an expression of the Claimant's belief that she was being scapegoated. Even so, I accept as reasonable Mr Henderson's conclusion that it was emotive and unprofessional nevertheless.

87 Mr Henderson recognised the Claimant's continuing belief that she was bullied but the allegation had not been upheld after a detailed investigation. He considered the definition of "vexatious" contained within the grievance policy; he did not find the earlier complaints vexatious as they had not been tested but was satisfied that the Claimant had used the grievance process unnecessarily and without merit to unsettle her manager and as an unreasonable response to a request to prioritise a meeting. Even if, as Ms Hudson submits, it was Ms Wilson who decided to commission an investigation, it was not manifestly inappropriate nor an act of bad faith for Mr Henderson to find that the initial allegation and the Claimant's willingness to maintain her allegation during the investigation was vexatious and unreasonable.

88 Mr Henderson formed an adverse view of the Claimant's credibility, which the Tribunal has shared at times and finds was objectively reasonable. As a consequence, he preferred the evidence of Ms Yu as to what happened on 9 April 2013 even allowing for the latter's acknowledgement that she had responded by losing her temper. Ms Yu's insight stands in contrast to the Claimant's steadfast refusal before Mr Henderson and to this Tribunal that she was in any way to blame in the argument.

89 The Claimant has advanced a case in this Tribunal hearing of total denial of any wrongdoing at all which is entirely inconsistent with her position in the disciplinary hearing. She has sought to re-open the merits of each of the allegations against her and has advanced some arguments which are entirely new (such as the rather strange and ill-judged reliance upon the Biblical origins of the word scapegoat, namely "**a goat sent into the wilderness after the Jewish chief priest had symbolically laid the sins of the people upon it**"). Other arguments in this Tribunal have attained greater importance than in the internal process (such as the alleged apology to Ms Yu in January 2013).

90 One consistent feature of the Claimant's position at the disciplinary hearing and before this Tribunal is that where she disagrees with the content of a report, she seeks to revisit its conclusions and to re-argue her case, presumably in hope of a more favourable outcome. A very telling example appears in the Claimant's witness statement where she criticises Mr Henderson for not taking into account her previous grievances and fails to recognise that those grievances had not been upheld on investigation. I conclude that there was ample evidence upon which Mr Henderson

relied when reaching a genuinely permissible conclusion that the Claimant had committed an act of misconduct in each of the allegations before him.

91 Having decided that each of the allegations of misconduct was proven, Mr Henderson considered sanction. As I have found, in deciding upon a final written warning, he took into account the Claimant's previously unblemished conduct record, the nature and seriousness of the misconduct found and the Respondent's practice on sanctions in similar cases. This was not a single act of misconduct but four separate allegations. Objectively considered, the conduct of the Claimant in each gave rise to serious concern about her ability to work with others and her reaction to instructions with which she did not agree. In such circumstances, I do not consider that a final written warning was manifestly inappropriate as a sanction nor was it issued in bad faith.

92 Having regard to the nature of the Claimant's evidence and the points made in submission on her behalf by Ms Hudson, I am satisfied that both are asking me to re-open the warning and decide whether or not I would have issued that warning based upon the evidence which I have heard at Tribunal. This is precisely the exercise which the Tribunal is not entitled to undertake, see **Sandwell**. As in her dealings with the Respondent, the Claimant again demonstrates an inability to accept any outcome with which she disagrees. The decision to issue a final written warning was that of Mr Henderson alone and was an appropriate sanction decided in good faith based upon the evidence before him which amply demonstrated misconduct.

Dismissal

93 For the reasons set out above, I have found that Mr McGhee genuinely believed that the information in the reference was in part untrue and in part unreliable, it was given without being checked for accuracy, the Claimant's use of the present tense suggested an ongoing line management five years after it had ceased to exist. Mr McGhee believed that the nature of the Claimant's explanations as to how she could give the reference based on only very limited contact since 2009 did not hold water. This and his belief that the Claimant was not telling the whole story led him to conclude that she had committed an act of misconduct in knowingly providing a factually inaccurate reference.

94 The facts, knowledge and beliefs which led Mr McGhee to this conclusion were entirely based upon the evidence before him and the conclusions he formed as a result. They were not due to any influence from Ms Wilson. In this Tribunal, the Claimant showed a willingness to impugn the good faith of a witness on oath solely it seemed because she disagreed with their decision. In her inability to accept that she might be at fault, or at the very least that a person might genuinely disagree with her refusal to accept blame, the Claimant relies upon allegations of bad faith and her case has developed and changed to meet any evidence which is does not fit her view of herself as the victim in both disciplinary situations. This approach was consistent generally with the way in which the Claimant regarded any situation with which she disagreed during the course of her employment, starting from as early as the very few occasions on which Mr Williams used her desk having first checked that the Claimant did not need it.

95 The Claimant relied upon five ways in which she considered the disciplinary process to be unfair: she was not involved in the counter-fraud investigation; insufficient time was taken to deliberate before giving the decision; failure to refer to her mitigating circumstances; failure to consider her background experience and/or her length of service. At the Tribunal hearing, the Claimant clarified that she raised no criticism about the appeal. Despite the care with which the issues were agreed at the Preliminary Hearing on 10 November 2017, in her submissions Ms Hudson relied upon additional matters such as alleged delay in acting upon the reference, a procedural criticism that the use of the present tense was not put to the Claimant in the disciplinary hearing and a failure to permit her to make additional representations in respect of the previous warning. Despite not being identified in the issues, I have considered these matters in deciding generally whether dismissal was fair within s.98(4) ERA.

96 The Claimant was not involved in the audit investigation, however, the separate disciplinary investigation was detailed and considered the allegation afresh. By the time that Mr McGhee reached his decision, the Claimant had been provided with a copy of the audit report, had a full opportunity to give her explanations for the reference both in the investigation meeting and the disciplinary hearing and to comment on any parts of the audit report with which she disagreed. The submission about delay is a bad point; the problem with the reference came to the Respondent's attention in August 2014, there was an investigation requiring information from a number of people, the audit report was produced on 23 October 2014 and the Claimant advised of the disciplinary allegations on 27 October 2014. I do not consider that the delay was such that it can reasonably be inferred that the Respondent had no genuine belief in misconduct or that the process was unfair.

97 Whilst there was only a 30 minute or so adjournment for deliberation, I bear in mind the nature of the misconduct. This was a single allegation about the contents of a reference which was available to the disciplinary hearing. The reason for leaving was agreed to be untrue. Mr McGhee accepted that the Claimant had been told incorrect information by SG and considered this in mitigation. In such circumstances, a reasonable investigation did not require him to contact SG or the other Trust to confirm what was already accepted, namely that SG had lied. As for the parts of the reference where the Claimant explained her knowledge of SG and commented on her performance, this was a relatively simple issue: objectively considered did Mr McGhee consider these to be misleading and should the Claimant have contacted HR? Mr McGhee had the benefit of hearing the Claimant's explanations and was able to reach a decision about her credibility. The decision he reached was that the Claimant's explanations were so unsatisfactory as to lack credibility. Having heard the same explanations myself, I have found that Mr McGhee's conclusion was objectively reasonable. This was not a complicated scenario with a large amount of complex material to be considered before a decision could reasonably be reached. In the circumstances, a 30 minute period within which to deliberate was well within the range of reasonableness.

98 In reaching his conclusion that the reference was misleading and the Claimant's explanations lacked credibility, Mr McGhee relied upon the use of the present tense. This was a matter extensively canvassed in this Tribunal hearing. It may be that it was not the subject of such focus at the disciplinary hearing but the Claimant was asked to explain how she could write the reference if she was relying her knowledge of SG over

five years ago. In answering that question, I consider that the Claimant had an adequate opportunity to explain her decision to use the present tense in commenting about SG's suitability in 2014. Moreover, the use of the present tense was a matter relied upon by Mr McGhee in the management case at appeal. The Claimant had an opportunity to question Mr McGhee and make any relevant representations. She did not do so.

99 The other criticisms raised by the Claimant are essentially a submission that the decision to dismiss fell outside of the range of reasonable responses. I have found that Mr McGhee did take into account the Claimant's mitigation that she had relied upon SG's information, her experience as SG's line manager and her ability properly to provide the reference in the terms in which he did. The Claimant's real criticism is that Mr McGhee did not agree with her own view of herself as blameless. Nevertheless, this was an objectively reasonable conclusion for him to reach.

100 Mr McGhee took into account the Claimant's service with the Respondent, including the final written warning. The Claimant had ample opportunity to make representations on this warning at the disciplinary hearing even if not explicitly invited to do so. She did not. It is relevant in my view that the Henderson warning was given on 7 May 2015 and the reference which formed the basis for dismissal was provided by the Claimant only two months later. Despite the time taken to conclude the investigation and convene a disciplinary hearing, the conduct for which the Claimant was dismissed occurred very early in the life of the final written warning. Mr McGhee properly considered whether the conduct in both disciplinary cases was sufficiently similar and concluded that it was as both related to the Claimant's judgment and her ability or willingness to comply properly with its policies, procedures and frameworks. Both were relevant to whether or not the Respondent could trust the Claimant. The mere fact of the earlier warning did not automatically mean that the appropriate sanction was dismissal. It was not (as Ms Hudson submits) a foregone conclusion. In the circumstances, a reasonable employer could properly conclude that it was relevant and could reasonably take it into account.

101 For all of these reasons, I am not satisfied that the decision to dismiss fell outside of the range of reasonable responses having regard to the equity and substantial merits of the case. Looked at as a whole, the procedure adopted by the Respondent was fair both at the disciplinary hearing and at the appeal hearing. The claim for unfair dismissal fails and is dismissed.

Next Steps

102 The Respondent has indicated an intention to apply for costs in the event that the claim was unsuccessful. If it still intends to do so, the application must be made in writing within 14 days of this Judgment being sent to the parties and must be accompanied by a schedule of costs providing sufficient detail to enable an assessment to be made in the event that costs are ordered.

103 Any objection to the application must be made within 14 days thereafter with full reasons provided. If the Claimant intends to ask the Tribunal to take into account her ability to pay, she must at the same time as submitting her objection also disclose her bank statements for all current and savings accounts, credit card bills, proof of income

and expenditure for the period 1 January 2018 to 30 June 2018.

104 Both parties must state in any application or objection whether or not they wish to have an oral hearing. If neither party requests an oral hearing, any application will be dealt with on paper.

Employment Judge Russell

7 June 2018