



# EMPLOYMENT TRIBUNALS

**Claimant** Mr J Penny

**Respondent** South Western Ambulance Service NHS Foundation Trust

**Heard at:** Exeter

**On:** 10,11,12,13 &14 June 2019

**Before:**  
**Employment Judge** Goraj

## **Representation**

**Claimant:** in person

**The Respondent:** Mr D Panesar, Counsel

## RESERVED JUDGMENT

### **The Judgment of the Tribunal is that: -**

1. The Claimant's complaint of unfair dismissal is dismissed.
2. The Claimant's wrongful dismissal claim is also dismissed.

## REASONS

### **BACKGROUND**

1. The claimant was employed by the respondent/ its predecessors in title between 30 July 2001 and 18 January 2018.

2. By a claim form which was presented to the Tribunals on 17 April 2018 the claimant alleged that he had been unfairly dismissed which was denied by the respondent.
3. At a case management preliminary hearing on 4 January 2019 (“the CMPH dated 4 January 2019”), the claimant was given leave by the Tribunal, by consent, to add a complaint of breach of contract relating to notice (page 38 of the bundle). This claim was also denied by the respondent who contended that the claimant had been guilty of gross misconduct which had entitled it to dismiss the claimant without notice. It is agreed between the parties that the claimant was entitled to 12 weeks’ notice in the absence of any gross misconduct.

#### **The documents and associated matters**

4. The Tribunal was provided with an agreed bundle of documents to which a number of additional documents were added during the course of the Hearing by agreement/ at the direction of the Tribunal (“the bundle”).
5. The Tribunal was also provided with (a) opening and closing skeleton arguments by the respondent together with a copy of a number of legal authorities (as referred to further below) (b) written closing submissions by the claimant and (c) a chronology of events which had been prepared by the respondent. This document was not agreed with the claimant and was therefore treated with caution by the Tribunal.

#### **The witnesses**

6. The Tribunal received witness statements and also heard oral evidence from the following witnesses: -

#### **7. The Respondent’s witnesses**

- 7.1 Ms Amy Beet – Executive Director of HR and OD of the respondent since April 2018 (previously Deputy Director of HR and OD).
- 7.2 William Lee- County Commander for Gloucestershire of the respondent since June 2018. At the relevant time Mr Lee was seconded by the respondent to the role of Operations Manager for the North Somerset Region. Mr Lee was the investigating officer in this case.
- 7.3 Mr Paul Birkett – Wendes - County Commander for Wiltshire of the respondent. Mr Birkett - Wendes chaired the claimant’s disciplinary hearing. Mr Birkett- Wendes was employed as Head of Operations (North) at the relevant time.

- 7.4 Mrs Jennifer Winslade – Executive Director of Quality and Clinical Care of the respondent since April 2019. At the relevant time Mrs Winslade was employed as the Executive Director of Nursing and Governance of the respondent. Mrs Winslade chaired the claimant’s appeal hearing.
- 7.5 Mr Wayne Darch – Head of EPRR at the respondent. At the relevant time Mr Darch was employed as the Acting Head of EPRR at the respondent. The respondent made an application on 14 June 2019 to serve a witness statement from Mr Darch and for him to be allowed to give oral evidence to the Tribunal which was opposed by the claimant. This application was granted by the Tribunal as it was satisfied that it was in accordance with the overriding objective to allow Mr Darch to address matters which had emerged during the course of the evidence of the claimant and his witnesses.

## **8. The Claimant’s witnesses**

- 8.1 The claimant.
- 8.2 Mr Phil Crook, rope rescue consultant
- 8.3 Ms Charis Taylor (CT) who is currently seconded by the respondent to the JESIP as the National Joint Organisational Learning Coordinator.
- 8.4 Mr G Baxter (statement at page s163 (h) – (i) of the bundle.
- 8.5 Mr I Joesbury, employed by the respondent as a HART paramedic.
- 8.6 Mr L Kirkbride
- 8.7 Mr B Mc Gachy, HART Operations Officer.
- 8.8 The Tribunal also had regard to the written statements of (a) Mr Phil Watts, HART Team Leader at the respondent (b) Mr E. John Walker HART paramedic at the respondent and (c) Mr Doug Kemp Operations Director at RIG Systems Limited. The Tribunal however placed limited weight on such statements as they did not attend the Hearing to give evidence and further none of their statements were signed.

## **The issues and associated matters**

9. At the CMPH dated 4 January 2019 an Employment Judge identified with the parties the issues which the Tribunal is required to determine. The agreed issues are set out at paragraphs 10 -12 of the associated order dated 4 January 2019 (“the Order dated 4 January 2019”) which is at pages 37 – 44 of the bundle.
10. The Employment Judge confirmed the issues at the commencement of the Hearing (on 10 June 2019) including in the light of (a) the references at paragraph 39 of the claimant’s witness statement (to the claimant’s alleged inconsistent treatment compared with SG who was allegedly

given a final written warning ,as opposed to dismissal, in respect of the alleged harassment of female staff) and (b) paragraph 50 ( to the claimant's alleged unfair and inconsistent treatment which was " partly direct discrimination because of my mental health issues and as a direct result of my whistle- blow the bullying culture by senior managers in SWAST".

11. After discussion with, and further consideration by the Claimant on 10 June 2019, he confirmed that (a) he was not seeking to pursue any complaints of disability discrimination or that he had been dismissed/ treated unfairly because he had made public interest disclosures (which would have required a formal amendment application) (b) that he wished however to pursue a complaint of inconsistency of treatment in respect of his dismissal. The claimant identified 3 people (including SG) in support of such alleged treatment. The claimant produced, at the request of the Tribunal, a document summarising such contentions.
12. On the morning of 11 June 2019, the claimant indicated to the Tribunal that he no longer wished to pursue an allegation of inconsistency in treatment in comparison with the 3 people referred to above but wished instead to pursue an allegation of inconsistency of treatment in respect of a third employee of the respondent, RH. The claimant produced to the Tribunal a letter of outcome in respect of the disciplinary hearing of RH. The claimant also produced, at the request of the Tribunal, a document summarising such contentions. This application was opposed by the respondent including on the grounds that such allegation had not been raised in the claimant's claim form, at the CMPH on 4 January 2019 when a detailed list of issues had been agreed, or subsequently (and including that there was no reference to any such allegation in the claimant's witness statement). The respondent further contended that if the claimant was allowed to pursue such allegation it would require the disclosure of further documentation which could result in the matter not being concluded in the time allocated for the Hearing.
13. Having given the matter careful consideration including the timing and nature of the application, the respective prejudice to the parties and the overriding objective, the Tribunal refused the claimant's application to amend his claim form to introduce such further allegation. When reaching this conclusion, the Tribunal gave full consideration to the fact that the claimant was a litigant in person and the potential prejudice to the claimant of not being allowed to pursue such an allegation. The Tribunal was satisfied however that this was outweighed by the factors referred to above including as the claimant had not raised the allegation in respect of RH in any of the pleadings, the CMPH on 4 January 2019 or in his witness statement, the additional disclosure and evidence which would be required to address the matter together with the potential consequential effect on the hearing and further that the claimant was able to pursue the

detailed remaining allegations identified in the Order dated 4 January 2019.

14. The Tribunal therefore proceeded to hear evidence in respect of the issues identified at paragraphs 10 – 11 of the Order dated 4 January 2019. It was agreed that the Tribunal would deal with any further issues relating to remedy (as identified at paragraph 12 of the Order dated 4 January 2019 including any adjustments to any compensatory award in respect of any breaches of the ACAS Code) at a separate remedy hearing if the claimant succeeded in any of his claims. The claimant confirmed during the Hearing that he was no longer seeking reinstatement or re- engagement if he succeeded in his unfair dismissal claim and would pursue instead a claim for compensation.
15. It was agreed between the parties that the names of the female staff in respect of Allegation (a) would be referred to by agreed initials only in the light of the nature of the allegations (and that any reference to them in the witness statements and documents in the bundle would be redacted accordingly). The Tribunal has also referred to other staff by reference to their initials only where it considered this to be appropriate.

#### **FINDINGS OF FACT**

16. The claimant was employed by the respondent/ its predecessors in title from 30 July 2001 until 18 January 2018 (for the reasons explained below) which latter date is the effective date of termination for the purposes of the Employment Rights Act 1996 (“the Act”).
17. The claimant’s Early Conciliation Certificate records that ACAS received the claimant’s EC notification on 22 January 2018 and that the EC certificate was issued by email on 29 January 2018 (page 1 of the bundle). The claimant’s claim form was presented to the Tribunals on 17 April 2018. The claimant’s claim form is at pages 2-13 of the bundle. The respondent’s response is at pages 18- -32 of the bundle.

#### **The respondent**

18. The respondent is a NHS Foundation Trust providing emergency and urgent ambulance care services in the south-west and neighbouring counties. The respondent employed approximately 4,000 staff at the date of the claimant’s dismissal.

#### **The respondent’s policies and procedures**

19. the Tribunal has been provided with extracts from a number of the Respondent’s policies and procedures as identified in the index to the bundle including in particular:- (a) extracts from the respondent’s disciplinary policy dated February 2018 at pages 88-103 of the bundle

(including paragraphs 8 and 9 relating to witnesses and the conduct of disciplinary hearings) (b) extracts from the respondent's grievance policy dated February 2018 at pages 104-108 of the bundle and (c) extracts from the respondent's bullying and harassment policy (undated) at pages 108(h) – (j) of the bundle and (d) the respondent's dignity and respect at work policy (which was added to the bundle during the course of the proceedings).

### **HART and NARU**

20. The respondent, in common with the other ambulance trusts within England, operates a Hazardous Area Response team ("HART"). The respondent's HART team is divided into 2 sub teams namely a North team which is based in Bristol and a South team which is based in Exeter. HART is an NHS service and HART units are required to work consistently within a national specification so that they can work together if and when required. The National Ambulance Resilience Unit ("NARU") is responsible for the national coordination of interoperable capabilities including HART. NARU sets the national standards which are authorised and approved by NHS England. HART units can enhance their capabilities locally but only if they have been approved through the national change management process which requires the submission of a NARU change request form to the relevant national sub group. Any unapproved local enhancements fall outside the contracted HART service and become the responsibility of the local Trust.

### **The claimant**

21. At all relevant times the claimant was employed by the respondent as a HART and EPRR (emergency preparedness resilience and response) Specialist Training Manager. The claimant was the Specialist Training Manager for the respondent's Exeter HART sub team and was also responsible for its EPRR training.

### **The claimant's contract of employment and job description**

22. The claimant was issued with an undated written statement of terms and conditions of employment in respect of his position as HART Team Leader which is at pages 56-71 of the bundle ("the contract"). The contract is unsigned, the claimant did not however challenge his acceptance of the terms and conditions contained in the contract. The Tribunal has noted in particular the following provisions of the contract namely:- (a) notice (at paragraph 4 and page 59 of the bundle) - which the parties accepted entitled the claimant to receive 12 weeks' notice of termination in the absence of a serious breach of the terms the contract (b) the references to the disciplinary rules of procedure and grievance policy (paragraphs 38 and 40 pages 68-69 of the bundle and (c) the references to the

respondent's requirements in respect of equality and diversity/discrimination (at paragraph 43 and pages 69-70 of the bundle).

23. The claimant's job description (as amended in July 2017) and associated documentation is at pages 73-86 of the bundle. The Tribunal has noted in particular the Leadership, Operational, Governance & Quality and Personal responsibilities contained in the claimant's job description (including the standard role requirements relating to risk set out at page 81 of the bundle).

#### **Informal disciplinary meeting - A1**

24. It was not contended by the respondent that the claimant had been subject to any formal disciplinary proceedings. The claimant was however issued with a letter dated 12 June 2017 following what was described by the respondent as, "an informal disciplinary meeting" on 9 June 2017 regarding an alleged incident on 20 April 2017 during training at Llangollen involving a female member of staff who is known in these proceedings as A1 (who remains in the employment of the respondent). This letter which was issued by Mr G Leeson, HART Operations Manager-Bristol together with the associated documentation is at pages 118 -121 of the bundle.

25. In brief summary, Mr Leeson stated in the letter dated 12 June 2017 that :- (a) A1 did not wish to make a formal complaint and that the respondent had therefore decided not to pursue formal disciplinary action (b) the respondent however had concerns relating to the claimant's behaviour and conduct and wished to confirm that such behaviour would not be tolerated going forwards (c) the claimant had been supported at the meeting on 9 June 2017 by Mr Mc Gachy, HART Operations Officer (d) the claimant had accepted at the meeting that he had "grabbed A1's backside and then lifted her buttock upwards" and that "she had approached you so [you] felt that this was a mutually agreed approach to a hug" (e) the claimant stated that he had not intended to cause A1 distress/that he felt distraught that he had caused her any such distress and that he understood and would adhere to the standards in the respondent's Dignity and Respect at Work policy going forwards (f) any further incidents were likely to be dealt with under the respondent's formal disciplinary process (g) the claimant did not have a right to appeal the outcome as the Respondent was not imposing a formal sanction and (h) the claimant was however, invited to contact Mr Leeson or Miss Finch of HR if he had any queries regarding the contents of the letter.

#### **The HART Management and Culture Investigation Report**

26. In June 2017 NARU produced a report in which it raised concerns about the management culture within the respondent's HART. The Tribunal has not been provided with a copy of this report. Following such report the respondent commissioned an independent investigator Barbara

Kozłowska (Head of Organisational Development for West Midlands Ambulance NHS Foundation Trust) (“BK”) to investigate and report upon the concerns which had been raised in the NARU report regarding the cultural and associated matters.

27. The subsequent undated HART Management and Culture - Investigation Report prepared by BK (“the HART report”) is at pages 214 – 238 of the bundle. The methodology adopted by BK, which included the review of documents, focus groups with randomly selected staff and one to one interviews, is identified at pages 217 – 219 of the bundle.
28. The HART report raised serious concerns regarding the management culture and behaviour within HART. The HART report raised concerns in particular, regarding the conduct and behaviour of two senior managers within HART including the claimant. BK stated that she had serious concerns about the behaviour of the claimant (pages 232 – 235 of the bundle) including in respect of his alleged conduct towards female members of staff (including JD and A1), alleged bullying and poor management skills and anecdotal evidence about the possible misuse of rope equipment at Exeter HART (including the purchase of and being trained to set up ropes instead of by the Fire and Rescue service).
29. The HART report made a number of recommendations (pages 235 and 236 of the bundle) including that formal investigations be undertaken in respect of two senior managers including the claimant. The HART report recommended in respect of the claimant that there should be a formal investigation into the allegations which had been made regarding the alleged bullying harassment/sexual harassment/violence and aggression and into the use of ropes and carabiners at Exeter and associated governance.
30. The HART report was reviewed by Ms Beet, the respondent’s then Deputy Director of HR and OD, who concluded that there should be a disciplinary investigation into the concerns which had been raised regarding the claimant’s conduct. The Claimant was not provided with a copy of the HART report.

#### **The claimant’s restriction of practice**

31. Following a restriction of practice meeting on 11 August 2017 a decision was taken by the respondent to restrict the claimant’s practice as HART training manager by redeploying him to an alternative role pending an investigation into working practices within HART. The position was confirmed to the claimant by letter dated 18 August 2017 (pages 131-132 of the bundle). The claimant was further advised in that letter that an investigating officer would be appointed who would contact him to arrange



an investigative interview. Two further managers were removed from post and placed on restriction of practice around the same time.

**The claimant's letter dated 21 August 2017**

32. The claimant wrote to the respondent by letter dated 21 August 2017 raising concerns regarding his removal from post and associated matters. The claimant advised the respondent that due to the levels of stress caused by the process he had no alternative but to declare himself unfit for work due to work related stress and that henceforward he wished to be kept informed about communications relating to the investigation via his trade union representative (page 133 – 135 of the bundle).

**The investigation by Mr Lee**

33. Mr W Lee, who was at the relevant time employed by the respondent as acting/ Operations Manager for the North Somerset Region, was appointed as the investigating manager. Although Mr Lee knew of the claimant by reason of his work with the respondent Mr Lee had had no direct previous involvement in the management of HART or with the claimant. Mr Lee was also appointed as the investigating officer in respect of allegations concerning the other HART/ EPRR employees. Mr Lee arranged for an Operations Manager to cover his substantive role from 29 September 2017 in order to allow him to focus on the disciplinary investigations.

**The letter dated 27 September 2017**

34. The claimant was advised by the respondent by letter dated 27 September 2017 of Mr Lee's appointment as investigating officer.

35. Mr Lee met with the Respondent's (Head of Human Relations) on 27 September 2017 to discuss and agree the terms of reference for his investigation which then related to two allegations namely: - (a) that the claimant had demonstrated a pattern of inappropriate behaviour towards colleagues and (b) that the claimant had deployed safe working at height ("SWaH") equipment within HART which fell outside of the NARU national specification and without the necessary governance in place leaving the operatives and the respondent at risk.

**Letter dated 5 October 2017**

36. Mr Lee wrote to the claimant (via his then nominated GMB representative) by letter dated 5 October 2017 inviting the claimant to attend an investigation meeting on 12 October 2017. This letter is at pages 169-170 of the bundle. Mr Lee advised the claimant that the purpose of the meeting was to investigate the allegations referred to above. Mr Lee enclosed with the letter a copy of the respondent's disciplinary policy and advised the claimant of the right to be accompanied at the investigation meeting. Mr

Lee also advised the claimant that if he had any reason to believe that he could not be a fair and impartial investigator the claimant should raise any concerns with the HR Department immediately upon receipt of the letter. The Claimant did not raise any concerns regarding Mr Lee's involvement as an investigator in response to the letter.

### **The investigations by Mr Lee**

37. The names of the personnel whom Mr Lee contacted as part of his investigation are recorded in his subsequent Investigation Report ("the Investigation Report"). The Investigation Report is at pages 263-278 of the bundle. The names of the people contacted/ interviewed by Mr Lee are at page 264 of the bundle. Details of the documentary information obtained by Mr Lee for the purposes of his investigation is listed at pages 265 – 266 of the Investigation Report. Mr Lee also included in the Investigation Report a Chronology of his investigation which is at pages 266 – 268 of the bundle.
38. Mr Lee interviewed the Acting HART Training Managers to ascertain their views regarding the use of equipment. The respondent's notes of Mr Lee's interviews with CH and SC are at pages 164-168 and 171-174 of the bundle respectively. Mr Lee also contacted various personnel by email in relation to documentation/ information which had been provided to him and to raise further questions / clarification as identified in the Chronology contained in the Investigation Report.
39. CH confirmed to Mr Lee that he had previously raised concerns regarding the use of rope rescue equipment by HART South because :- (a) he had concerns that the Exeter HART rope access capability exceeded the SWaH standards and (b) he was unaware of any associated risk assessments, statements of practice or that any relevant training had been delivered to Exeter HART to support such in-house capability. CH also informed Mr Lee that he was concerned that they had been a conscious managerial decision to push forward with the development of SWaH capability for Exeter HART including rope access and/or rope rescue however without the necessary supporting governance including risk assessments, a NARU change request form and local standard operating procedures. CH also raised with Mr Lee further concerns regarding the welfare of the Claimant and others in respect of the matters referred to at page 167 – 168 of the bundle.
40. SC also raised concerns during his meeting with Mr Lee ( the respondent's notes at pages 171 – 174 of the bundle) including regarding (a) the alleged conduct of the claimant in respect of the alleged setting up of twin line rope systems during training exercises including at Tamar Bridge and (b) the claimant's alleged conduct towards JD and towards another

female (A1) whilst on water training courses and (c) the safety of a water training exercise at Llangollen.

### **The respondent's investigation meeting with the Claimant on 16 October 2017**

41. Mr Lee conducted an investigation meeting with the claimant on 16 October 2017. The Respondent's notes of that meeting are at pages 183 – 192 of the bundle. The Claimant was accompanied at that meeting by his GMB representative, Mr Gage, who described himself in subsequent correspondence as an experienced trade union representative. Mr Lee was accompanied by a note taker from the respondent.
42. The claimant denied that the notes of the investigation meeting are an accurate account of the meeting. The claimant contended in summary, that he was not afforded a proper opportunity to make amendments to the notes as (a) he was unable to make track changes to the notes because of the high number of inaccuracies and (b) he was prevented from making amendments because of the delay by the Trust in providing him with a recording of the meeting which he was, in any event, unable to access as it was encrypted and (c) that accordingly he was advised by his trade union representative not to sign the notes as they were not a true representation of what was said at the meeting.
43. Having given the matter careful consideration, the Tribunal is satisfied that the claimant was provided with a proper opportunity to comment on the notes of the investigation meeting and further, that the notes are a broadly accurate account of the matters discussed. When reaching such conclusions, the Tribunal has taken into account in particular that (a) the notes were taken by a designated note taker (b) the claimant did not provide any comments on the notes to the respondent at any time during the course of investigatory or disciplinary proceedings (between October 2017 and January 2018) and (c) there are no details of any alleged inaccuracies in the claimant's witness statement (paragraph 10).

### **Matters discussed during the Investigation meeting**

44. In summary, the claimant (a) raised concerns regarding the origin/reasons for the investigation (b) denied any inappropriate conduct towards colleagues (including JD / A1) (c) denied any inappropriate conduct in respect of the deployment and governance of SWaH equipment at Exeter HART (including the use of rope) and (d) contended that he had acted appropriately in respect of the deployment of staff at the Llangollen water training course.
45. In respect of JD, the claimant acknowledged that his relationship with her was "fractured" and that they had on occasions become angry towards

each other. The claimant contended however that any exchanges between them had to be considered in the context of their overall relationship including that they had corresponded by phone calls and text messages over a number of months during which they had discussed personal matters. The claimant accepted that he had one occasion moved forward to hug JD but contended that she had previously indicated that such an approach was acceptable but then stormed off in what was a complete overreaction. The claimant identified a witness to the incident (CT). Mr Lee did not contact CT as part of his investigation.

46. In respect of the alleged incident involving A1 (which had taken place during a water training course) the claimant contended in summary, that (a) he believed that the alleged incident had been blown out of proportion including as A1 had not wished to report the matter/ complained about it and it had been reported by a third party who had not witnessed what had happened (b) the claimant did not deny that he had touched A1's "backside as I picked her up off the floor" (d) he was mortified that A1 would think that it was a sexual move as all he had done was pick A1 up off the floor (e) the matter had been dealt with by the respondent on an informal basis and the claimant had been told that the outcome letter would not be placed on his personnel file and (f) the allegation should not therefore form part of the investigation.
47. In respect of the allegations relating to SWaH the claimant denied any inappropriate conduct. The claimant however stated during the investigatory meeting that (a) Exeter HART had equipment which was above and beyond the national specification (b) it was not necessary to complete a change request form in order to use equipment which went above and beyond NARU standards and there were no specific SOPs in respect of such enhanced use and (c) that during the Foggin Tor exercise HART staff had been lowered from height on a double twin line system which process had been overseen by DK.
48. In respect of the water training exercise at Llangollen (March 2017) the claimant offered to send the training package to Mr Lee. The claimant further contended that the appropriate risk assessments and local governance had been completed and that the feedback from the course was that it was the most comprehensive training course ever completed.

### **Subsequence correspondence**

49. On or around 19 October 2017, the claimant sent to Mr Lee documents relating to SWaH training and risk assessments. There was however no evidence before the Tribunal to indicate that the claimant or his representative requested Mr Lee to interview any further witnesses in respect of any of the above-mentioned matters.

50. There was correspondence between the claimant and the respondent/HR at the end of October 2017 during which the claimant raised concerns in particular, regarding his restriction of practice/ the investigatory process and associated matters including the alleged effect that the process was having on his health. In response, the respondent advised the claimant to raise any concerns with the respondent's head of Employment Relations. The respondent also confirmed that it had referred the Claimant to occupational health and apologised for the delay in doing so (pages 196 – 201 of the bundle).

### **The findings of the Investigation Report**

51. The Summary of Findings contained in the Investigation Report are at pages 269- 276 of the bundle. The findings related to the original 2 allegations together with a further allegation relating to the conduct of the claimant in respect of the swift water rescue training/recertification course at Llangollen in March 2017.

52. The conclusions contained in the Investigation Report are set out at pages 277-278 of the bundle. In summary, Mr Lee concluded as follows :- (a) several staff had reported that the claimant had demonstrated inappropriate behaviour (including alleged aggressive/confrontational behaviour towards JD, NG and SG) (b) staff had reported that the claimant had not dressed in full uniform/had advised staff that they could wear civilian clothes whilst travelling on duty (c) it had been alleged that the claimant had suggested inappropriate staff games (d) the claimant had allegedly prevented the delivery of recertification training for the Bristol HART team including as part of an alleged ongoing dispute against JD ( e) the claimant had been heavily involved in the development of enhanced SWaH capability within Exeter HART including the use of ropes from height utilising HART equipment without the necessary governance / SOP arrangements in place and thereby putting staff and the respondent at risk and (f) several staff had raised concerns that HART staff were deployed into an unsafe water environment in breach of the relevant risk assessments during a training course at Llangollen in March 2017 for which the claimant was the course director.

53. Mr Lee did not make any recommendations to the respondent regarding the appropriate way forward. Following the submission of the Investigation Report Mr Lee did not have any further involvement in the matter save for his attendance at the subsequent disciplinary hearing in January 2018 for the purposes of presenting the management case.

### **The disciplinary allegations**

54. The Investigation Report was considered by Ms Beet who determined that the matter should proceed to a formal disciplinary hearing to determine allegations of alleged gross misconduct.

55. On 6 November 2017 the respondent wrote to the claimant advising him that it had been decided that there was a case to answer and that the matter would be considered at a disciplinary hearing on 16 November 2017 in accordance with the respondent's disciplinary policy. This letter is at pages 202-203 of the bundle. The claimant was advised that the hearing would be chaired by Mr Birkett – Wendes, then the Head of Operations (North Division) who would be accompanied by a senior HR business partner to advise the panel on process and that Mr Lee would present the Investigation Report as investigating officer. The claimant was further advised that the panel would be asked to consider the following allegations that : (a) the claimant had displayed a pattern of inappropriate behaviour towards colleagues (b) the claimant had been complicit in the deployment of SWaH within HART Exeter that fell outside the national specification and did not have the necessary governance in place which had left HART operatives and the respondent at risk and (c) as course director the claimant had overseen the deployment of HART operatives into an unsafe water training environment during a training course at Llangollen. The letter further (a) stated that the allegations had been categorised as gross misconduct under the respondent's disciplinary policy and that if substantiated might result in the claimant's summary dismissal (b) enclosed a copy of the Investigation Report (c) requested the claimant to submit any paperwork to which he would be referring at the disciplinary hearing as soon as possible and in any event no later than five calendar days in advance of the hearing (d) confirmed the claimant's right to be accompanied at the hearing and ( e) requested the claimant to confirm his attendance at the hearing and to inform the respondent of any witnesses whom he wished to bring to the hearing. The claimant was advised that it was his responsibility to arrange representation and for the attendance of any witnesses.

56. The disciplinary hearing 16 November 2017 was postponed at the request of the claimant as he was unable to arrange trade union representation for that date (page 204 of the bundle). The hearing was postponed again on two subsequent occasions including on compassionate grounds on the recommendation of occupational health (including pages 209-213). The hearing was ultimately re- arranged for 12 January 2018 (pages 212-213 of the bundle). The claimant was advised on 12 December 2017 that the Hearing would take place on 9 January 2018 (which was subsequently changed to 12 January 2018).

**Documents provided by the claimant during the course of the investigation and disciplinary processes**

57. There has been a lack of clarity from both parties regarding the dates/nature of the documents (including witness statements) submitted by the claimant during the course of/for the purposes of the

investigation/disciplinary (and also during the subsequent Tribunal proceedings). Having given careful consideration to the available evidence the Tribunal is satisfied, on the balance of probabilities, that the following documents were submitted by / on behalf of the claimant prior to the disciplinary hearing on 12 January 2018: -

- (1) The statements at pages 152-163 inclusive of the bundle were submitted by/on behalf of the claimant on or around 4 January 2018. These consist of statements from a range of staff (including a significant number of female staff) which are highly supportive of the claimant including with regard to the quality of training provided and his conduct/character. None of these statements however contain any evidence which is directly relevant to the disciplinary allegations save that CT and GN raised concerns relating to the alleged conduct of JD/contended that they had experienced in appropriate/ aggressive conduct by JD (pages 157-159 and 161-163 of the bundle).
- (2) The photographs/video extracts from social media, concerning in particular working with ropes, which are at pages 239-250 of the bundle were also submitted to the Respondent's HR partners on 4 January 2018 as identified in the accompanying emails.
- (3) The further statements at pages 280 (a) – (c) and 282(a) and (b) were also submitted by the claimant/on his behalf in advance of the disciplinary hearing as confirmed by Mrs Winslade in her evidence to the Tribunal. These included a statement from Mr McGachy dated 12 January 2018. All of these statements were supportive of the claimant and quality of training provided by him/his good conduct towards staff including female employees in alleged contrast to the behaviour of others. None of these statements however directly addressed any of the disciplinary allegations.
- (4) None of the above documents were included in the pack which was placed before the disciplinary panel. The Tribunal accepts the respondent's explanation that this was due to an oversight on the part of the respondent's HR partners.

### **The attendance of witnesses at the disciplinary hearing and associated correspondence**

#### **The exchange of emails on 5 January 2018**

58. On 5 January 2018 the claimant emailed a Senior HR partner for the Respondent, Mr Fraser, listing (a) 29 witnesses whom he wished to give evidence on his behalf at the disciplinary hearing on 12 January 2018. The claimant did not provide any explanation of why any of the witnesses

were relevant to his case. The claimant also (a) asked for assurances in respect of his witnesses including that they would be able to claim for travelling expenses and where appropriate for accommodation for the night prior to the hearing/overtime rates where appropriate in the light of the hearing venue (b) listed a 18 further respondent/ other personnel (including the respondent's Chief Executive and the author of the HART report – BK) whom the claimant requested the respondent to make available to attend the hearing so that further explanation could be gained from their statements of their role within the investigation (pages 257 – 258 of the bundle). The claimant further stated that they would not, however, be required as witnesses for the claimant.

59. Mr Fraser, responded to the claimant by email dated 5 January 2018 (pages 255 – 256 of the bundle). In summary, he (a) acknowledged receipt of the documentation which had been provided by the claimant which he stated would be provided to the disciplinary panel (b) requested the claimant to provide a short summary document explaining the relevance of the information provided (c) advised the claimant that having discussed the matter with the chairman of the disciplinary panel, Mr Birkett Wendes, the claimant's proposed witnesses would not be required to attend the hearing as he had no questions for them. The claimant was further advised however that they could be asked to provide a written statement which Mr Birkett Wendes would consider as part of the Hearing and might wish to follow up further (d) declined the claimant's request for the attendance of the requested respondent personnel to enable the claimant to question them as this was not the purpose of the hearing and further as the claimant would have the opportunity to make statements about them and their involvement in the matter at the disciplinary hearing.
60. The claimant's trade union representative, Mr Gage responded to the respondent on 5 January 2018 (pages 254 – 255 of the bundle) complaining about the way in which the claimant was being treated including that the claimant was being denied a fair process / a proper opportunity to defend himself and that the respondent was acting in breach of paragraph 12 of the ACAS Code and of paragraph 7 of the respondent's disciplinary policy. Mr Gage also raised concerns regarding the request for the claimant to provide details of his case prior to the disciplinary hearing which he contended was not required by the ACAS Code or the respondent's disciplinary procedure. Mr Gage reiterated his request that the claimant's named witnesses be allowed to attend the disciplinary hearing. Mr Gage also requested that the investigating officer, Mr Lee be in attendance at the hearing in order to clarify matters in his report and its methodology.



### **The involvement of Mr Squires**

61. On 8 January 2018 a HR Business Partner emailed Mr Squires, then Acting HART Operations Manager, (page 252 of the bundle) advising him that having reviewed the list of the claimant's proposed witnesses the chairman of the disciplinary panel did not have any questions for them and that due to the volume of proposed witnesses Mr Birkett -Wendes was happy for them to submit a witness statement covering the points which they wished to address. The HR Business Partner further advised Mr Squires that it was not possible for 35 witnesses to attend the hearing and that if the claimant had any specific witnesses whom he felt could only present their evidence at a hearing he needed to speak to Mr Fraser to identify the key personnel whom he definitely wish to attend in order that there could be a discussion with the claimant and his trade union representative. Five members of staff subsequently requested permission from Mr Squires to attend the disciplinary hearing in response to which Mr Squires informed them, in the light of the above email, that they were not required to attend the disciplinary hearing.

### **Further correspondence on 9 January 2018**

62. Mr Fraser corresponded further with Mr Gage by email dated 9 January 2018 (pages 253-254 of the bundle). Mr Fraser advised the claimant's trade union representative as follows :- (a) the claimant would have an opportunity to put his case forward to the panel at the disciplinary hearing (b) it was not reasonably practicable to accommodate over 40 witnesses as proposed by the claimant (c) the request for witness statements to be submitted had been made as it was considered to be the most practical way of ensuring that all evidence could be considered (d) if however the claimant had a select number of witnesses whom he wished to call to provide specific information this would be considered (e) the claimant was not required to provide a summary of his case prior to the hearing and (f) the investigating officer Mr Lee would be in attendance at the hearing in order to answer questions from the disciplinary panel and the claimant. The claimant's trade union representative was invited to contact Mr Fraser if he had any further queries.

63. The claimant's trade union representative, Mr Gage, replied to Mr Fraser on 9 January 201 (page 253 of the bundle) criticising the process which he contended was in breach of the respondent's policy and raising concerns regarding their ability to organise any witnesses to attend at short notice in the event that they were prepared to reduce the number of witnesses. The claimant did submit any further request for the attendance of a reduced number of witnesses.

**The claimant's grievance dated 9 January 2018**

64. On 9 January 2018 the claimant raised formal grievances regarding, in summary, the alleged refusal of the respondent to allow him to call witnesses at the disciplinary hearing and for not allowing the claimant an opportunity to question the witnesses whom he contended that the respondent had used against him. The claimant also contended that it was virtually impossible to arrange for staff to be released to attend the forthcoming disciplinary hearing because of the late notification of the respondent's position. (pages 259-262 of the bundle).

**The respondent's letter dated 10 January 2018**

65. The respondent's Director of HR and OD Ms Beet responded to the claimant's grievances by letter dated 10 January 2018 (pages 279-280 of the bundle). Ms Beet stated that issues relating to the disciplinary proceedings were excluded from the respondent's grievance policy as they were matters which should be dealt with via the disciplinary process but contended that she had, in any event, sought to resolve the issues. Ms Beet informed the claimant in summary as follows: (a) it was not practicable for the proposed 29 witnesses to attend the hearing, the claimant was however invited and encouraged to bring with him witness statements which would be considered by the panel (b) the chairman of the disciplinary panel had confirmed that the panel did not require the 10 respondent witnesses identified by the claimant to attend the hearing however the claimant would be given the opportunity to put questions to them if they were willing and able to attend (c) it was the claimant's responsibility to arrange for any witnesses to attend the hearing however the respondent appreciated that it might be difficult to secure the attendance of individuals who had contributed to the case against him and that in such circumstances the respondent would request their attendance/make arrangements for them to be contacted for questions by telephone (d) if any such respondent witnesses were unavailable or unwilling to attend the hearing the claimant could provide to the panel the lines of enquiry which he wished them to follow up as part of the panel's deliberations and (e) the respondent agreed to change the venue of the hearing to Taunton .

**The claimant's letter dated 11 January 2018**

66. The claimant's trade union representative, Mr Gage, responded by letter dated 11 January 2018 (pages 281 – 282 of the bundle) reiterating and raising further concerns regarding the disciplinary process which he contended denied the claimant a fair hearing including in particular the alleged exclusion of witnesses which he again contended breached the respondent's policy (section 7) and paragraph 12 of the ACAS Code. The claimant's trade union representative also raised concerns in summary, regarding (a) the respondent's alleged refusal to allow the claimant to

have his grievance heard including on the grounds that it was unfair for the grievance to be dealt with Mr Birkett -Wendes as he was the subject of the grievance especially as the outcome of the grievance would directly impact on the disciplinary hearing and (b) that the claimant was prevented from fully preparing for the hearing by reason of the respondent's alleged late proposal for witness statements/ for the possibility that some of the respondent's witnesses might be in attendance. The claimant's trade union representative stated that if the respondent continued to proceed with the disciplinary hearing as proposed, including to deal with the claimant's grievance at the disciplinary hearing, he and the claimant would attend the disciplinary hearing for the purposes of formally recording and explaining their objections. Mr Gage further stated that they would then withdraw from the hearing unless the respondent was prepared to suspend the proceedings that day in order to discuss a resolution. The claimant's trade union representative described himself in his letter as NHS Lead Officer, GMB Wales and South West.

### **The disciplinary hearing on 12 January 2018**

67. The respondent proceeded with the disciplinary hearing on 12 January 2018. The chairman of the disciplinary panel and overall decision-maker was Mr Birkett Wendes who was supported by an HR business Partner. Mr Birkett – Wendes had had no previous involvement in the matter save for the discussions relating to the attendance of witnesses at the hearing and associated matters. Mr Birkett-Wendes was aware of the existence of the HART report but had not been provided with a copy and not been advised of its outcomes. The investigating officer, Mr Lee was also in attendance at the hearing together with a note taker. The claimant attended the hearing represented by Mr Gage. The respondent's notes of the disciplinary hearing are at pages 283-293 of the bundle. The Tribunal is satisfied that the notes are a broadly accurate account of the hearing.

68. At the commencement of the hearing Mr Gage stated that they had had insufficient time to prepare for the hearing and that, having taken legal advice, they had informed the respondent's HR director the previous day of the position which the Claimant proposed to take regarding his participation in the hearing. Mr Gage further stated that although they had advised the respondent within the required timescale of the witnesses which the claimant wished to be called at the hearing, which he understood to be in the region of 20 witnesses, they had been advised by HR on behalf of Mr Birkett Wendes that he did not require the attendance of such witnesses. Mr Gage further contended that the claimant's witnesses had been told by their managers that they would not be allowed to attend the hearing in any circumstances and that although the claimant had subsequently been informed that he could call witnesses, if available, the claimant not being given a proper opportunity to bring witnesses. Mr

Gage also raised concerns about the way in which the claimant's grievances had been dealt with by the respondent and contended that it was not appropriate for Mr Birkett Wendes to chair the disciplinary hearing as one of the grievances was against him in respect of the attendance of witnesses and that he was supported in his contentions by the ACAS Code. Mr Birkett- Wendes sought to persuade Mr Gage/ the claimant to continue with the hearing. Mr Gage declined, on behalf of the claimant, to participate with the hearing on the grounds that if they continued with the hearing and it went to appeal they would be considered to have condoned the process. The claimant and Mr Gage withdrew from the hearing but invited the Panel to contact them by telephone if they wished to discuss the matter further. Mr Birkett Wendes advised them that if the Panel decided to proceed with the hearing he would inform them of the outcome by letter.

69. After consulting with the HR partner Mr Birkett Wendes decided to proceed with the disciplinary hearing including as he considered the issues regarding witnesses had been addressed as he had agreed to speak to any witnesses who relevant to the allegations and he was conscious that the hearing had previously been arranged on a number of occasions. Further Mr Birkett Wendes considered that given the nature of the claimant's grievances they were excluded from the respondent's grievance procedure and fell to be dealt with as part of respondent's disciplinary process.
70. The disciplinary panel proceeded with the hearing as recorded at pages 288-292 of the bundle. Mr Lee presented the allegations and summary findings in his Investigation Report following which the Panel asked questions. Mr Birkett Wendes reviewed with the HR partner the evidence presented together with the clarification on technical aspects of allegation B (relating to the deployment of SWaH practices) from Christian Cooper, Head of compliance at NARU (page 296 of the bundle). Mr Birkett Wendes had previously obtained information from Mr Cooper in an email dated 18 November 2017 (pages 205-207 of the bundle).

### **The outcome of the disciplinary hearing**

71. Mr Birkett Wendes wrote to the claimant on 18 January 2018 advising him of the outcome of the disciplinary hearing. Mr Birkett Wendes' letter is at pages 293-297 of the bundle.
72. Mr Birkett Wendes stated in the letter that the Panel had concluded that all of the allegations were substantiated and that as the allegations constituted gross misconduct relating to offensive behaviour (Allegation A) and negligence (Allegations B and C) under the Respondent's disciplinary procedure, the Panel considered that they had no option but to dismiss the claimant summarily. Mr Birkett Wendes advised the claimant that the

claimant's final day of service with the Respondent was 12 January 2018. The claimant was advised of his right of appeal.

73. In brief summary, the respondent's letter addressed the allegations as follows: - (a) Allegation A - the Panel had concluded that there was sufficient evidence to uphold the allegation as the evidence provided identified a pattern of confrontational and inappropriate behaviour that fell below the professional standards expected of staff in positions of management/ stated in his job description. The letter made specific reference to the claimant's informal disciplinary meeting on 12 June 2017 regarding the incident involving A1 (b) Allegation B- after seeking clarification from Mr Cooper the Panel considered that there was sufficient evidence to uphold the allegation including as the HART units across the country were required to remain consistent with a national specification so that they could work seamlessly together and HART units could only enhance their capabilities locally if such enhancement had been approved through the national change management process and the respondent had submitted a change management request to enhance capability which it had failed to do. Any local enhancements were therefore considered to be outside of the contracted HART services for which the respondent became entirely responsible and required appropriate governance to be put in place. There was however no evidence provided to demonstrate that such actions had taken place. In the circumstances, the Panel had concluded that the claimant had created a substantial risk to the respondent and its employees by not working within the national specification and by allowing a team for which he was responsible to undertake exercises/ training for which the claimant had been unable to provide any documentation to confirm that it had been approved and endorsed by the respondent and ( c ) Allegation C - the Panel had concluded that there was sufficient evidence to uphold this allegation as the evidence provided showed that the two risk assessments completed during the training course at Llangollen in March 2017 recorded the water level as being above 11 whereas the safe level was identified at 10 and notwithstanding which the claimant allowed the training exercise to go ahead in conditions that were deemed unsafe. As course director the claimant had ultimate responsibility for the safety of the persons attending the course and the Panel had serious concerns regarding the claimant's ability to work within the safe practices required by the respondent and to safeguard staff within his care.

74. The Tribunal is satisfied that the effective date of the termination of the claimant's employment with the respondent was 18 January 2018 rather than 12 January 2018 (as stated in the respondent's letter of dismissal) as Mr Birkett Wendes accepted in his evidence to the Tribunal that the outcome letter was not sent to the claimant until 18 January 2018.

### **The claimant's appeal**

75. The claimant appealed against his dismissal on 24 February 2018. The claimant's undated letter of appeal is at pages 289-299 of the bundle. In summary, the claimant advised the respondent that he wished to appeal on the following grounds :- (a) Mr Birkett- Wendes had continued with the disciplinary hearing in his absence despite the fact that there was an outstanding grievance regarding the denial of access to witnesses to assist in the defence of his case which the claimant contended was in breach of section 7 of the respondent's disciplinary procedure (b) the majority of the witnesses whom the claimant had wished to attend the hearing on his behalf had informed him that they were told by their managers that they would not be allowed to attend the hearing under any circumstances which was contrary to paragraph 12 of the ACAS code (c) by proceeding with the hearing in such circumstances, notwithstanding the representations of the claimant's trade union representative regarding such issues, the respondent had unfairly dismissed him as he was not in a position to defend himself at a fair and transparent hearing and (d) the claimant considered that the disciplinary action against him was in breach of the respondent's policy on equality and diversity as he believed that if he had been given the opportunity to call his witnesses and question the witnesses who were referred to in the disciplinary investigation report a full and thorough examination of the facts would have resulted in a different outcome whereas the case against him was not fully examined and the Panel made a decision that was one-sided and biased against him. The claimant confirmed that he would be represented at the appeal by Mr Gage.

### **The submission of further documentation**

76. The claimant submitted further documentation prior to the appeal hearing namely, the exchange of text messages between the claimant and JD at pages 307-332 of the bundle and the feedback forms from the Llangollen SRT recertification course at Llangollen in March 2017 at pages 333 onwards in the bundle. In summary, the exchange of text messages between the claimant and JD indicate, in summary, (a) that they were in contact with each other outside the work environment (b) a frank exchange of views regarding personal matters including an expression by the claimant of admiration for JD/ his desire for a personal relationship with JD which was not reciprocated (as acknowledged by the claimant) and (c) and a denial by JD of any suggestion of harassment by the claimant (page 332 of the bundle).

### **The appeal hearing on 16 April 2018 and associated matters**

77. An appeal hearing took place on 16 April 2018. The appeal hearing was conducted by Mrs Winslade, then executive Director of Nursing and Governance at the respondent, who was the overall decision-maker. Mrs Winslade was accompanied by Ms C Mortimore, Head of Projects, acting as senior manager and a Human Resources Business Partner in a HR advisory role together with a note taker. Mrs Winslade knew of the claimant by reason of his work in the respondent but had not at any time had any direct line management responsibility for him or any involvement in the disciplinary process. The claimant attended the appeal hearing accompanied by Mr Gage. The respondent's notes of the appeal hearing are pages 359-363 of the bundle. The Tribunal is satisfied that they are a broadly accurate account of the appeal hearing.
78. Mrs Winslade approached the appeal on the basis that the purpose of the appeal was to review the fairness of the original disciplinary decision in relation to the procedure which was followed in the light of the issues raised in the claimant's grounds of appeal including, his concerns that he had been prevented from calling witness evidence at the original disciplinary hearing and the consequential decision to dismiss the claimant for gross misconduct. In preparation for the appeal hearing Mrs Winslade was provided by the respondent with a pack of documents which included the Investigation Report, the minutes of the disciplinary hearing, the claimant's dismissal letter and letter of appeal. Mrs Winslade also reviewed the grievances submitted by the claimant together with the respondent's grievance policy. Mrs Winslade was not however provided with the documentation which the claimant had submitted (including the statements) prior to the disciplinary hearing.
79. In summary, the focus of the appeal hearing related to the alleged refusal of the respondent to allow the claimant to call/question witnesses and the fact that Mr Birkett -Wendes had continued with the disciplinary hearing despite the fact that the claimant had raised three grievances regarding the attendance of witnesses. The claimant did not bring any further evidence/witness statements to the appeal hearing.
80. On 20 April 2018 the claimant was informed that there would be a delay in providing the outcome of the appeal as there were a number of points which the panel wish to consider.

### **The letter dated 26 April 2018**

81. Mrs Winslade wrote to the claimant by letter dated 26 April 2018 in which she rejected the claimant's contentions regarding the procedural issues. This letter is at pages 364 a-364c of the bundle. In summary, Mrs Winslade advised the claimant that (a) having reviewed the relevant

documents, including Ms Beet's letter dated 10 January 2018 together with the subsequent disciplinary minutes and outcome letter dated 12 January 2018, the panel was satisfied that the claimant had been provided with a sufficient response regarding his grievances (b) that this had not compromised the continuation of the disciplinary hearing including as the claimant was advised that he would have an opportunity to question the respondent's witnesses if they were willing to attend (c) in respect of the claimant's contention that he had not been afforded the right to bring witnesses to the disciplinary hearing/that witnesses had been advised by management that they could not attend in any circumstances the panel had had regard to the relevant correspondence including Ms Beet's letter dated 10 January 2018 and had also spoken to Tom Squires, then Acting Operations Manager. Having reviewed such information the panel was satisfied that, having regard to the significant number of witnesses and associated practicalities, the claimant had been provided with an appropriate opportunity to obtain witness statements to present to the disciplinary panel. The panel was further satisfied that in respect of the respondent's witnesses the claimant would have had an opportunity to put questions to them if they had been willing to attend and the respondent had offered assistance in arranging such attendance (d) in respect of the claimant's concerns that witnesses had been told by Mr Squires that they could not attend the hearing the respondent had spoken to Mr Squires. The letter stated that Mr Squires had informed the respondent that he had been approached by five witnesses regarding their attendance and that he had initially requested them formally to submit their request, because of the need to arrange operational cover, however he had subsequently informed them that the disciplinary chair no longer required their attendance but that they could provide statements (d) the appeal panel was satisfied that the requirement to submit statements was reasonable in the circumstances having regard to the number of witnesses which the claimant intended to call to the disciplinary hearing.

82. Mrs Winslade further advised the claimant that although the appeal panel believed that due process had been followed as the claimant had advised the respondent that he would reconsider obtaining statements from his witnesses the panel wished to afford him a further opportunity to gather witness statements from his witnesses and to submit any questions to the witnesses who had contributed to the investigation. Mrs Winslade further advised the claimant that although it was not the intention of the respondent to hold a further disciplinary hearing the panel would consider the relevance of his witness statements including whether their attendance would have had a material impact on the outcome of the case. The claimant was asked to provide his witness statements and questions for the remaining witnesses by 14 May 2018. Mrs Winslade offered the claimant the respondent's assistance in contacting witnesses on his behalf. The claimant did not however, provide any statements/ further



information in response to the respondent's invitation / a reminder from the respondent dated 8 May 2018.

83. At the beginning of May 2018 Mrs Winslade became aware that the disciplinary panel that not received the documentation which had been submitted by the claimant in early January 2018 as identified in Mrs Winslade's subsequent letter to the claimant dated 15 June 2018 and which included the documents contained at pages 280a – c and 282 a – b of the bundle ( which were highly supportive of the claimant in general terms but did not deal directly with the allegations against him)

**The respondent's letter dated 15 June 2018**

84. Mrs Winslade wrote to the Claimant by letter dated 15 June 2018 advising him of the outcome of his appeal. This letter is at pages 365-369 of the bundle. Mrs Winslade (a) summarised the appeal process to date including with regard to the invitation to the claimant to submit further statements and the review of the documents which had been submitted by the claimant in January 2018 but had not been submitted to the disciplinary panel (b) advised the claimant that the appeal panel had decided to dismiss the claimant's appeal as they were satisfied after considering the documents and representations that the claimant's actions constituted gross misconduct (c) advised the claimant that the panel was further satisfied that there were no grounds for reducing the sanction of summary dismissal in the light of the claimant's conduct and the standards of behaviour expected of the respondent's employees. Mrs Winslade advised the claimant that there was no further right of appeal. In respect of the individual allegations the appeal panel advised the claimant in brief summary of its findings as follows: -

84.1 Allegation (a) – that the claimant had displayed a pattern of inappropriate behaviour towards colleagues - Mrs Winslade stated that the appeal panel had reviewed the documents which had been submitted by the claimant in early January 2018 relating to such allegation as referred to above. Mrs Winslade advised the claimant that (a) having reviewed such documents the appeal panel recognised that the 8 character references had been submitted from individuals who held him in high regard/were unaware of any harassment/discrimination by the claimant in the workplace and further that the text messages between the claimant and JD provided evidence of a platonic relationship which supported the claimant's comments made during the investigation meeting on 16 October 2017 (b) such information had however been considered in conjunction in particular, with the evidence contained within the Investigation Report including the letter from GL dated 12 June 2017, statements from JD dated 18 July 2017, DT dated 11 October 2017 and NG dated 15 October 2017 and the wider concerns which

had been raised regarding the claimant's conduct whilst acting as a course director. Mrs Winslade further advised the claimant that the appeal panel was satisfied that the claimant's conduct and behaviour was not acceptable and that the evidence which he had provided in his defence did not mitigate his behaviour and further that he had not demonstrated any acceptance that his behaviour had fallen outside of the standards expected from a senior member of staff within the organisation and that the panel had therefore decided to uphold the decision of the disciplinary chairman.

- 84.2 Allegation (b) – Safe working practices at height - Mrs Winslade advised the claimant that (a) the panel had reviewed the various documents which the claimant had provided in early January 2018 regarding safe working at height which she identified in the letter (b) the panel had considered such documents in conjunction with the evidence contained within the Investigation Report together with the additional information provided from Christian Cooper of NARU who had advised that HART units could enhance their capabilities locally but only if such enhancements had been approved through the national change management process by way of the submission of a change management request (c) the claimant had confirmed during his investigation meeting on 16 October 2017 that the respondent had equipment which went above and beyond the national specifications as he did not believe that this needed to be completed in line with NARU guidelines and that he had not completed a SOP for enhanced safe working at height capability and (d) the claimant had admitted that he had conducted two exercises whereby HART operatives were lowered on twin line rope systems without the fire service or a commercial trainer in attendance (e) having reviewed the papers, the appeal panel had been unable to locate any required documentation (f) the appeal panel had concluded that the claimant had failed to provide any documentation or explanation to mitigate acting outside of the national specification within HART or the additional risk presented to staff and the respondent by reason of such actions (including the failure to provide an SOP) and as a result of which he had placed the respondent at considerable risk.
- 84.3 Allegation (c) - the deployment of HART operatives into an unsafe water training environment during a training course at Llangollen. Mrs Winslade advised the claimant that the appeal panel had reviewed the documents which he had submitted in early January 2018 regarding the training course at Llangollen which had consisted of two course feedback forms from two members of staff who had stated that they had found the course valuable and beneficial. Mrs Winslade further stated that the panel had considered such documents in conjunction with the evidence

contained within the Investigation Report which she also identified in the letter. Mrs Winslade advised the claimant that having reviewed the relevant documents the panel recognised that two members of staff had found the training invaluable. Mrs Winslade further stated however, that the claimant had failed to provide the appeal panel with any evidence to mitigate the risk in which he had placed staff including as (a) within the risk assessment it stated that no one was to commit to the water when the marker level was at or above 11 (b) SC had advised in his statement that the water level limit was lowered to 10 following advice from local experts as the river was in full flood and (c) EW had advised that when carrying out a practical water session the water level was just above 11. Mrs Winslade stated that in conclusion (a) the claimant had not provided any documentation or explanation that mitigated the decision to deploy HART operatives into an unsafe water training environment during a training course at Llangollen (b) on the balance of the evidence the panel was satisfied that the claimant had committed staff to unsafe water levels which were in contravention of the risk assessment and (c) accordingly the appeal panel had decided to uphold the decision of the disciplinary panel.

#### **Other matters**

85. The claimant has submitted the further unsigned statements which are contained at pages 163 a – z of the bundle. These statements were not prepared/submitted by the claimant until after the conclusion of the appeal process/ during the course of the tribunal proceedings. Such statements are highly supportive of the training provided by and conduct/character of the claimant. None of these statements are however, directly relevant to the matters in issue save that:-

- (1) The statement of Mr Douglas Kemp Operations Director of RIG Systems Limited (at pages 163 (f) – (g) of the bundle) states that the claimant had received the necessary training required for persons setting up and operating twin line systems for lowering or raising people during training or as part of an emergency response.
- (2) The statement of Mr G Baxter (pages 163 (h) – (i) of the bundle) in which he gave his recollections of the swift water training at Llangollen in March 2017 including that (a) it had been carried out to a high standard/ was professionally delivered and that he had no concerns regarding safety (b) he however felt held back by some members of HART who seemed to be struggling in the water which showed a clear divide between the skill and knowledge of a number of staff.

- (3) The statement of Mr L Kilbride (page 163 (q) of the bundle) containing his recollections of the water training at Llangollen in March 2017 including that (a) he considered that it had been well structured and professionally delivered and (b) although the hazards present presented a challenging situation the risks were mitigated by the safe systems of worked implemented by the instructors and he felt safe and supported by them.
- (4) The further statements from the personnel who participated in the Llangollen training in March 2017 (at pages 163r, 163s -t , 163w and 163 y of the bundle) which are also supportive of the training provided by the claimant during the course.

**Further findings of fact for the purposes of (a) the claimant's wrongful dismissal claim and (b) any requirement, if the claimant is found to have been unfairly dismissed, to determine any issues relating to contributory fault /and any adjustments to any awards pursuant to sections 122 and 123 of the Employment Rights Act 1996.**

**Allegation (a) – That the claimant had exhibited a pattern of inappropriate behaviour towards colleagues**

#### **The respondent's case**

86. The respondent relied upon the alleged conduct of the claimant as set out in the Summary of Findings of the Investigation Report (paragraph 3 pages 269-271 of the bundle) and the accompanying documentation as subsequently as determined at the subsequent disciplinary/appeal hearings. A1 remains in the employment of the respondent. The respondent has not however adduced any oral evidence from A1 or any other witnesses regarding this matter. The respondent relied in particular on the following: -

- (1) **The claimant's alleged conduct towards A1** as recorded in a letter from the respondent dated 12 June 2017 (at pages 120-121 of the bundle) as set out at paragraphs 24 – 25 above.
- (2) The claimant's recorded admission at the investigation meeting with Mr Lee on 16 October 2017 (page 186 bundle) that he did not deny, "that I had touched her backside as I picked her up of the floor" and .... " I hug people on a regular basis and they hug me. I just picked her up (off the floor) and she never complained about it".

- (3) **The claimant's alleged conduct towards JD** including (a) as detailed in the respondent's unsigned meeting notes dated 18 July 2017 (pages 127 – 129 of the bundle ) of a discussion between JD and the respondent's then head of HR Projects (the respondent has not adduced any oral evidence/a signed statement from JD who left the employment of the respondent or around 15 August 2017) (b) the written evidence from SG contained in an email exchange dated 7 October 2017 (at pages 180-181 of the bundle) concerning the alleged failure of the claimant to cooperate with JD concerning training matters and (c) the exchange of text messages between the claimant and JD (at pages 311 onwards of the bundle) which were provided to the respondent by the claimant.

### **The claimant's position**

#### **87. The Claimant's position regarding A1**

- (1) In summary, the claimant challenged in his witness statement for the Tribunal proceedings the way in which the matter had been dealt with by the respondent including that (a) the respondent's outcome letter was not a true reflection of what had happened (b) that no one had made a complaint or reported any wrong doing/ no one who was present at the alleged incident was interviewed or asked to comment and (c) that an innocent act had been maliciously reinterpreted to bully him out of the unit/slander his reputation.
- (2) In summary, the claimant stated in his oral evidence to the Tribunal that (a) A1 was a relatively new employee who was junior to him (b) he denied having lifted A1 up by the buttocks (c) A1 had approached him for a hug and wrapped her legs around him so that he could not do anything other than hold her and that he did not deny touching her bottom (d) the claimant accepted that he had not given such an account to Mr Lee during the investigation meeting and (e) accepted that it would be unacceptable to purposefully grab someone by their buttocks without their consent and that such conduct would constitute gross misconduct.

#### **88. The claimant's position regarding JD**

- (1) In summary, the claimant denied/ contended in his witness statement to the Tribunal that (a) he had engaged in any inappropriate conduct towards JD including in respect of the alleged incident referred to in the meeting note dated 18 July 2017 at the top of page 128 of the bundle. The claimant

further contended that he had informed Mr Lee at the investigation meeting that there was a witness to the incident and invited him to interview CT / review the relevant CCTV footage (b) contended that he had provided to Mr Lee text messages which showed that JD did not consider herself to have been harassed by the claimant and (c) contended that JD had on occasions been aggressive towards him including kicking him aggressively in the groin.

- (2) The claimant also provided alleged supporting evidence regarding JD's alleged inappropriate behaviour including in the witness statement / oral evidence from CT in which she described JD acting in an aggressive/excessive manner towards the claimant.

**The Tribunal's factual findings in respect of the claimants alleged inappropriate behaviour towards colleagues**

**The Tribunal's factual findings in respect of A1**

- 89.** The Tribunal has given careful consideration to the available evidence including that (a) the Respondent has not adduced any oral or written evidence from A1 regarding the alleged incident notwithstanding that she remains in the employment of the respondent and (b) the respondent has also not adduced any oral or written evidence from any witnesses to the incident/anyone involved in the subsequent "informal disciplinary hearing".
- 90.** Having given the matter careful consideration, the Tribunal is satisfied, on the balance of probabilities, that the incident occurred as described in the third paragraph of the respondent's letter dated 12 June 2017 (at page 120 of the bundle) as recorded at paragraph 25 above.
- 91.** When reaching the above conclusions the Tribunal has taken into account in particular, that (a) the recorded version of the incident was not challenged at the relevant time by the claimant under the respondent's grievance procedure and (b) that the claimant acknowledged to Mr Lee during the investigation meeting (page 186) that he hugged people on a regular basis/ that they hugged him and that he did not deny that he had touched A1's backside as he had picked her up from the floor. Further, the Tribunal rejects the claimant's evidence to the Tribunal that A1 had wrapped her legs around him precipitating the incident. When reaching this conclusion the Tribunal has taken into account in particular, that there is no reference to any such action on the part of A1 in the respondent's letter dated 12 June 2017 (pages 120 – 121 of the bundle), in the notes of

the investigation meeting with Mr Lee (page 186 of the bundle ) or in the claimant's witness statement for the Tribunal proceedings.

### **The Tribunal's factual findings in respect of JD**

**92.** The tribunal has given careful consideration to the available evidence including in particular, that (a) the respondent has not adduced any oral or written evidence from JD save in respect of the unsigned meeting note dated 18 July 2017 at pages 127-130 of the bundle (b) the written and oral evidence of CT and other witnesses of behalf of the claimant regarding the conduct of JD and (c) the exchange of text messages provided by the claimant (at page 311 onwards of the bundle).

**93.** The Tribunal is satisfied, on the balance of probabilities, that: -

(1) The claimant and JD, who were of an equivalent standing in the respondent, had a complex and fractured relationship (as acknowledged by the claimant) during which they contacted each other by text messages/ telephone outside of working hours regarding personal issues.

(2) The claimant expressed admiration for and wished to have a personal relationship with JD which was not reciprocated by her.

(3) The claimant had on at least one occasion approached JD by attempting to hug her and caused JD to react strongly and storm off (page 184 of the bundle and the evidence of CT).

(4) The claimant had on occasions chosen not to respond to JD's text/telephone messages relating to work-related matters (the evidence of SG at pages 180 – 181 of the bundle) and

(5) JD had on occasions behaved in a manner towards the claimant and others which was perceived by them to be inappropriate / aggressive (paragraphs 45 and 57 above).

**Allegation (b) that the claimant had been complicit in the deployment of safe working at height practices(SWaH) within HART Exeter that fell outside of the national specification and did not have the necessary governance in place which actions left HART operatives and the respondent at risk.**

### **The respondent's position**

**94.** The respondent relied upon the alleged conduct of the claimant as set out in the Summary of Findings (paragraph 3 of Mr Lee's investigation report at pages 272-275 of the bundle) and accompanying/ further documents as subsequently upheld by the disciplinary/appeal panels and in particular, that: -

- (1) The claimant had acknowledged that there was no relevant Statement of Practice (SOP) in respect of enhanced SWaH capability by Exeter HART.
- (2) Two training exercises (for which the claimant was responsible) had taken place at Foggin Tor in May 2015 and Tamar Bridge in August/September 2016 at which HART operatives were lowered on a twin line rope system without partner agencies or a commercial trainer in place (page 272 of the bundle).
- (3) In an email dated 21 September 2017, Mr C Cooper, Head of Compliance at NARU had confirmed that no consultation /conversation had taken place regarding the SWaH enhancements in place the Exeter HART unit.
- (4) The claimant had advised that several HART teams had extended their SWaH capability and that Exeter had put SWaH working in place above and beyond the national specification (page 275 of the bundle).
- (5) The evidence contained in the email from Mr Cooper dated 18 November 2017 (pages 205-207 of the bundle) to Mr Birkett- Wendes including (a) the requirement for any HART training to be conducted and approved nationally for the training to be considered safe and authorised (b) that the respondent had not submitted a change management request to NARU to enhance their SWaH capability and (c) that in the absence of any such national approval the procedure implemented locally became the responsibility of the local organisation which would need to have clear risk assessments to cover the enhanced activity and be clearly approved and endorsed by the respondent in order to avoid potential corporate liability/ risked breaching the standards of NARU.

### **The claimant's position**

**95.** In summary, the claimant contended in particular in his witness statement/evidence to the Tribunal that: -

- (1) Where training had taken place with live casualties they had always used a two-line system in order to ensure compliance with SWaH Regulations.
- (2) He had provided pictures of training events organised by Bristol HART which proved that it was common practice for them to organise and carry out training using two-line systems employing HART equipment and using qualified trainers with no partner agency or commercial trainer involved in the planning or execution of the training.



(3) He denied making any comment to Mr Lee at the investigation meeting that a change request form was not required for equipment to go above and beyond the service specification.

(4) The claimant further denied that he had informed Mr Lee that Exeter HART had worked outside of the relevant SWaH regulations and contended that accordingly, he not therefore submitted a change request form to NARU,

(5) The claimant further contended that he had never written a SOP or implemented local agreements as the respondent had never declared itself as a rope rescue team.

(6) The claimant also relied on the statements from staff referred to above testifying to the safety and quality of the SWaH training at Exeter HART.

**The factual findings of the Tribunal concerning Allegation (b)**

**96.** The Tribunal has given careful consideration to the available evidence including in particular the summary of findings contained in Mr Lee's investigation report (at pages 272- 275 of the bundle), the contents of Mr Cooper's email to Mr Birkett- Wendes dated 18 November 2017 (at pages 205 - 207 of the bundle) and the evidence of the claimant and his witnesses.

**97.** The Tribunal is satisfied on the balance of probabilities that: -

(1) The claimant was the responsible person for the Foggin Tor and Tamar Bridge exercises in May 2015 and August / September 2016 respectively.

(2) During both of the above exercises HART operatives were lowered on twin line/ double twin line rope systems without a partner agency ( such as the Fire and Rescue service)/ a commercial trainer in place.

(3) At the Tamar Bridge exercise, the health and safety representative for the Bridge (an IRATA level 3 instructor) oversaw the first rotations following which HART staff continued to be lowered as part of a twin line system without the presence of a partner agency/commercial training provider.

(4) The relevant NARU guidelines/SOP in place at the relevant times required rope lines to be put in place by another technical rescue provider such as the Fire and Rescue service and for such exercises to be undertaken in the presence of a partner agency/ commercial training provider.

(5) No change management request form had been submitted by the respondent to NARU and further there was no respondent approved

governance in place permitting the setting up/use of twin/double line rope systems outside the relevant NARU guidelines/ SOP at the time of/ in respect of the Foggin Tor and Tamar Bridge exercises.

(6) A number of the participants in the Foggin Tor and Tamar Bridge exercises considered the training provided by the claimant to be well organised and of value.

**Allegation (c) - As course director the claimant oversaw the development of HART operatives into unsafe water training environment during a training course at Llangollen**

98. The respondent relied upon the alleged conduct of the claimant as set out in the Summary of Findings at paragraph 3 of Mr Lee's investigation report (pages 275-276 of the bundle) and accompanying documents as subsequently upheld by the disciplinary and appeal panels and, in particular that:-

(1) The claimant was the course director at the Swift water rescue training re-certification event at Llangollen on 8 and 9 March 2017.

(2) The concerns raised by EW, HART Lead Paramedic, in an email to J D dated 19 March 2017 (at page 114 of the bundle) regarding in particular (a) the alleged unsafe deployment of HART staff into the water just after midday on the first day of the course when the river marker was allegedly just above 11 (in contravention of the risk assessment) and (b) the alleged dismissive attitude of the instructors to safety concerns and (c) that one of the participants had twisted his shoulder exacerbating an existing injury when using the only means of self-rescue.

(3) The safety concerns raised by M and SC including the concerns raised by SC the Acting HART training manager at Bristol, during an investigatory meeting with Mr Lee on 9 October 2017 (pages 171-172 of the bundle including his concerns that the site was unusable as the river was in full flood and his contention that following discussions with local experts it was agreed that (a) parts of the river were unusable and (b) they should set a safe working level of 10 on the water gauge.

(4) The Analytical Risk Assessment dated February 2017 at pages 416-418 of the bundle including that (a) the general water related hazards were described as "Fast, Powerful, high water flow sweeping staff downstream to River right.." (b) nobody was to commit to the water when the marker level was at or above 11 and (b) "only SRT qualified students and competent and confident students (willing) under direct supervision to commit" (to the water).

(5) The respondent's SRT Records of Venue Conditions dated 8 March 2017 at pages 109 – 110 of the bundle, which were signed by the claimant, including that (a) the record at page 109 (which was timed at

7.02 am ) recorded a water meter marker reading of 11.8 and (b) the record at page 110 (which was timed at 14. 45pm) recorded a water meter marker of 11).

### **The claimant's position**

99. The claimant confirmed in his oral evidence to the Tribunal that he did not submit any witness evidence to the disciplinary/appeal hearing panels regarding the training exercise at Llangollen in March 2017.

100. The claimant contended in his witness statement for the Tribunal in particular that:- (a) he had addressed the issues of water level during the training course including by demonstrating to E W that the main water level entry was 10 but that the "nursery" area in question could be entered with additional measures (which had been approved by the owners of the site/specialist training provider, River Active) up to a marker level of 11 and (b) following a meeting with the instructors and River Active personnel, staff were permitted to train when the water level marker had fallen to 10.8 and (c) it was untrue to suggest that anyone apart from EW and her boyfriend had said that the water levels were too dangerous/ that they would not commit to water.

101. The claimant relied on an undated letter from River Active Limited (page 112 of the bundle) including the contentions in the letter that (a) the river level had been dropping all day and by just after lunch had dropped to a level that was covered by the risk assessment (b) the training was confined to the nursery section of the river (c) no one had raised any issues with River Active regarding the course and (d) that the respondent's risk assessments were some of the most comprehensive provided by any of the emergency services using the site and the instructors were knowledgeable and showed a great deal of professionalism and integrity throughout.

102. The claimant also relied upon the written and oral evidence of his witnesses including in particular: -

- (1) The witness evidence of Mr McGachy, HART Operations Manager who was the lead water instructor responsible for designing the water course and preparing the associated programme and risk assessments for the training course at Llangollen including that (a) the complaints about the training at Llangollen were confined to 2 members of staff who were in a relationship whilst the feedback from the remaining students was positive (b) the nursery site risk assessment permitted water entry up to and including 11 and (c) he believed that the marker was at 10.8 when the

students entered the water but in any event did not exceed 11.

- (2) The witness evidence of Mr G Baxter (pages 163 (h)- (i) of the bundle) including that (a) the area was properly risk assessed and appropriate measures put in place (b) the training was supportive with extra time given to some participants to allow them to achieve the standard required.
- (3) The witness evidence of Mr L Kilbride including that (a) comprehensive risk assessments and associated discussions were undertaken (b) that although the water level was significant he felt totally safe and well prepared to enter the water (c) he did not hear any of the participants raise any concerns and (d) once on the water it was apparent that there was a difference in the abilities between the Exeter and Bristol teams with the Exeter team being more confident and knowledgeable.
- (4) The further supportive witness statements from SD (page (page 163 (r)) of the bundle), DR (pages 163 (s)-(t) of the bundle, MS (page 163 (W) of the bundle) and DK (page 163 (y) of the bundle.

**The Tribunal's factual findings in respect of allegation (c).**

103. Having given careful consideration to all of the above the Tribunal has made, on the balance of probabilities, the factual findings referred to below. When reaching its findings, the Tribunal has taken into account that it has not received any oral evidence from EW/ M or SC regarding this matter.
104. The Tribunal is satisfied, on the balance of probabilities, that: -
  - (1) The claimant was the course director of the SRT re-certification course that took place at Llangollen on 8 and 9 March 2017. He was assisted in particular at that course by Mr McGachy who was the lead water instructor responsible for designing the watercourse and associated matters.
  - (2) An analytical risk assessment was carried out by Mr McGachy in advance of the SRT training at Llangollen. This risk assessment is at pages 416-417 of the bundle, the principal contents of which are summarised as referred to at paragraph 98 (4) above.

- (3) The river was in full flood on 8 March 2017 and the water conditions were challenging.
- (4) The SRT record of venue conditions dated 8 March 2017 (which is at timed at 7.02am) (page 109 in the bundle) which was signed by the claimant, records a meter marker water level of 11.8 and advises that there should be “No entry”.
- (5) The SRT record of venue conditions dated 8 March 2017 (page 110 of the bundle) (which is timed at 14.45) which was signed by the claimant, records a meter marker water level of 11 and advises that “Water level subsided. Nursery only”.
- (6) Participants including EW raised concerns with the claimant/Mr McGachy on 8 March 2017 regarding the water level and conditions. Further, some people (particularly from the Bristol HART team) struggled in the water. When reaching this conclusion the Tribunal has taken into account in particular (a) the contents of EW’s email to JD dated 19 March 2017 (at page 114 of the bundle) (b) that Mr Mc Gachy accepted in his oral evidence to the Tribunal that EW had raised with him concerns about the adequacy of safety on the nursery slopes and that at least one person struggled in the water and (d) the statement of Mr Baxter in which he stated that although he felt comfortable and safe in all tasks he felt held back by some members of HART who seemed to be struggling in the water (paragraph 163 (h) of the bundle).
- (7) One of the participants on the course exacerbated an existing shoulder injury when seeking to catch hold of the tension diagonal to self-rescue. No datix report was submitted in respect of this injury notwithstanding that the claimant accepted in his oral evidence that it was his overall responsibility as course director to ensure that such a report was submitted.
- (8) A significant number of the participants considered the course of high standard and of significant value to them in their day-to-day working and further that it was professionally organised and run by the claimant and his colleagues

105. The Tribunal is not satisfied, on the balance of probabilities, that the water maker level (including on the nursery area) had fallen below

11 when course participants entered the water on 8 March 2017. When reaching this conclusion the Tribunal has taken into account in particular that (a) there is no documentary evidence to indicate that the water marker level fell below 11 on 8 March 2017 (b) the SRT record of venue conditions timed at 14.45 records a meter marking of 11 and goes on to note “nursery only” (c) the written statement of EW (in her email to JD dated 19 March 2017) that “Bristol committed to the water around midday with the water level just above 11, in direct contradiction to their own risk assessment” (page 115 of the bundle) and (d) the claimant has not produced any documentary evidence in support of the contention contained in his witness statement that the staff were allowed to train when the water marker level had dropped to 10.8. When reaching this conclusion the Tribunal has also taken into account that although River Active state in the undated letter at page 112 of the bundle that the river level was dropping throughout the day and that by just after lunch had dropped to a level that was covered on the risk assessment, this is at odds with the water meter marker level recorded at 14.45 (page 110). Furthermore River Active did not state/ has not provided any documentary evidence to confirm the level of the water at the relevant time.

#### **CLOSING SUBMISSIONS**

106. The parties provided written closing submissions/ skeletons. The respondent also provided a number of legal authorities upon which it sought to rely as referred to further below.

#### **THE LAW**

107. The Tribunal has had regard, in particular, to the following statutory/associated provisions authorities referred to below.

#### **The claimant’s complaint of unfair dismissal**

108. The Tribunal has had regard in particular to the following: –

- (1) Sections 98, 122 and 123 of the Employment Rights Act 1996 (“the Act”) and Section 207 A of the Trade Union and Labour Relations (Consolidation) Act 1992.
- (2) The ACAS Code of Practice 1 Disciplinary and Grievances (2015) (“the ACAS Code”).
- (3) The following legal authorities:-

**British Home Stores Ltd v Burchell 1980 ICR303 EAT**  
**Samuel Smith Old Brewery (Tadcaster) v Marshall**  
**and another EAT 0488.09**  
**Santamera v Express Cargo Forwarding t/a IEC**  
**Limited 2003 IRLR 273 EAT**

**West Midland Co- operative Society Limited v Tipton  
1986 ICR192  
Taylor v OCS Group Ltd 2006 IRLR 613  
Airbus UK Limited v Webb 2008 ICR 561 CA**

109. The Tribunal has reminded itself in particular of the following matters: -

- (1) The starting point is section 98 (1) of the Act. It is for the respondent to establish the reason for the claimant's dismissal or, if more than one, the principal reason for the claimant's dismissal, including that it had a genuine belief in such reason and that it was for one of the potentially fair reasons permitted by section 98 (1)/(2) of the Act.
- (2) If the respondent is able to establish the reason for the claimant's dismissal, the Tribunal has to determine whether such dismissal was, in all the circumstances of the case, fair or unfair having regard to all of the matters set out in section 98 (4) of the Act. This includes whether (a) the respondent's belief that the claimant was guilty of the alleged misconduct was based on reasonable grounds and after undertaking reasonable investigations and (b) the respondent acted fairly or unfairly in all the circumstances in treating the reason as sufficient for dismissal having regard to the size and administrative resources of the respondent and in accordance with equity and the substantial merits of the case. The burden of proof is neutral at this stage.
- (3) When considering the above, the Tribunal has to determine whether the overall procedure adopted by the respondent and also the decision to dismiss the claimant/to reject his appeal considered together, fell within the range of responses of a reasonable employer. The Tribunal is not entitled to substitute its own decision. When determining the fairness of the procedure adopted by the respondent the Tribunal has to have regard to the overall disciplinary/appeal process including whether the respondent adhered to its own policies and the provisions of the ACAS Code.
- (4) Dismissal for a first offence may be justified, notwithstanding the lack of any previous misconduct, including where (a) the act of misconduct is so serious that dismissal is a reasonable sanction (b) where the rules make it clear that a particular conduct will lead to dismissal

and/or(c) where the employee has made it clear that he/she is not prepared to alter their attitude so that a warning is unlikely to lead to any improvement.

- (5) A finding of gross misconduct does not automatically justify dismissal and it is important to consider any mitigating factors which might justify a lesser sanction for reasons specific to the employee or the incident in question.
- (6) If the Tribunal considers that there were defects in the process which were sufficiently serious to render the claimant's dismissal unfair, the Tribunal is required to consider for the purposes of any award of compensation (if it is possible to do so on the evidence available), what is likely to have happened if a fair procedure had been followed. This includes consideration of the percentage chance that the claimant would thereafter have been fairly dismissed for the purposes of any compensatory award pursuant to section 123 (1) of the Act.
- (7) If the Tribunal finds that the claimant has been unfairly dismissed, the Tribunal is also required to determine whether there should be any reduction/further reduction in any basic and/or compensatory award pursuant to sections 122(2) and/or 123(6) of the Act by reason of the claimant's contributory fault. The Tribunal has reminded itself that contributory fault covers a wide range of conduct and can include culpable, blameworthy, foolish or otherwise unreasonable behaviour. The Tribunal has also reminded itself however, that for the purposes of determining any contributory fault it has to be satisfied that the claimant was, on the balance of probabilities, guilty of any such conduct, that it caused or contributed to the dismissal and that it is just and equitable to reduce any award.

#### **The claimant's complaint of wrongful dismissal**

110. the Tribunal has reminded itself that it is required to apply a contractual test in respect of the claimant's complaint of wrongful dismissal for breach of contract relating to his entitlement to notice/notice pay. It is for the respondent to establish, on the balance of probabilities, that the claimant was guilty of gross misconduct. In order to amount to gross misconduct the claimant must have committed an act/acts which fundamentally undermine the contract namely, repudiatory conduct by the claimant going to the root of the contract. Moreover, the conduct must be a deliberate and wilful breach of the contractual terms or amount to gross negligence.



## **THE CONCLUSIONS OF THE TRIBUNAL**

111. The Tribunal has addressed the issues in the order identified at paragraphs 10-11 of the List of Issues in the Order dated 4 January 2019 (“the List of Issues”) unless otherwise indicated below.

### **THE CLAIMANT’S COMPLAINT OF UNFAIR DISMISSAL**

#### **The reason for dismissal (paragraph 10.1 of the List of Issues)**

112. The Tribunal has considered first the reason for the claimant’s dismissal. It is for the respondent to satisfy the Tribunal, on the balance of probabilities, of the reason/principal reason for the claimant’s dismissal including (a) that it was for a potentially fair reason for the purposes of section 98 (1)/ (2) of the Act and (b) that it had a genuine belief in such reason.

113. The respondent contended that the reason for the claimant’s dismissal (and the dismissal of his subsequent appeal) was conduct namely, in summary, the conduct of the claimant in respect of the following allegations: - (a) his alleged inappropriate conduct towards colleagues (b) his safe working at height practices and (c) the deployment of HART operatives in an alleged unsafe water training environment during a training course in Llangollen in March 2017. The respondent relied in particular on (a) the findings contained in the Investigation Report (b) the contents of the claimant’s letter of dismissal from Mr Birkett – Wendes dated 18 January 2018 (pages 293-297 of the bundle) and (c) the contents of the letter from Mrs J Winslade dated 15 June 2018 (pages 365 – 369 of the bundle) dismissing the claimant’s appeal.

114. The claimant’s case, as set out in his claim form and in the List of Issues, was that his dismissal was unfair for procedural reasons (including in particular, that the respondent failed to carry out a fair and balanced investigation and refused to allow him to call/question witnesses at the disciplinary hearing). Further the claimant confirmed at the commencement of the Hearing that he did not contend that he had been unfairly dismissed for making any public interest disclosures or because of any disability.

115. The Tribunal is satisfied having had regard, in particular, to its findings of fact at paragraphs 37-49, 51- 55, 70-73 and 81-84 above (including the contents of the Investigation Report and the respondent’s letters dated 18 January 2018 and 15 June 2018 dismissing the claimant/his appeal) that (a) the reason / the principal for the claimant’s dismissal was conduct namely the claimant’s conduct in respect of allegations (a) – (c) referred to above. The Tribunal is further satisfied

that in the light of the above, the respondent's disciplinary and appeal panels (primarily Mr Birkett-Wendes and Mrs Winslade) had a genuinely held belief that the claimant was guilty of such misconduct.

116. For the avoidance of doubt there was no evidence before the Tribunal to indicate that the claimant was dismissed/his appeal was dismissed for any reason other than in respect of the above mentioned alleged conduct.

117. The Tribunal is therefore satisfied that the respondent has established that the reason/principal reason for the claimant's dismissal was conduct for the purposes of section 98 (1)/(2) of the Act.

**The fairness of the claimant's dismissal for the purposes of section 98 (4) of the Act.**

118. The Tribunal has gone on to consider the fairness of the claimant's dismissal for the purposes of section 98 (4) of the Act. The Tribunal has reminded itself of the matters referred to above including that the Tribunal has to determine whether the overall procedure adopted by the respondent and the decision to dismiss the claimant/to reject his appeal, considered together, fell within the range of responses of a reasonable employer and that it is not entitled to substitute its own decision.

**Paragraphs 10.2 and 10.4 of the List of Issues - the investigation by the respondent**

119. The Tribunal has considered first whether the Respondent had reasonable grounds for its belief in the claimant's alleged misconduct following as reasonable an investigation as was warranted in the circumstances having regard in particular, to the procedural matters identified at paragraphs 10.2.1, 10.2.2 and 10.4.1 of the List of issues.

120. In summary, the claimant contended that the respondent had failed to undertake a fair and reasonable investigation including that (a) the investigation by Mr Lee was limited to a selected number of witnesses (b) that Mr Lee failed to consult with relevant technical experts and (c) that the respondent failed to interview other relevant witnesses (including the 29 witnesses whose identity had been brought to the investigating officer's attention) and/or (d) review other relevant documents.

121. In summary, the respondent contended that (a) it had undertaken a proper and reasonable investigation as set out in Mr Lee's Investigation Report and supporting documentation (b) the

claimant had had an opportunity to identify relevant witnesses during the investigation/ disciplinary process.

122. Having given the matter careful consideration, the Tribunal is satisfied that the respondent undertook a proper and reasonable investigation in all the circumstances (save in respect of the matter referred to below in respect of allegation (a) – relating to JD). Further, the Tribunal is satisfied that Mr Lee was not under any time pressure to conclude his investigations and that his investigation was appropriate in all the circumstances.

123. When reaching such conclusions the Tribunal has had regard in particular to :-

- (1) The provisions of the respondent's disciplinary procedure (at paragraph 4-page 88 of the bundle).
- (2) The provisions of the ACAS Code (paragraphs 5-8).
- (3) The Tribunal's findings of fact relating to the investigation and associated matters at paragraphs 37-49 and 51, 52, 55,56 and 58 above) including in particular (a) the interviews and documents referred to in Mr Lee's report and appendices (b) that the claimant did not identify during the course of the investigatory process (including during the investigatory meeting with Mr Lee on 16 October 2017) any witnesses/other persons to whom Mr Lee should speak (other than CT referred to below) (c) that the claimant had the assistance of his union representative, Mr Gage during the investigatory process and was given a reasonable opportunity to comment on the respondent's notes of the investigatory meeting (d) the claimant was advised by the respondent at the beginning of November 2017 (the respondent's letter to the claimant dated 6 November 2017 at pages 202-203 of the bundle) that the respondent had decided that there was a disciplinary case to answer at which time the claimant was provided with a copy of the Investigation Report and (e) the claimant did not however advise the respondent until 5 January 2018 of the 29 witnesses upon whom he proposed to rely/ call at the disciplinary hearing/ provide the respondent with any explanation of how he contended that the evidence of such witnesses was relevant to his case.

124. The Tribunal is however satisfied that a reasonable employer acting within the range of reasonable responses would have interviewed CT as part of the investigation process relating to allegation (a) (the allegations relating to JD) (paragraph 45 above). When reaching this conclusion the Tribunal has taken into account in

particular, that (a) the claimant identified CT as an eyewitness to an incident relating to JD and (b) that the respondent has not provided the Tribunal with any satisfactory explanation as to why Mr Lee did not interview CT as part of the investigatory process. The Tribunal has considered the effect of such failure when considering the overall fairness of the procedure for the purposes of section 98 (4) of the Act as addressed below.

**Paragraphs 10.2.3, 10.2.4/10.4.4, 10.4.1, 10.4.2, 10.4.3 and 10.4.6 of the List of Issues.**

**The conduct of the disciplinary process**

125. The Tribunal has gone on to consider the alleged procedural issues in respect of the conduct of the disciplinary hearing for the purposes of section 98 (4) of the Act.
126. In summary, the claimant challenged the fairness of the conduct of the disciplinary hearing on a number of grounds as identified in the List of Issues referred to above including in particular (a) the refusal of the respondent to allow the claimant to call his proposed 29 witnesses/question persons who had contributed to the investigation on behalf of the respondent (b) the failure of the respondent to provide the disciplinary panel (and that such information was therefore not taken into account) with the mitigation and associated documentation submitted by the claimant prior to the disciplinary hearing and (c) that Mr Birkett – Wendes should not have dealt with/continued with the disciplinary hearing as there was an grievance against him.
127. The respondent denied the allegations of procedural unfairness including in summary, on the grounds that (a) the claimant had been given a proper opportunity to call/ challenge witness evidence (b) the respondent took a reasonable and proportionate approach to the attendance of /calling of witnesses particularly in the light of the fact that the claimant did not identify until 5 January 2018 that he proposed to call 29 witnesses/requested the attendance of 18 further witnesses from the respondent and refused to limit or provide an explanation of the relevance of their evidence to the case (c) the respondent had responded promptly to the claimant's grievances in a constructive manner and in accordance with the respondent's disciplinary/grievance procedures and (d) the claimant and his representative withdrew from the disciplinary hearing without bringing any witnesses or witness statements or making any representations as to the substance of the case. The respondent accepted however, that the "mitigation " and

associated documentation submitted by the claimant prior to the disciplinary hearing was not provided to the disciplinary panel.

128. Having given the matter careful consideration, the Tribunal is satisfied that the respondent's conduct of the disciplinary hearing and associated matters (including in respect of the procedural matters referred to above) was within the range of responses of a reasonable employer, save in respect of the failure by the respondent to submit the claimant's mitigation and other documentation to the disciplinary panel (which is addressed separately below).

129. When reaching its conclusions, the Tribunal has taken into account the provisions of the respondent's disciplinary and grievance procedures (paragraph 19 above) and the provisions of the ACAS Code (including paragraphs 9-12 and 26). The Tribunal has noted (a) the entitlement stated at paragraph 4 of the respondent's disciplinary procedure (page 90 of the bundle) to call witnesses at a disciplinary hearing together with the associated responsibility to arrange for such attendance (b) that paragraph 13 of the ACAS Code entitles employee to be given, "a reasonable opportunity to ask questions, present evidence and call relevant witnesses" and (c) paragraph 46 of the ACAS Code recognises that, "where the grievance and disciplinary cases are related it may be appropriate to deal with both issues, concurrently".

130. The Tribunal is satisfied that it was within the range of responses of a reasonable employer in all the circumstances of the case to (a) refuse the claimant's request on 5 January 2018 to call 29 witnesses / to require a further 18 people to attend the disciplinary hearing on 12 January 2018/ to seek to limit the claimant's witness evidence ( including by the submission of witness statements) (b) address the claimant's grievance dated 9 January 2018 as part of the disciplinary process including the proposed way forward as set out in the respondent's letter dated 10 January 2018 (paragraph 65 above) and (c) proceed with the disciplinary hearing in the claimant's absence and with Mr Birkett Wendes as the disciplinary chairman in the light of the claimant's refusal to participate in the disciplinary hearing and the resolution of the grievance as indicated above having regard in particular, to the following matters:-

- (1) That the claimant was, at all relevant times, assisted by Mr Gage, who represented himself as an experienced trade union representative.
- (2) That the claimant was provided with a copy of Mr Lee's Investigation Report and associated documentation/was advised of the disciplinary proceedings against him at

the beginning of November 2017 (the respondent's letter dated 6 November 2017 at pages 203-203 of the bundle and paragraph 55 above).

- (3) That the disciplinary hearing was originally arranged for 16 November 2017 and was subsequently postponed on two subsequent occasions at the request of the claimant before ultimately taking place on 12 January 2018. The claimant had therefore had over two months to prepare for the disciplinary hearing/ advise the Respondent of his intentions regarding witness evidence. Further, the Tribunal is satisfied that the claimant / his representative would/ should reasonably have appreciated that the intention to call / require the attendance of a total of over 40 witnesses (particularly at such short notice further without giving any indication of their relevance to the case) would have been impracticable/ unreasonable.
- (4) The correspondence passing between the parties concerning the attendance of witnesses and associated matters between 5 January 2018 and 11 January 2018 including the claimant's grievance dated 9 January 2018 and the respondent's response dated 10 January 2018 (paragraphs 58 – 66 above) (including that it was made clear to the claimant in the respondent's letter dated 10 January 2018 that the respondent was prepared to consider witness evidence as set out in that letter-paragraph 65 above).
- (5) The claimant/ his trade union representative did not suggest in any correspondence prior to the disciplinary hearing that any of the claimant's witnesses were unable to submit witness statements and /or required a safe/closed environment in order to present their evidence.

### **The fairness of the disciplinary hearing and associated processes**

131. The Tribunal has therefore gone on to consider whether the disciplinary and associated processes (including up to the disciplinary hearing on 12 January 2018) complied with the ACAS Code and further, whether, in any event, the procedure adopted by the respondent in respect of such processes was within the range of responses of a reasonable employer. When considering this matter the Tribunal has taken into account in particular the provisions of the respondent's disciplinary/ grievance procedures and of the ACAS Code as referred to above.

132. Having given the matter careful consideration the Tribunal is not satisfied that the procedure adopted by the respondent at the disciplinary stage of the process was fair as being within the range of responses of a reasonable employer having regard to (a) the failure of the respondent to interview CT, as raised by the claimant during the investigation meeting, regarding the allegations relating to JD (paragraph 45) in respect of which the respondent has failed to provide any satisfactory explanation to the Tribunal and (b) the failure of the respondent to provide to the disciplinary panel the statements and other documentation which was submitted by the Claimant for the purposes of the disciplinary hearing (paragraph 57 above) for which the respondent has also failed to provide a satisfactory explanation. When reaching this conclusion the Tribunal has taken into account in particular the size and resources of the respondent/its HR partners together with the provisions of paragraph 12 of the ACAS code which provides that the employee should be given a reasonable opportunity to present evidence.

133. The Tribunal is however further satisfied, for the reasons explained below in respect of the appeal process, that the above procedural matters did not render the claimant's dismissal unfair for the purposes of section 98 (4) of the Act. When reaching such conclusion the Tribunal has considered such procedural matters in the context of the overall process having regard in particular to the findings of the Tribunal concerning the appeal process subsequently conducted by Mrs Winslade as addressed below.

#### **The conduct of the appeal/ the fairness of the overall process**

134. The Tribunal has gone on to consider whether (a) the procedure adopted by the respondent at the appeal stage was within the range of responses of a reasonable employer and (b) further whether in the light of such findings, the overall procedure adopted by the respondent was fair for the purposes of section 98 (4) of the Act.

#### **Allegation 10.4.5 - the claimant's appeal**

135. The claimant contended in paragraph 10.4.5 of the List of Issues that the conduct of the appeal hearing by the respondent was unfair as he was informed that the case would not be reheard which was unfair because it had not previously been held in full by the respondent.

136. The respondent accepted that the appeal hearing was not conducted as a rehearing but contended that the appeal process was appropriate in all the circumstances including as (a) there was no obligation on the respondent to conduct a rehearing at the appeal stage and (b) it was not, in any event, appropriate to do so in the light

of the fact that the claimant had had ample opportunities to present his case but had failed to engage with the respondent.

137. When reaching its conclusions regarding this issue the Tribunal has had regard in particular to (a) the provisions of the respondent's disciplinary procedure (b) the provisions of the ACAS code and (c) its findings of fact relating to the appeal process (including the contents of the claimant's letter of appeal presented on 24 February 2018 (paragraph 75 above ) and its subsequent findings regarding the appeal process culminating in the respondent's outcome letter dated 15 June 2018 (paragraphs 78-84 above).
138. Having given careful consideration to all of the above the Tribunal is satisfied that the appeal process conducted by the respondent was fair and within the range of responses of a reasonable employer.
139. When reaching such conclusions the Tribunal has taken into account in particular the following matters:-
- (1) The provisions of the respondent's disciplinary procedure relating to the conduct of appeals at pages 93 and 95 of the bundle (including that they do not include any right for rehearing).
  - (2) The provisions of the ACAS Code (paragraph 26-29) including that the ACAS Code does not contain any requirement for a rehearing and,
  - (3) The findings of fact in relation to the appeal process identified above, including in particular (a) the limited nature of the claimant's grounds of appeal (paragraph 75) which concentrated on the respondent's refusal to allow him to call witnesses at the disciplinary hearing (b) the limited further documentation submitted by the claimant in response to the disciplinary allegations (paragraph 76) (c) the limited nature of the claimant's challenge to the fairness of his dismissal at the appeal hearing (paragraph 79 above ) (d) the opportunity which was given to the claimant to submit further witness statements/ questions for the respondent's witness so that the respondent could consider whether their attendance would have had a material impact of on the outcome of the claimant's case - to which the claimant did not respond (paragraph 82) and (e) the appeal panel's consideration of the documents which the claimant had submitted (but which had not been presented to the disciplinary panel by the respondent) (paragraphs 78 and 83 above) and (f) the detailed and



considered outcome letter dated 15 June 2018 (paragraph 84 above).

140. In the light of all the findings referred to above the Tribunal is satisfied that, having regard to the overall procedure adopted by the respondent by the conclusion of the appeal, the process was fair for the purposes of section 98 (4) of the Act having regard to the provisions of that section and the guidance contained in the above mentioned authorities of **West Midlands v Tipton and Taylor v OCS** referred to above.

**Issue 10.3 of the List of Issues - Was the decision to dismiss the claimant a fair sanction, that is, was it within the range of responses open to a reasonable employer when faced with these facts including having regard to the claimant's contentions that (a) "an informal conversation" regarding A1 was used against him and (b) he was not guilty of any misconduct and no sanction would therefore have been appropriate.**

141. In summary, the claimant contended that the decision to dismiss him was not a reasonable response as the respondent (a) did not take into account 17 years of exemplary service (b) the informal discussions relating to A1 were used to "fabricate" a pattern of behaviour and (c) that the respondent could not have reasonably found, on the balance of probabilities, that the claimant was guilty of gross misconduct.

142. In summary, the respondent contended that (a) in the light of the multiple aspects of misconduct, the safety critical nature of the claimant's work and the seriousness of the misconduct it was plainly within the range of responses to dismiss the claimant (b) Mr Birkett – Wendes and Mrs Winslade gave proper consideration to the claimant's length of service and previous record and (c) they were entitled to take into account the incident relating to A1 as part of a pattern of inappropriate behaviour.

### **The conclusions of the Tribunal**

143. When determining this issue the Tribunal has given careful consideration to the matters identified in section 98 (4) of the Act . Further the Tribunal has reminded itself that it has to consider whether the decision to dismiss the claimant was, in all the circumstances, within the range of responses of a reasonable employer and that it is not entitled to substitute its own decision.

144. Having given the matter careful consideration, the Tribunal is satisfied that the respondent's decision to dismiss the claimant (having

regard also to the outcome of the appeal process) for misconduct was, in all the circumstance within the range of reasonable responses of a reasonable employer and fair for the purposes of section 98 (4) of the Act.

145. When reaching this conclusion the Tribunal has taken into account in particular:-

146.

- (1) The nature of the claimant's role and responsibilities (paragraphs 22 and 23 above) including in particular that (a) the claimant held a managerial position and (b) the safety critical nature of the claimant's role as a training officer for HART including as reflected in the Leadership, Operational and Governance & Quality responsibilities contained in the claimant's job description (pages 73 -86 of the bundle) including the standard role requirements relating to risk (page 81 of the bundle).
- (2) The provisions contained in the claimant's conditions of employment requiring the adherence to the Respondent's policies (paragraphs 27, 29, 36, 38 and 43 of the terms and conditions at pages 68 – 69 of the bundle).
- (3) The serious nature of the allegations including in particular, that the Tribunal is satisfied that Mr Birkett – Wendes and Mrs Winslade were entitled to conclude on behalf of the respondent on the basis of the information which was before them during the disciplinary/ appeal processes (and further in the light of the failure by the claimant substantively to engage with the substance of the allegations during such processes), that the claimant was guilty of misconduct which was sufficient to justify dismissal including in particular with regard to (a) the deployment of staff at Foggin Tor/ Tamar Bridge outside the nationally approved SWaH procedures and practices and without any locally approved procedures and governance in place and (b) the deployment of staff in the water at the SRT training course at Llangollen on 8 March 2017 including as the respondent was entitled to conclude, in the light of the evidence from EW and the absence of any documentary evidence to show that the water marker level had fallen below 11 at the relevant time, that participants had entered the water in breach of the respondent's risk assessment and thereby placing them and the respondent at risk. . When reaching such conclusions the Tribunal has taken into account in particular its findings at paragraphs 71 – 73, 75 , 77 -79 and 84 above including in respect of the contents of the letters of dismissal and rejecting the

claimant's appeal at pages 293 – 297 and 365 – 369 of the bundle).

(4) The Tribunal is further satisfied, in the light in particular, of the findings relating to the contents of the respondent's letter of dismissal and rejecting the claimant's appeal, as referred to above, that the respondent gave proper consideration to the appropriate sanction, including the claimant's length of service. The Tribunal is further satisfied that in the light of all of the above matters including (a) the safety critical nature of the claimant's role (b) the seriousness of the allegations and (c) the concerns of the respondent regarding the claimant's ability to work within the respondent's policies and procedures/ governance / safe practices the decision to dismiss of the claimant / the rejection of his appeal was, in all the circumstances within the range of responses of a reasonable employer.

(5) When reaching the above conclusions, the Tribunal has had regard to the claimant's contentions relating to the respondent's reliance on the incident involving A1 as part of allegation (a) – alleged inappropriate behaviour towards colleagues. Having given this matter careful consideration the Tribunal is satisfied that the overall fairness of the decision to dismiss the claimant / dismiss his appeal was not affected by the decision to include the incident involving A1 as part of allegation (a). When reaching this conclusion the Tribunal has taken into account in particular that (a) the incident relating to A1 was not relied upon by the respondent as a stand alone allegation but as part of an alleged pattern of inappropriate conduct towards colleagues and (b) further that the allegation relating to the alleged pattern of inappropriate towards colleagues was only one of 3 potentially serious allegations of gross misconduct against the claimant.

147. Having had regard to all of the above, the Tribunal is satisfied that the claimant's dismissal for misconduct was, in all the circumstances, fair for the purposes of section 98 of the Act and the claimant's complaint of unfair dismissal is therefore dismissed.

## THE CLAIMANT'S COMPLAINT OF WRONGFUL DISMISSAL

### Issue 11.2 of the List of Issues - the claimant's complaint of breach of contract claim in respect of notice.

148. It is agreed that the claimant was entitled to 12 weeks' notice in the absence of any gross misconduct (paragraph 4.1 of the terms of employment – page 59 of the bundle and paragraph 22 above).
149. In summary, the claimant denied that he was guilty of any misconduct which entitled the respondent to dismiss him (with or without notice).
150. In summary, the respondent contended that in the light of the serious nature of the allegations which were upheld by the disciplinary/appeals panels the respondent was entitled to conclude that the claimant was guilty of gross misconduct including having regard to the findings regarding the impropriety towards women (which the respondent contended were largely admitted by the claimant).
151. The Tribunal has reminded itself that (a) the test for wrongful dismissal is different to that for unfair dismissal (b) the respondent is required to prove for such purposes, on the balance of probabilities, that the claimant committed the alleged conduct and (c) that it was serious enough to amount to a repudiatory breach of contract as defined further at paragraph 110 above.
152. Having given the matter careful consideration, the Tribunal is satisfied that viewed objectively, the claimant's cumulative conduct in respect of allegations (a) – (c) was sufficiently serious to amount to a repudiatory breach of contract entitling the respondent to dismiss the claimant without notice. When reaching such conclusions the Tribunal has taken into account in particular, the findings which it has made in respect of the claimant's role and responsibilities above together with the Tribunal's findings in respect of each of the allegations (a) – (c) as referred to below.
153. **Allegation (b) – that the claimant had been complicit in the deployment of SWaH within HART Exeter that fell outside of the national specification and did not have the necessary governance in place which actions left HART operatives and the respondent at risk.**
154. The Tribunal is satisfied, having regard in particular to the safety critical nature of the Claimant's role (including his responsibilities for risk ) together with the findings at paragraphs 96 and 97 that the respondent has established, viewed objectively, that (a) the claimant

had , on the balance of probabilities, committed the conduct referred to above and (b) that such conduct was serious in nature including in particular having regard to the claimant's failure to adhere to the relevant NARU guidelines/ seek the required variations thereto and further the failure to put in place approved local governance in respect of the Foggin Tor or Tamar Bridge exercises.

**155. Allegation (c ) As course director the claimant oversaw the deployment of HART operatives into unsafe water training environment during a training course at Llangollen .**

156. The Tribunal is satisfied, having regard to nature of the claimant's role and responsibilities as referred to above together with the findings at paragraphs 104 and 105 above, that the respondent has established, viewed objectively that (a) the claimant, had on the balance of probabilities, allowed staff ( including participants who were not confident) to enter the water on 8 March 2017 a time when the water marker level had not fallen below 11 (in contravention of the analytical risk assessment at pages 416- 417 of the bundle ) and (b) that such conduct was serious in nature as it placed the participants and the respondent at risk.

**157. Allegation (a) that the claimant exhibited a pattern of inappropriate behaviour towards colleagues.**

158. The Tribunal is satisfied having regard in particular to its findings of fact at paragraph 90 above, that (a) the claimant had acted towards A1 as set out in the respondent's letter dated 12 June 2017 (page 120 of the bundle) and (b) the claimant had a complex and fractured relationship with JD including that he had on at least one occasion attempted to hug her / chosen not to respond to her text / telephone messages relating to work ( paragraph 93 above). The Tribunal is not however satisfied on the available evidence that the claimant 's conduct in respect of the above (or the other matters relied in support of this allegation such as the spinning of the bottle and the wearing of uniform) constituted a pattern of inappropriate behaviour towards colleagues such as to constitute serious misconduct.

159. When reaching such conclusion the Tribunal has taken into account in particular that (a) the Tribunal has received no evidence from A1 (who is still in the employment of the respondent) regarding such matter and further that A1 did not make any complaint about the incident/ the respondent chose at that time not to pursue the matter as a formal disciplinary issue and (b) the Tribunal has heard no evidence from JD. Further, the available evidence indicated that JD and the claimant had a complex/ fractured relationship during which they had

contacted each outside of work regarding personal issues and JD had, on occasions, behaved in a manner towards the claimant and others which was perceived by them to be inappropriate.

160. The Tribunal is however satisfied that the Respondent was entitled to have regard to the incidents involving A1 and JD when considering the overall conduct by the claimant.

161. Having regard to the overall conduct of the claimant (including in particular, his conduct in respect of the safety and governance related issues relating to allegations (b and (c)) the Tribunal is satisfied that the respondent was entitled to treat the Claimant's overall conduct as amounting to a repudiatory breach of conduct and entitling the respondent to dismiss the claimant without notice.

162. The claimant's complaint of wrongful dismissal is therefore also dismissed.

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Employment Judge Goraj

Date: 26 July 2019

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