



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101536/2019

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Held in Stornoway on 22, 23 and 24 October 2019

Employment Judge S Walker

10 **Mr I Pritchard**

**Claimant
Represented by:
Mr McGuire -
Advocate**

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Western Isles Health Board

**Respondent
Represented by:
Mr Watson -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claim is dismissed.

REASONS

25 **Introduction**

1. The claim is of unfair dismissal. It is not disputed that the claimant was dismissed. The respondent relies on some other substantial reason justifying dismissal.
2. The claimant confirmed that he is no longer seeking reinstatement or re-
30 engagement and the remedy sought is compensation.
3. The claimant gave evidence on his own behalf and evidence was led from Ms Dunsmore, Trade union representative. For the respondent, evidence was led from Mr MacPherson (Hospitals Manager) who made the decision to dismiss,

E.T. Z4 (WR)

Stuart King (Employee Relations Officer) and Gordon Jamieson (Chief Executive) who heard the appeal against dismissal.

Findings in fact

4. The Tribunal found the following facts to be established:
5. The claimant was employed by the respondent as a Lead Biomedical Scientist in Microbiology from September 2008. He worked in the laboratory in Western Isles Hospital. There was a team of 14 staff who worked at the laboratory. There were two rooms and the claimant worked mainly in one room with Margaret-Ann Macdonald who was a Band 6 Microbiologist. There was also a laboratory assistant who was assigned to them on a weekly rotation.
6. The claimant and Ms Macdonald had worked together since he started with the respondent. Their relationship had had difficult periods. Each of them had had periods of absence which they attributed to their relationship with the other.
7. Mr King had facilitated a mediated conversation in June 2017 between the claimant and Ms McDonald at the request of the claimant. This did not end well. Mr King formed the view that the claimant was dismissive of Ms McDonald's feelings and that there was no attempt by the claimant to see how he might be in the wrong.

Investigation of Complaint by Ms Shand

8. In 2018, complaints were made about the claimant by Kerstin Shand. She had been on an 8 week placement as a laboratory assistant starting on 5 January 2018. Her contract was due to end on 28 February 2018. Her contract was terminated by the claimant on 8 February 2018.
9. Ms Shand put in 3 complaints in total. "Complaint 1" related to issues surrounding a lab report and a particular disagreement on 22 January 2018. Complaint 2 related to two alleged incidents on 5 January 2018 and 1 February 2018 and also made some general allegations about the claimant's behaviour towards Ms Shand. Complaint 3 related to an allegation that on 8 February Ms Shand's employment was terminated by the claimant.

10. Mr Pritchard was suspended on 8 February 2018 until the allegations had been investigated.
11. Ms Fraser, Communications Manager, was asked by the Nurse Director to investigate the complaints and the investigation commenced on 19 February 2018. She was supported by Christine Kennedy and Diane Campbell from the Human Resources Department.
12. From the complaints, Ms Fraser extracted the following allegations for investigation:
- (a) On 22 January 2018, Mr Pritchard allegedly snatched a paper out of Ms Shand's hand
 - (b) On 5th January – Mr Pritchard allegedly came back from work and screamed at Ms Shand *“What the hell was I thinking in doing (sic) and if I thought I could do my own thing I am very much mistaken”*. He proceeded *“to tell me only because I worked in Glasgow I shouldn't think they are always right. He is the manager and I have to do things his way I stopped what I was doing, and he said I had really messed things up now.”*
 - (c) Mr Pritchard allegedly kept reminding Ms Shand that she would only be employed for eight weeks. Ms Shand alleges that she was told this several times during the day.
 - (d) Ms Shand alleges that Mr Pritchard reprimanded her in an intimidating way, asking if she just felt like doing her own thing.
 - (e) Ms Shand alleges that Mr Pritchard asked her why she couldn't do as she was told as she was making mistakes all the time and couldn't do the work required of her.
 - (f) Mr Shand alleges that Mr Pritchard raised his voice towards her and told her she was useless, the worst locum he ever had working for him and if she could not do the little work there was in eight hours she was of no use to him. Ms Shand alleges that Mr Pritchard asked her again

if she was incapable of following his instructions, he is the manager, he is the band 7 in this Lab and whatever he says will be done.

- (g) Ms Shand alleges that Mr Pritchard got very agitated, “lost it” and told her she had a week’s notice finishing on Thursday 8th February.
- 5 (h) Ms Shand alleges that whenever she asked a question, she was asked if she could read by Mr Pritchard.
- (i) Ms Shand alleged that Mr Pritchard used to stand behind her watching her try to log onto the system unsuccessfully until she either worked it out or was given instructions grudgingly.
- 10 (j) Ms Shand alleges that Mr Prichard attacked her verbally on a personal level and intimidated and undermined her from the start of her contract.
- (k) Ms Shand states that she does not believe it is in Mr Shand’s jurisdiction to “Fire” her without even a fair hearing
- 15 (l). “Very limited induction”, work instructions incomplete and missing information which is given verbally, insufficient Standard Operating Procedures.
- (m) On 8th February on her return to work from lunch at 2pm, Ms Shand alleges that Mr Pritchard told her she could not work there this afternoon to which she replied “Why not?”. Mr Pritchard allegedly said that she had put a complaint in against him and he did not want her to work there anymore. Ms Shand alleges that it was his department and that she must go “leave now”. He thanked her for sharing her concerns. Mr Pritchard then allegedly rejected Ms Shand’s timesheet.
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13. Ms Shand’s allegations were investigated under the respondent’s Dignity at Work Policy in conjunction with the Employee Conduct Policy.

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14. Ms Fraser interviewed Ms Shand and the claimant. As most of the alleged incidents were not witnessed by others, she interviewed other members of staff to “rule out or confirm any potential pattern or recurring behavioural themes.”

She interviewed Acting Laboratory Manager, Ms Carstairs, Ms McDonald and Amelia Fairweather(the Transfusion lead).

15. Ms McDonald gave details of how she felt she had been undermined by the claimant over a number of years, referring to a number of incidents. She said she had been absent twice with work-related stress as a result of his attitude towards her. She said her second period of absence was so stressful that her hair fell out. She said that during the mediated meeting he stood up and said, *"If that's all you've got take me to a tribunal"*.
16. Ms McDonald said that she was no longer comfortable being based with the claimant in a small room. She said that she understood the claimant had responded to this request by saying he was considering taking out a grievance against Ms McDonald as she was presenting him in a bad light. Ms McDonald said she *"didn't have the emotional strength to defend herself."* Ms Fraser quoted Ms McDonald's statement that *"the nature of his thoughts, where only self-preservation is his primary concern with no ability or wish to see anything from the other person's perspective is a particularly dangerous trait. How a team lead can turn the very obvious suffering or upset of another work colleague into an attack on them for having the audacity to be annoyed with them or current practice demonstrates a troublesome personality."*
17. Ms McLeod described in her statement *"unbearable tension"* between Ms McDonald and the claimant with *"very little communication between them"*. She said it was a *"very uncomfortable working environment"* and *"not conducive to best practice for the Microbiology department"*.
18. Ms Carstairs provided a number of examples of allegedly intimidating behaviour.
19. Ms Fairweather also provided an example of when she considered the claimant had been intimidating and that she had been *"aggressively picked on"*.
20. The claimant was given the opportunity to respond to allegations presented by the other individuals but declined to do so.

21. After the claimant's interview, Ms Fraser was contacted by Genevieve Urquhart, a medical laboratory assistant, who said she had overheard the conversation, understood to have been the conversation on 8 February, and described the claimant's conduct as "calm" and "civil". She was also interviewed by Ms Fraser.
22. Ms Fraser also sought statements from David Stirling, Director of Healthcare Services about whether he claimant had the authority to terminate Ms Shand's contract as he had done and also as Ms Carstairs had suggested he would be aware of the claimant's conduct towards another locum Mr Hendy. Mr Stirling reported that Mr Hendy had reported that he felt "*very poorly treated*" and that the claimant had belittled his abilities and contribution.
23. Mr King was also invited to submit a statement about the facilitated meeting and Ms McDonald's allegation made during interview about the claimant's behaviour during that meeting. He said that Ms McDonald was open in sharing her feelings but that the claimant was "*very dismissive*" of those feelings and didn't recognise the behaviour Ms McDonald was describing. He said the claimant was "*flippant*" with regards to the overall situation which made it hard to facilitate. He said he had considered stopping the meeting as there was a lack of proper engagement from the claimant and there was no attempt by the claimant to see how he may be in the wrong and that this had the potential to make matters worse in the long run.
24. Ms Fraser produced a very detailed report of over 50 pages into Ms Shand's allegations. Her report included details drawn from statements and interviews and the originals were attached to the report.
25. Allegation (a) was found not established in fact.
26. Allegation (b) was found not to be established in fact. However, Ms Fraser stated "*there are apparent themes of behaviour (Raised voice/shouting by Mr Pritchard) described by another interviewee and in a statement verified by a previous locum who worked for Mr Pritchard, which indicate that Mr Pritchard has raised his voice/shouted at colleagues and that staff felt intimidated by this behaviour. Shouting at a colleague is defined within the Dignity at Work Policy*

as an example of bullying behaviour which NHS Western Isles deems to be unacceptable”

27. Allegation (c) was found not established in fact. However, Ms Fraser stated that *“it is reasonable to assume that, on the balance of probabilities, there have been clear issues with regard to Mr Pritchard’s approach to certain (though not all) locum staff. This type of behaviour could be considered to be bullying and detrimental to the effective functioning of the Microbiology Department.”*
28. Allegation (d) was not upheld.
29. Allegation (e) was not upheld in respect of the allegation that Mr Pritchard asked her why she couldn’t do as she was told. However, in respect of the allegation that Mr Pritchard told Ms Shand that she was making mistakes all the time and could not do the work required of her, Ms Fraser concluded it was likely that Mr Pritchard communicated this type of information to Ms Shand during the exchange.
30. Allegation (f) was not upheld.
31. Allegation (g) was not upheld. However, Ms Fraser concluded that this allegation had highlighted other issues. Specifically, that Mr Pritchard had said in his interview that he would have to *“nurse”* Ms Shand to the end of her contact and *“this could be perceived as patronising and undermining language to describe his approach towards a colleague”*. Further she concluded that this approach together with Ms Shand’s description of only being given limited work to do in her final week and Mr Pritchard making sure all work was done *“could be interpreted as undermining /bullying behaviour”*.
32. Allegation (h) was not established in fact. However, having considered the findings of allegations (b) and (j), Ms Fraser considered it was probable that Mr Pritchard had used this type of language towards Ms Shand and she clearly found it to be uncomfortable, if not humiliating to ask Mr Pritchard questions. He was not approachable in her view. Ms Fraser concluded *“It would be fair to say that this implies a hierarchical relationship practiced by Mr Pritchard and*

the consequences, intended or otherwise, are a well-known risk to patient safety”.

- 5 33. Allegation (i) was upheld in fact. Mr Pritchard admittedly stood behind Ms Shand while she was attempting to log on to her computer. Mr Pritchard may not have intended this to be an intimidatory action, however, Ms Shand clearly felt it was inappropriate and intimidating and she was not comfortable. Ms Fraser concluded *“Given the additional findings of this investigation, in particular finding (j) it would be reasonable to accept that Ms Shand felt this to be an intimidating act”.*
- 10 34. Allegation (j) was upheld on the balance of probability that *“Mr Pritchard intimidated and undermined” Ms Shand considering the vast array of consistent allegations against Mr Pritchard presented during interviews in addition to Mr Pritchard’s own admission that he was sarcastic (undermining) behaviour towards his line manager on 8th February 2019.* Ms Fraser noted that *“intimidating behaviour which undermines self-confidence”* is defined as an example of bullying under the Dignity at Work Policy.
- 15 35. In respect of allegation (k), Ms Fraser concluded that custom and practice appear to support the view that Mr Pritchard had the authority to both enter into a contract with and terminate the contract of Ms Shand. However, she considered that the decision appeared to have been poorly communicated by Mr Pritchard. She also stated that the decision to terminate with immediate effect *“appears to have been taken without reference to the Staff Governance Policy (treating staff with dignity and respect and fairly and consistently) and without contacting the locum agency in the first instance. This could have been an unfair penal sanction which is an example in the NHS Western Isles Dignity at Work Policy of bullying behaviour”.*
- 20 36. Allegation (l) was not established. However, Ms Fraser noted *“What is of concern is that Ms McDonald confirmed that adequate SOPs are a “bit sparse” but would be adequate if there was a supportive person to refer to. Ms Fraser considered that given the findings in (h) and (j) it is likely that Ms Shand did not feel comfortable to ask for the support she required when documentation was*
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lacking as she found Mr Pritchard's response to questions and general attitude towards her as intimidating."

37. Allegation (m) – the conclusion was *"as per allegation (k)"*.

38. Ms Fraser highlighted some additional matters which included a concern that
5 *"during interviews with various staff members that a number of Mr Pritchard's colleagues are of the view that he makes inappropriate comments in the workplace and allegedly appears to have issues with women in professional positions"*. She also noted that it was *"apparent"* that Mr Pritchard had discussed what he considered to be Ms Shand's poor performance with others
10 and that *"criticising colleagues in front of others"* is an example of bullying within the Dignity at Work Policy.

39. Ms Fraser noted that *"Mr Pritchard stated he did not regret any behaviours as he states he cannot feel remorse for something he has not done. He said that there was nothing in the complaints or alleged behaviour that bore any
15 resemblance to the truth"*.

40. Ms Fraser noted that Ms Urquhart had expressed support of Mr Pritchard's character and behaviours and said that he had been helpful training her and very supportive.

41. Ms Fraser finally concluded that *"on the balance of probability, taking into
20 account behavioural themes and recurring patterns that Mr Pritchard's behaviour whilst intended or not has been of a nature that could be defined as bullying under the Dignity at Work Policy (in particular intimidating and undermining behaviour) towards Ms Shand and other colleagues (past and present) and that it also fell short of "acceptable contemporary standards of
25 behaviour" and NHS Western Isles Standards of behaviour."*

Disciplinary hearing – Final Written Warning

42. The claimant was invited to a disciplinary hearing on 24 April 2018 chaired by Mr McPherson. He was provided with the investigation report and the various statements and notes of interviews. Mr McPherson decided to impose a First
30 and Final Written Warning for 12 months. The outcome letter stated that *"on*

the balance of probabilities there were some behaviours displayed by yourself that require improvement. Should there be a reoccurrence of this behaviour/conduct or should you fail to comply with the supportive actions suggested below then further disciplinary action may be taken.”

5 43. The letter went on, “As a means of supporting you and as part of your return to
work programme, I will require you to agree to a tailored Supported
Improvement Programme (SIP) which I will discuss with you on your return to
work. It is also my opinion that there appears to be a significant breakdown in
10 your relationships with some of your colleagues in the Laboratory, particularly
in Microbiology. As such the SIP will include:

- *A mediated meeting for microbiology*
- *Facilitated meeting with the laboratory department*
- *Review of layout of laboratory to improve working conditions, including
15 equipment (eg additional computer screens) amongst other measure
which I will carry out.*

44. The claimant was advised of his right of appeal. He did appeal. The appeal
was heard on 26 June by Debbie Bozkurt, Acting Director of Finance. The
appeal was not upheld and the claimant informed of that by letter on 29 June
2018.

20 **Meeting 9 May 2018**

45. Mr MacPherson held a meeting with the claimant on 9 May 2018 to discuss his
return to work and supportive improvement measures. The claimant had a
trade union representative with him, Mr Murray. 2 HR colleagues attended, Mr
King and Ms McLay.. At this time, the claimant had appealed the decision to
25 impose a final written warning but that appeal had not yet been heard. His
position at the meeting was that he hadn’t done anything wrong. He said that
issues had not been identified. Mr MacPherson was concerned at the
claimant’s attitude and decided to adjourn the meeting until a later stage.

46. Following that meeting, Mr MacPherson wrote to the claimant on 17 May 2018. He said he had given the situation some thought. He said that the SIP would concentrate on areas where Mr MacPherson felt the claimant required support and development. *“For example, there have been various behaviours displayed by yourself which exhibit an unacceptable pattern of behaviour towards a number of your colleagues. These behaviours on which you requested clarity, fall short of that which is expected from any member of staff of NHS Western Isles and particularly a Band 7 registrant of the HSPC register. Some specific examples of your behaviour which cause me concern include responding sarcastically (by your own admission), undermining colleagues, displaying a flippant attitude towards your colleagues and staff from other departments within the Laboratory. Also, your poor communication skills which were interpreted in a variety of negative ways by your colleagues require to be addressed.”*
47. Mr MacPherson continued *“I am in agreement with the findings of the report produced by Ms Fraser, investigating manager, in that there appears to be clear themes of behaviour demonstrated by yourself over a period of time that cannot be ignored. These behaviours have been described by several of your colleagues during the course of a formal investigation and therefore must be managed appropriately.”*
48. Mr MacPherson stated, *“It is an essential and necessary part of the return to work that the SIP is completed and agreed upon to ensure that the return to work was successful and satisfactory for all concerned.”*
49. He proposed a further meeting on 22 May 2018 to discuss and agree areas for inclusion in the SIP. This would run parallel with the appeal process. He confirmed that mediation would commence before the end of May and that Mr King would be in touch about that.
50. By the end of May, Mr King had sourced two external mediators and they had had an initial meeting with the claimant and Ms McDonald. The mediator’s initial view was that they were confident they could support the process but that it was better to wait until after the appeal was concluded.

Meeting 23 August 2018

51. In fact, the meeting planned for 22 May 2018 to discuss the SIP did not take place until 23 August 2018, after the appeal had concluded. The claimant waived the right to be represented. Mr King attended the meeting with Mr MacPherson. Mr MacPherson asked the claimant if he acknowledged that there were behaviours that need to change following the disciplinary process that was now concluded?
52. The claimant said that "*none had been proven in the process*" and asked for examples. Mr King said there had been a number and referred to an example of undermining colleagues. The claimant said no complaints had been made and they were not true. Mr MacPherson asked again if he accepted the behaviours identified were unacceptable to which the claimant said "*no*". Mr MacPherson said that there had been an investigation and two panels had found the behaviours to be of concern. The claimant said that neither panel had given credit to what he had to say and he had "*no qualms about saying all these things were hearsay.*" Mr MacPherson said he didn't want to go over the process again but there were a number of examples given. Would the claimant acknowledge these behaviours needed to change? The claimant said that he did nothing that didn't happen already in the laboratory and he was being victimised. Mr MacPherson said that the SIP would be in place to address these concerns but if the claimant did not accept the behaviours then it would be difficult to proceed with the SIP and return to work. Mr King asked the claimant if he understood the seriousness given the sanction received. Would he still not acknowledge the unacceptable behaviours as being valid? The claimant said that at no stage had he had a chance to put forward his case to someone who would give him a fair hearing. Mr MacPherson said he had hoped to go through the SIP but he felt that the meeting had to be adjourned for the claimant to consider this position. The claimant asked about mediation and Mr King said that there needed to be an acceptance from the claimant of the behaviours that were of concern before mediation would be implemented. He said that accepting these behaviours were wrong was the first step in returning to work but with the claimant's position this needed to be considered.

53. The meeting was adjourned.

54. Mr MacPherson wrote to the claimant on 29 August 2018. He said that the claimant had intimated that he did not acknowledge that behaviours identified in the formal process needed to change. He said that in order to proceed with the return to work, it was expected that the claimant would be in a position to accept the conclusions of the disciplinary process. Mr MacPherson said he wanted to meet with the claimant again. At that meeting he would be *“seeking an acknowledgment that you will need to change behaviours. Without that I am concerned that there will be a reoccurrence of the behaviours that led to the FWW. As you know any reoccurrence could lead to a further disciplinary process and possibly dismissal. In addition I am concerned that in you returning to work in the laboratory with no acknowledgment of a requirement for change that I am failing in my responsibility to your colleagues in the department (particularly those who have raised issues).I need to guard against the potential for further complaints of bullying and harassment and I need to ensure the effective functioning of the laboratory department. This is particularly the case given there is a need for the laboratory to move on from a difficult period where a number of issues have arisen and in light of the essential role that the laboratory plays in the delivery of care. I would be surprised if after reading the initial report and being involved in formal proceedings you believe that no changes in behaviour are required.”*

55. Mr MacPherson went on, *“The issues that arose were with the manner of communicating workplace or performance issues or otherwise in engaging with staff members who you believe are not performing to your standards. I do believe it is important to protect you from further complaints and in the interested of your colleagues and the effective running of the department that at his juncture there is a degree of reflection and a willingness to make changes to behaviours.”*

56. He went on to say that if they were unable to reach agreement and if he did not have the required reassurance in terms of there being no reoccurrence, he would need to consider potential redeployment or, failing that, consider dismissal. The claimant was invited to attend a meeting on 7 September 2018.

Meeting 19 September 2018

57. At the meeting in September (which actually took place on 19 September), the claimant was accompanied by Wendy Dunsmore from his trade union and Mr King attended with Mr MacPherson.

5 58. Mr MacPherson started by setting out the background and saying that, as in the letter, should the claimant be unwilling to accept any responsibility that his own behaviour required to be altered then that left two possible outcomes of redeployment or termination of employment. Ms Dunsmore responded by raising a concern that the mediation had been cancelled because of the claimant not recognising his behaviour. She said she could understand why he had not done that as "*the behaviour in the department as a whole was not fantastic*". She said that Mr Pritchard had acknowledged his behaviour and others in the department had to acknowledge their behaviour was not great for things to move on. Mr MacPherson responded that this meeting was about the claimant's behaviour only and Mr King said that the claimant had not acknowledged his behaviour verbally. Ms Dunsmore said that she and the claimant had demonstrated at the appeal that dysfunctional behaviour was demonstrated by everyone in the department and that the claimant had acknowledged his behaviour had not been as satisfactory as it could have been even though no one had told him. Mr MacPherson said that there had not been any verbalised acknowledgement from the claimant. Ms Dunsmore again asked for an acknowledgement that there were issues in the department as a whole and that she and the claimant thought he was taking the hit for the department. She said that there is a problem in the department and the claimant would admit to being part of it.

15 59. Mr King said that the sanctions were specific to the claimant. Ms Dunsmore again said that she and the claimant could say that he acknowledged he has behavioural issues but these issues exist within the department as a whole. Mr King said that the situation could be framed in the context of other issues but this meeting was concerned with the claimant. Mr MacPherson asked again if the claimant acknowledged that his behaviour needed to change. The claimant said he would if people gave him the knowledge of what the perceived

problems were. He said he cannot know that something is wrong if people do not say anything to him about it. Mr MacPherson asked the claimant which behaviours in his opinion needed to change. The claimant said he didn't know as no one was telling him which behaviours were unacceptable. He said the only official complaint was from Ms Shand and *"all elements of that complaint had been ripped to shreds"*. He said there was *"no evidence in Ms Shand's favour and it had been proved that what she said occurred did not happen"*.

60. Ms Dunsmore said that Ms Shand had complained about the claimant looking over her shoulder and the claimant did not know it was wrong to do so. She said that he had acknowledged during the disciplinary and the appeal hearings that aspects of his behaviours needed to be changed and he was not aware that these behaviours were upsetting people.

61. Mr King asked if the claimant was acknowledging that the behaviours existed that needed to change. The claimant said that people perceived it as his issue but no one mentioned it to him and no one said they had a problem with his behaviour. Ms Dunsmore said she and the claimant had talked in the car about the communication issue and how the claimant would change his behaviour on returning to the lab. Ms Dunsmore said that the claimant would check with his colleagues to find out whether or not they were feeling uncomfortable with him. The claimant said that if the issue was about communication, he could happily seek education in improving that communication, but this can only happen if he is informed about his poor communication. Mr King said that the investigation seemed to uncover that and it was great that the claimant acknowledged his behaviour and was willing to learn and improve but an acknowledgment of what those behaviours are from the claimant is vital to alleviate concerns that the organisation had. He said that improving communication does not address the behaviours that need to change. He pointed out that in the previous meeting, the claimant had said these were "hearsay". Ms Dunsmore said that members of staff in the department were talking behind people's backs. She said that the claimant had not put this in the right words yet but he had told her in the car that he would ask people how they feel about things and whether they have any issues while he is training

them and the issue would be identified and nipped in the bud. Mr King asked why this was not something the claimant had verbalised for himself through the whole process?

5 62. Mr MacPherson said people in the department had come forward with issues about the claimant and a lot of them had felt intimidated. He referred to Ms McLeod who had felt unable to ask a question about her work and this was a patient safety issue. Ms Dunsmore said there was no context and what would Mr MacPherson expect someone to respond to a question about what behaviours needed to change? Mr McPherson said Ms McLeod had been
10 afraid to ask questions. He repeated this was a patient safety issue. Ms Dunsmore asked again how Mr MacPherson would expect someone to reply to being asked what behaviours needed to change? She said that the claimant had acknowledged that communication was an issue and she thought that was the only thing that could be changed at this point.

15 63. Mr MacPherson said that Ms McDonald's health had been affected by her relationship with the claimant. Ms Dunsmore said that everyone had a duty of care in this area and had not done anything about it. Mr MacPherson said that the claimant should have followed up on it as he was Ms McDonald's line manager. The claimant said he was unaware of her concerns. Mr MacPherson
20 said a meeting had been arranged for that purpose and the claimant had cancelled it. The claimant said that it had been decided it would more appropriate for the Laboratory Manager to facilitate the meeting. Mr MacPherson asked if the claimant had ever gone back to Ms McDonald about it and he said Ms McDonald had never given him any idea of what the issue
25 was. Mr King said what was important was that an issue had been raised. Ms Dunsmore said that the claimant did not know what the issues were because nothing had happened. She said the claimant had escalated it which is what matters. Ms Dunsmore said that there was a mediation meeting and the claimant had left the room and no one followed that up. Mr McPherson said
30 that as Ms McDonald's line manager the claimant should have followed up on her concerns about his behaviour.

64. Ms Dunsmore said that institutional failures were being identified and that the claimant had said he would communicate more openly and talk to more people. Ms Dunsmore said they would not be here today if the department was more open with communication. The claimant said the only communication he got was when he was told it was more appropriate for Ms McDonald's issues to be facilitate by the Laboratory Manager. Mr King said that the claimant should have known there was an issue and that from the meeting on 23 August, there had been no recognition from him that he required a potential change in the way he communicates with others. Ms Dunsmore said to the claimant he had to recognise there was an issue. The claimant said that at no stage did Ms McDonald ask for any formal investigation.
65. Mr King said that at the outset of this process, the claimant should have noticed that someone felt intimidated by him and he would have expected his to wonder why that might be? The claimant replied by asking where Mr Hendy's statement was. Ms Dunsmore said the issue was communication. Mr King said communication is not a behaviour and asked again what specific behaviours the claimant felt needed to be changed? What behaviours needed to change to improve communication? The claimant said the department is dysfunctional anyway and the only way he knows if something is bothering someone is if they tell him. He said that Ms McLeod's statement had been used as an example of his aggressive behaviour but there were 4 other MLAs who had not been asked. He asked them not to pretend that Ms McLeod had been picked out of the blue. Mr MacPherson said that Ms McLeod had said she was afraid to ask questions. He replied there were 4 others that worked with him. Mr MacPherson said it would have a serious effect on patient safety if Ms McLeod made a mistake but was afraid to say. Ms Dunsmore said Mr MacPherson was right but if no one tells you are doing wrong you will keep doing it. She said that the claimant was horrified by the allegations. The claimant said what bothered him was that no one mentioned any of these points to him and no one mentioned the positive points they could have related to him.
66. Mr King said Mr MacPherson was asking how it felt to go through the process. The claimant said he was disappointed that people had these issues with him.

Mr King asked if he recognised any of the described behaviours in himself? The claimant said that he did not. Mr King said this was where Mr MacPherson had concerns because the claimant's responses did not acknowledge that he had an issue with his own behaviour. Ms Dunsmore said that Ms McLeod had not said why she was afraid of the claimant and this remained a very vague situation. Ms Dunsmore said that the appeal was finished and the claimant was horrified. He had "*crumbled*" with the things said about him because he did not know about them before the report came out. She said they had had a long conversation and they can only acknowledge that his behaviours have not been good. She said the claimant acknowledges these things and this was about going forward now. She said the claimant would work with the team to make sure these behaviours are improved. She said he had been issued with a Final Written Warning so communication is the key and the only way forward.

67. Mr King said it would be necessary for the claimant to explain what specific behavioural issues needed to be improved. He said he remembered Ms Carstairs saying she had felt undermined and that the claimant had been sarcastic. Mr King said these were the specifics mentioned in relation to communication. He said it would be great to see improvement in communication, but you have to explain what behaviours will change to see this improvement. The claimant asked Mr King to tell him what he should do to improve? Ms Dunsmore said the claimant wanted help with the process. Mr King asked the claimant again what he thought needed to improve? The claimant referred to Ms Carstairs' example of him being undermining and said there had been discussions in the department when he had pointed out some changes that had been made in the department that had not been successful and he was only trying to make her aware of that fact. Ms Dunsmore said a mediation meeting with everyone would make sure boundaries of communication were not crossed.

68. Mr King said that the claimant had not yet acknowledged he had displayed any potentially undermining or sarcastic behaviour that needed to change. Ms Dunsmore asked the claimant to take a step back and consider that Ms Carstairs felt undermined despite the content of what he had said and it may

be to do with how he was doing something rather than what he was doing. The claimant said there had never been any intent behind what he said. No one had ever suggested he was undermining them and Ms Carstairs had never suggested he was undermining her. Mr King acknowledged that the claimant may not have heard about it till he read her statement but he had not reflected on what she had said. Ms Dunsmore said this was not true and he had acknowledged his behaviour during the disciplinary and appeal meetings. Mr MacPherson said that the claimant had not acknowledged these behaviours at the meeting on 23 August. Mr King said that the claimant had said what was said about his behaviour was hearsay and the claimant had not acknowledged anything himself. Ms Dunsmore said that the claimant had acknowledged it at the disciplinary and appeal hearings and the claimant had been feeling isolated. Again Mr MacPherson said that the claimant had not acknowledged his behaviour either in the disciplinary process nor at the meeting on 23 August. Ms Dunsmore said that the claimant had gone into the meeting on 23 August feeling very defensive and as if he was in a corner and that Mr MacPherson and Mr King had not helped him out of that corner. Ms Dunsmore said this was what the mediation was meant to be about. Mr King said that the claimant had not made any acknowledgment during the appeal hearing and that this was the second meeting in which he and Mr MacPherson had given him an opportunity to acknowledge his behaviour and even in the invite letter they had outlined what they expected. Mr MacPherson said that the return to work might fail if the claimant did not acknowledge his behaviour.

69. Ms Dunsmore said the question was not clear and asked Mr MacPherson and Mr King what they were looking for? Mr King said they would like the claimant to acknowledge there were certain behaviours that needed to change. Ms Dunsmore asked for specifics. Mr King said the claimant had already mentioned communication which is great but there are different behaviours that impact on communication. Ms Dunsmore said she and the claimant had asked for mediation to understand the issues and move forward. Ms Dunsmore said the claimant was still not entirely clear what he had been accused of and it had not been made clear that his behaviours were not good enough. Mr MacPherson said his concern was that after all the formal proceedings, the

claimant still did not acknowledge that these issues existed. Mr King said the struggle of the organisation is that in light of everything that had happened it was hard to understand why the claimant had not acknowledged that these issues existed within his own behaviour.

5 70. The claimant said that the occupational health referral had said that mediation was vital before he could make a return to work but that was no longer available. Mr King said the mediation had not been cancelled but that the organisation needed to see him acknowledge behaviours that need to change before entering into mediation. The claimant said that the point of mediation was so that he and the others could all accept there were problems in the department. He said this had turned into a witch hunt for him. Mr King said that unlike the others, the claimant had been involved in a lengthy disciplinary process that should have been sufficient to highlight concerns in his behaviour,

10 71. Ms Dunsmore asked what they wanted the claimant to say and the fact he was asking for mediation showed he was seeking help. Mr King said that the claimant had not asked for mediation - he had agreed to it. Ms Dunsmore disagreed and said that they had asked for it during the appeal. The claimant said Occupational Health had said it was essential and his GP and Occupational Health had concerns about his mental health. Mr King restated his position that mediation had been put forward as a suggestion by the organisation.

15 72. Mr King said that Ms Dunsmore had told them that the claimant acknowledged there was an issue, but the claimant needed to tell them what he recognised needed to change. The claimant said this was what mediation was for and Ms Dunsmore agreed. Mr King said it was hard to understand why the claimant would not come up with that himself in light of everything that had taken place. Ms Dunsmore asked what Mr King would say if he was the claimant? He replied that he was not the claimant. He said that the rest of the department may have the opportunity to improve their communication through mediation but they have not had the opportunity for reflection that the claimant had had through the disciplinary processes. Mr King asked the claimant if he acknowledged that there were areas of his behaviour that needed to change? The claimant replied

that this suggested there were no issues with others in the department. Mr MacPherson said that the claimant had said on 23 August that there were no issues with his behaviour. The claimant said he had not said this, rather that he would not acknowledge issues in isolation and people had to let him know about the concerns they had.

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73. Ms Dunsmore asked for an adjournment and spoke to Mr King. She asked what he and Mr MacPherson needed the claimant to say? Mr King said that it had been made clear. They wanted to see an acknowledgment by the claimant of things raised in the formal proceedings like being sarcastic and flippant. Ms Dunsmore asked to speak to the claimant alone and then the meeting resumed.

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74. When the meeting reconvened, Mr MacPherson asked the claimant if there were any behaviours he needed to change. The claimant said the issue of sarcasm had been raised and that he can be sarcastic. However, he said this is a humorous thing that is never intended to be hurtful. He could not guarantee that would never happen again, no one could, but he would make every attempt to reduce the amount of sarcastic comments he makes and would appreciate it if people let him know when he makes such comments.

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75. Mr King asked if there were any other behaviours to change? After a pause, Ms Dunsmore pointed to her notes and the claimant then referred to Ms Carstairs' comments that he had undermined her. He said that any comment that she perceived as undermining was probably addressed to her in a flippant way. He said he does not intend to be flippant and this is just a mannerism or trait. He would endeavour not to repeat that behaviour but again he needed people to be open about that fact they consider his comments to be flippant. He said that people misunderstood the intention and that it had been very unpleasant for him. He had been in the NHS for 38 years and these things had never been questioned before. Mr MacPherson asked how he would make changes and he said he would think a bit more before coming out with a quip and take time to be more communicative toward the people he was working with. Mr MacPherson asked what that would look like and the claimant said in

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Microbiology they chat about things they have seen and done through the course of the day and he cannot see a reason not to continue doing that.

76. Mr MacPherson asked what difference others would see when he returned?

Ms Dunsmore said she hoped the claimant would be more confident. She said that she was concerned about how the claimant could change the way he communicated as it was necessary for everyone to change. She also said she thought people would find the claimant different through mediation and those who did not find him to be approachable would find him to be so now. She said it would be fundamental for people in the department to tell the claimant when they don't like what he is saying and for him to tell others when he does not like what they are saying.

77. There was then a break of between 20-30 minutes. Mr MacPherson discussed his decision with Mr King. Neither was convinced that the claimant had accepted there were issues with his behaviours that needed to change. They

were concerned that the claimant had continued to maintain his position that he had done nothing wrong and that any concession had either been made by Ms Dunsmore or following prompting from her. They did not consider these to be genuine. Mr MacPherson considered he could not continue with reintegration, including mediation or a SIP, if the claimant did not accept this. He was concerned about the working of the department and patient safety. He considered a list of redeployment options but none were suitable for the claimant. He decided he should proceed to dismiss.

78. When they reconvened, Mr MacPherson said that he had not been convinced that the claimant had genuinely acknowledged the issues with his behaviour needed to change. He said that redeployment had been considered but was impracticable due to the nature of the work and he had made the decision to terminate.

79. That decision was confirmed by letter from Mr MacPherson on 24 September 2018. That letter said that at the meeting the claimant's responses, or lack of responses, showed no semblance of an acknowledgement of a need to change nor any suggestions about how he would go about achieving any change. It

said that the only times there were responses was upon direct prompting from the trade union representative and following an adjournment where Ms Dunsmore had sought to establish the behaviour that management felt could improve and where these were repeated after the interval it was “without any sincerity or elaboration”. Mr MacPherson said he was not convinced that the claimant accepted he had to alter his behaviour in any way nor was he convinced that this situation was not likely to recur given the lack of acknowledgement. He said he felt the claimant had had time to reflect on the investigation report and the issues raised. He said he had a responsibility to colleagues in the department and needed to ensure the effective functioning of the laboratory. An additional consideration, he said, was to ensure there was an environment where the team working together can deliver a safe service to patients. He said he had heard nothing that would assure him the claimant could contribute to that.

- 15 80. He said that he did not expect the claimant to accept all of the content or conclusions of the investigation report but was very surprised that, after presumably considering the report in full, the claimant had given no meaningful response to the changes in behaviour that may be required. He also said he saw no evidence of any remorse, reflection or acknowledgment of concerns.
- 20 His impression was that the claimant was completely unmoved by the entire situation and he was quite shocked by his approach considering the seriousness of the matter. He said he had considered training or mediation with the team but considered these could only be successful if there was a degree of willingness or insight from the claimant. He said he had also
- 25 considered redeployment but did not consider this to be viable given the claimant’s role, the lack of vacancies, the seriousness of the matter and the lack of any encouragement that behaviours would improve.
81. He said that the employment was terminated “*on grounds of a breakdown in the workplace relationship and trust and confidence arising from a failure to obtain a satisfactory assurance there could be a safe return of you to the workplace.*”
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Appeal

82. The claimant was advised of his right of appeal and he did appeal. He said in his grounds of appeal that he had expressed his surprise, shock and regret at the allegations during the disciplinary process as he had never been made
5 award of the issues (with the exception of Ms McDonald). He said he had believed that the issues with Ms McDonald had been concluded as there had been no follow up discussion. He said he had sought support, coaching and mediation and this had been agreed as a way forward. He said the Mr Macpherson wanted him to accept full responsibility for the behaviour of the
10 department which he was unable to do. He had asked for specifics and he said that Ms McLeod's statement was vague and that he had thought Ms McDonald had been closed. He said that after the adjournment he had outlined that "in the short term" he would cease to be sarcastic and flippant (which he believed to be banter and unknown to him had not been taken that way) to rebuild the
15 relationship.
83. He said there was no reflection on his 38 years of service nor the effect the elongated suspension had had on his mental health.
84. The claimant was invited to an appeal hearing on 25 October 2018 which was heard by Gordon Jamieson, the Chief Executive. The claimant was
20 accompanied by James O'Connell, from his trade union. This was a lengthy hearing generating a 34-page minute. The appeal heard from Mr MacPherson, who presented the management case and called Mr King as a witness. The claimant and his representative had an opportunity to question these witnesses and Mr Jamieson also questioned them. The claimant's appeal was presented
25 by Mr O'Connell. He questioned why the SIP had not been discussed and said that until someone told the claimant what behaviours needed to change he would not be able to change them. Mr MacPherson's position was that the acknowledgment of the behaviours had to exist before moving onto the SIP or mediation. Mr O'Connell also raised issues about the procedure that had been
30 used as well as the decision. He suggested that the return to work meetings were just a "rehash" of the disciplinary process. He suggested that Mr MacPherson had concluded that a Final Written Warning was an appropriate

sanction and the return to work was not conditional on the claimant doing certain things. Mr MacPherson disagreed and said the return to work was adjourned because the claimant would not acknowledge behaviours. Mr O'Connell pointed to sections of the minutes that he said showed the claimant was acknowledging behaviours. Mr MacPherson said he thought these were not genuine. Mr Jamieson asked questions of Mr MacPherson, Mr King and Mr O'Connell. He also asked the claimant a number of questions. Mr Jamieson was surprised that the claimant did not take the opportunity to clearly acknowledge he had behaviours that needed to change. Mr Jamieson formed the view that the claimant did not think he had done anything wrong and wanted to use mediation as an opportunity to challenge his colleagues about what they had said.

85. Following the appeal hearing, Mr Jamieson was concerned about the claimant's health and decided to seek an occupational health opinion on whether the claimant was fit to return and whether his health would impact on the decision to dismiss. He sought the claimant's consent to an OH referral. The claimant responded that it was unclear why a referral to OH would add anything further to the appeal. He said he had never argued that a medical condition was contributing to the background. This was therefore not progressed by Mr Jamieson.

86. Mr Jamieson issued his decision on the appeal on 20 November 2018. He concluded that it was not unreasonable or unfair for the responsible manager to make every effort to gain assurance that the claimant acknowledged that he had displayed behaviours that required to consistently improve in a genuine manner. Regrettably he said, this was not successful and was judged as essential to the next steps of reintegration and mediation and to establish a safe working environment. He referred to the duty of care to patients and staff as being key considerations. He said that no adequate assurance was produced to the appeal hearing and he had been unable through questioning to ascertain that the claimant acknowledged the need for behavioural improvement. He accepted that progressing towards integration back into the department with support and mediation was not likely to be a safe or effective

option. Mr Jamieson said he had formed the impression that the claimant was not suggesting mediation in a conciliatory way but rather the claimant wished to be face-to-face with colleagues “daring them to challenge you on behaviours, almost in a combative sense”. He said he did not see any genuine indication that the claimant wished to return to his role or otherwise put matters right. He said that he kept giving the claimant the opportunity to persuade him he wished to return to make changes to make this a success but none of this was forthcoming and he found this surprising. He also noted that claimant suggested not being sarcastic or flippanant in the short term only and this was a concern. He said the claimant’s long service would have been relevant if paired with the claimant being keen to return or outlining steps he would take.

87. He concluded that the decision to terminate was reasonable and the appeal was not upheld.

New employment

88. The claimant was paid in lieu of notice until the 18 December 2019. He has since found employment in a similar role In Shetland with effect from 18 February 2019. He has therefore no ongoing loss of earnings from that point. He has incurred other expenses in relation to relocation in relation to accommodation in Shetland and removal and legal fees. These amount to £3500 after deduction of the relocation allowance paid by Shetland Health Board.

Relevant law

89. The claim is one of unfair dismissal made under section 94 of the Employment Rights Act 1996. (“the ERA”). It is for the respondent to show that there is a potentially fair reason under section 98(1)(a) (which includes a reason relating to conduct) or that there is “some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held” S98(1)(b).

90. If the respondent establishes a potentially fair reason, the Tribunal must decide whether in the circumstances (including the size and administrative resources

of the respondent) the respondent acted reasonably or unreasonably in treating that reason as sufficient reason for dismissal. That shall be determined in accordance with equity and the substantial merits of the case. (s98(4))

91. It is well established that there may be more than one reasonable response to the particular circumstances. One employer acting reasonably might dismiss while another might not. The tribunal, in making the assessment under s98(4), must consider whether the decision to dismiss falls outside that “range of reasonable responses”. It must not substitute its own view of what it would have done in the circumstances and conclude that if it would not have dismissed, then the dismissal is unfair.

Issues

92. The issues were:

- (i) Has the respondent established it had some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held? S98(1)(b)
- (ii) If so, was dismissal for that reason within the range of reasonable responses available to an employer acting reasonably?
- (iii) Did the employer adopt a fair procedure?
- (iv) If the dismissal was unfair, what should be awarded by way of compensation?
- (v) Should any compensatory award be reduced on **Polkey** grounds?
- (vi) Was the dismissal caused or contributed to by any action of the claimant under rule 123 (6)?
- (vii) If so, should any compensatory award be reduced and, if so, by how much?
- (viii) Should any basic award be reduced on the basis that it is just and equitable to do so. S122(2)?

Respondent's submissions

93. Mr Watson submitted that the claimant worked in a small laboratory with a limited number of individuals. He was in a department of (essentially) two in microbiology. He worked with Margaret-Ann Macdonald who had been absent from work twice due to work related stress arising from the claimant's conduct and with whom he had had an unsuccessful mediation in the past. Six individuals raised issues regarding the claimant as part of a disciplinary process. The claimant was issued with a Final Written Warning (with conditions) as part of the disciplinary process referable to bullying behaviours
94. The findings were that the Ms Shand (and others) found it uncomfortable/humiliating to ask the claimant questions, implying a hierarchical relationship practiced by the claimant which is a well-known risk to patient safety and that the claimant intimidated Ms Shand by standing behind her. There were other findings relating to behaviours as being disrespectful, undermining and raising his voice. Some of Ms Shand's allegations were "not established in fact" because it was one person's word against another and the allegations raised by other members of staff were considered from the perspective of establishing themes or patterns of behaviour which would become relevant when considering a return to the workplace.
95. Mr Watson submitted that the Final Written Warning does not foresee a situation where the claimant does not explicitly acknowledge that there are behaviours that require to change but it was implicit in the in the letter because of the requirement for a SIP and a mediation. The Final Written Warning does not explicitly specify the behaviours relied on but it follows a well-presented investigation report (with appendices not in the bundle) identifying findings and the behaviours and a disciplinary hearing and is also clarified in the 17 May letter.
96. What Mr MacPherson was looking for was not complicated. Mr Watson submitted that anything similar to or variations of "I [accept/recognise/acknowledge] that colleagues perceived my behaviour as

[undermining/intimidating/not being open to questions]. It was not intended [but I am sorry to har that]. I want to make things right and return to my job”.

- 5 97. Mr MacPherson did not get that and there is no policy that accounts for the situation. Mr Watson submits that the process moves from Stage 1 (conduct disciplinary process leading to FWW in April and unsuccessful appeal in June) to Stage 2 (Return to Work meetings in May and August - unsuccessful) leading to stage 3 (SOSR meetings in September (dismissal) and October(Appeal).
- 10 98. There is no obvious policy for the second and particularly the third stages. Policies cannot account for all eventualities. The September and October meetings are not designated as Return to Work meetings – rather the invite is to a “formal meeting” but it is acknowledged that this language creeps in. However, Mr Watson submits that it is clear that this has become something else than merely a discussion about a return to work. Mr King gave evidence that he was applying best practice throughout. Mr MacPherson said it was 15 outwith policy and he took advice from HR and Mr Jamieson said that there was not a policy that addresses an issue like this but any appeal would be through the conduct policy. There is no suggestion that Stage 3 would have been different if the conduct policy had been followed through Stage 3.
- 20 99. The respondent had tried very hard to extract something meaningful from the claimant. Mr MacPherson wanted to see if the claimant had reflected on issues and accepted that behaviours had to change. He could not take forward the SIP without the claimant’s buy-in to improve. He wanted the claimant to volunteer something as that would reassure Mr MacPherson that what was 25 coming from eth claimant was genuine.
100. Mr MacPherson’s evidence was that the appeal had to conclude and the SIP be in place before mediation could take place. The whole department was involved and there were elements of fragility. They wanted it to be safe for everyone.
- 30 101. Mr MacPherson and Mr King recollected that after the adjournment to the September meeting, one matter was volunteered by the claimant, one next

5 following prompting from Ms Dunsmore referring to her notes and in a third exchange, Ms Dunsmore responded on the claimant's behalf. They did not view this as genuine. There had previously been an investigation and disciplinary process identifying the relevant behaviours and these were flagged in correspondence and the meetings themselves.

102. Mr MacPherson considered redeployment or proceeding with the SIP and mediation regardless but was not assured there could be a safe return.

103. The appeal was lengthy and open. The claimant had considerable time to consider the matter and take advice yet his approach was much the same as prior meetings. Mr Jamieson gave him every opportunity to say the right words – something to indicate they could progress with a return to work and seemed quite incredulous that he, like Mr McPherson, was unable to extract that.

104. Mr Watson submitted that the respondent had established there was “some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held” as required by s98(1)(b).

105. He referred to ***Ssekisonge v Barts Health NHS Trust* UKEAT/0133/16/LA** where Mrs Justice Simler clarified that the well-known band of reasonable responses consideration applied in an SOSR case and that there is no higher threshold than on other cases.

106. He referred to ***Ezsias v North Glamorgan NHS Trust* [2011] IRLR 500** to demonstrate that a breakdown in trust and confidence is capable of amounting to some other substantial reason justifying dismissal and to ***Hutchison v Calvert* UKEAT/0205/06** as authority for the proposition that that as long as an employer can show a genuinely held belief that it had a fair reason for dismissal that reason may be a substantial reason provided it is not whimsical or capricious in the sense that no ordinary person would entertain such a reason.

107. Mr Watson referred to a number of cases (***McFarlane v Relate Avon Ltd* 2010 ICR 507**, ***Perkin v St Georges Healthcare NHS Trust* 2006 ICR 617** and

Huggins v Micrel Semiconductor (UK) Ltd 2006 UCR 617 UKEATS/0009/04) where the EAT had disagreed with the tribunal's categorisation as SOSR rather than conduct (or vice versa) but this was not fatal to the reasoning.

5 108. In *Exeter v Distressed Gentlefolks Aid Association 1973 WL 363216*, restoring harmony among staff when a claimant (subject to complaints) was not prepared to accept she did anything wrong was found to amount to SOSR.

109. Mr Watson noted that the case of *Sarkar v West London Mental Health NHS Trust [2010] EWCA Civ 289*, is relied on by the claimant. He submits that in
10 that case the initial process was sabotaged by the respondent and the same behaviours were categorised as Gross misconduct when it reached a disciplinary hearing. Mr Watson submits that here was no stage 1, 2 and 3 as he has outlined.

110. Applying the law to the facts, Mr Watson notes that each case has to be judged
15 on its own facts. He submits that the the dismissal is expressed to be on grounds of a breakdown in the working relationship and trust and confidence arising from a failure to obtain satisfactory reassurance that there could be a safe return of the claimant to the workplace and that, read in its entirety, its clear what it is about. Even if conduct was a more appropriate categorisation it is unclear how this helps the claimant. He was on a FWW and if his inability to
20 recognise behaviours is misconduct, that may put the respondent in a stronger position. The case show that categorisation should not be fatal is section 98 is satisfied. The respondent's witnesses' evidence should be viewed as a whole. Mr Watson submits that the circumstances appear to fit most neatly within
25 SOSR. The reason was not whimsical or capricious. Taking account of all the circumstances, Mr Watson submits, the respondent's decision to dismiss fell within the range of reasonable responses.

111. If the tribunal finds that the dismissal was unfair, the respondent's position is
30 that there is an absence of clarity about the expenses claimed and these should be properly verifiable. The respondent's position is also that there should be a *Polkey* reduction, if the dismissal is found to be unfair because of

the procedure adopted and also that any compensatory should be dismissed because of the claimant's contributory conduct under s123(6) and any basic award reduced under s122(2). .

Claimant's submissions

5 112. Mr McGuire invited the Tribunal to find that the claimant has been unfairly dismissed.

113. His primary submission was that the respondent failed at the first hurdle as it had not established a potentially fair reason. He noted the cases referred to by Mr Watson but reminded the Tribunal these were all fact specific. He submitted
10 that it is not enough just to rely on a "breakdown of a working relationship". Mr McPherson when questioned suggested that one of the relationships that had broken down was his! Then he mentioned other people in the laboratory and then he said, "trust and confidence". Mr Jamieson did not say much about what relationship had broken down. Whatever relationship is relied on, it has to have
15 properly broken down and there was no evidence that relationships had broken down to that extent.

114. Mr McGuire pointed out that the investigation report found that that to a large extent, Ms Shand's complaint was found to be not established in fact. There were statements from other people. The Tribunal must be careful not to accept
20 as fact what is simply commentary of what people thought. For example, in paragraph 5.78, the allegation is upheld but what follows is simply commentary. The Tribunal needs to distinguish findings in fact from commentary.

115. Mr McGuire submitted that a breakdown in relationships has not been
25 established. It is not a matter genuinely and reasonably in the employer's mind. Mr McPherson was very vague and he was the decision maker.

116. In the documentation relating to the Return to Work process, there is no indication of what the breakdown is other than a general issue in going back. Mr McGuire submitted that this is insufficient. Although he accepts there is a

low hurdle for “some other substantial reason” he submits that the respondent has not got over it.

117. Moving on to section 98(4), there is a constant theme that the claimant did not show any remorse and didn't accept anything he did was wrong. Mr McGuire submits that this was at the investigation stage. Mr McPherson heard the disciplinary following that investigation and imposed a Final Written warning. Mr McGuire submitted that what followed in the Return to Work stage was a repetition of parts of the disciplinary – Can you show remorse? Do you accept anything in the complaints? Can you reflect/understand? Mr McGuire submitted that this was already covered in the disciplinary process and a sanction was given of a FWW in knowledge that there was no remorse. What follows goes back to the same point which has already been dealt with in the disciplinary outcome where Mr McPherson said he had considered the report. Mr McGuire submits that to go back and deal with the same matters is just “re-hashing” and looking for something that he didn't get in the disciplinary. Mr McPherson had the opportunity to dismiss following the disciplinary hearing and didn't.

118. Mr McGuire referred to the case of **Sarker** which he submitted was on a par factually with the present case. The Court of Appeal said it was not reasonable under section 98(4) for an allegation already dealt with to then be dealt with again under a different procedure. In that case the employer had applied the “Fair Blame Policy” which had a limited sanction. That broke down and a new procedure, the Disciplinary Procedure, was applied and the claimant was dismissed. This was found to be unfair as the respondent was doing the same thing under a different policy. Applying that to the present case, Mr McGuire submitted that the claimant had been disciplined (taking account of the fact that he had shown no remorse) and then dismissed for the same thing.

119. Mr McGuire submitted that **Polkey** had no relevance to the present case. There was a fundamental unfairness. It was not about saying what would have happened if the respondent had applied the disciplinary process. They had already applied the disciplinary process. This was “double jeopardy”. The

claimant as investigated and a sanction given. It was not reasonable to investigate again.

120. On a more general point about process, Mr McGuire said it was unclear what was being applied. Mr Jamieson thought it was a continuation of the disciplinary process and the FWW was conditional. Mr McPherson and Mr King said it was not the conduct policy, it was something else, a bespoke process. This led to fundamental unfairness. The FWW was imposed for 12 months. If there was any reoccurrence, there could be a further disciplinary sanction. There is to a SIP and mediation to address the breakdown with colleagues. That breakdown is considered in the investigation report when the sanction was imposed.

121. Mr McGuire noted that the draft SIP had been prepared but was never given to the claimant. On 23 August, he submits there was no indication of any sanction for not agreeing the SIP. That comes at the adjourned hearing in September. He submitted it is incumbent on an employer to move away from generalised comments about acknowledging behaviours. The claimant's job is on the line. The respondent should say "This is what we want" but this was not done. Although the letter of 17th May (p101) sets out some things but this is not referred to in the meetings. The claimant has been told this is not a disciplinary process – it's a return to work. Moreover, there is conversation between Ms Dunsmore and Mr King and the claimant then in a genuine manner put forward matters that fully addressed what had been said. The respondent says this was "not genuine" but that is very subjective and the range of reasonable responses test needs to be objective. Although the claimant had been told that one outcome from the meeting in September could be dismissal, no reasonable employer, if they were going to say we don't believe you, you're not being genuine, would have given an opportunity to address the specific points. There was no indication that after the adjournment that Mr McPherson and Mr King do not think the claimant was sincere. No reasonable employer would behave in that way.

122. During the Return to Work process, there was no real evidence that relationships had broken down. Mr King said that the mediators thought there

could be progress but wanted to wait till after the appeal. The appeal was now out of the way but mediation was not back on. The outcome letter makes clear that mediation will take place. Why was that not allowed to progress after the appeal?

5 123. In summary, Mr McGuire submitted that the claimant did not accept that some other substantial reason had been established but, if it had, dismissal for that reason was outside the band of reasonable responses.

124. No **Polkey** reduction should be made. It can't be said that the result would be the same and it would be a fair dismissal. The respondent was essentially
10 rehashing the same "crime". It couldn't have been a fair disciplinary process in relation to these reasons. If there is an element of speculation should be no more than 10%.

125. There should be no reduction for contributory fault. The sanction took into account the lack of remorse. The claimant was advised by and represented by
15 a trade union in a reasonable and proper manner. He was willing to take part in mediation and to engage with the SIP. There should be no reduction to the basic award.

126. As for remedy, there must be sufficient recovery of expenses. The expenses claimed for relocation were necessary. The claimant should be applauded for
20 finding a job quickly and relocating to Shetland. In order to get comparable employment, he had to move to Stornoway.

Respondent in reply

127. In reply, Mr Watson drew a distinction between remorse and changing
25 behaviour. By the latter stages, he submitted, it was not about remorse but about changing behaviour. He had given an indication of the type of wording required – it was just an acknowledgement of the outcome and the need for behavioural change.

128. He asked the Tribunal to look carefully at the findings in totality which included an "intimidating act" (p75)

129. He submitted that the case of **Sarkar** is particular to the facts, the respondent had sabotaged the process.

130. With regard to **Polkey** – the respondent is not saying that following a further disciplinary process was the right thing to do but it was an option to categorise the failure to acknowledge behaviours as misconduct which was a new thing following on from the FWW. However, the respondent’s position was that SOSR was more apt.

131. Mr Jamieson’s evidence was that an appeal, however it arose, would follow the procedure in the conduct policy.

132. The claimant relies on the language used of breakdown in relationship and the witnesses’ evidence should be taken in totality. All the witnesses knew why they got there – it was an impasse, a failure to acknowledge behaviours. There was no prejudice to the claimant.

133. The claimant says that after the adjournment Mr McPherson and Mr King took the view that he was not genuine. This was examined at great length in the appeal (pp160 and 170) and the claimant was given an opportunity to remedy that.

Discussion and decision

Was there a potentially fair reason?

134. I have first to consider whether the respondent has established a potentially fair reason, specifically some other substantial reason justifying dismissal. The respondent relies on a breakdown in the working relationship and trust and confidence arising from a failure to obtain satisfactory reassurance there could be a safe return of the claimant to the workplace. Establishing “some other substantial reason” is not a particularly high bar but the reason must be genuine and not whimsical or capricious. Mr McGuire contends that the respondent has not shown there was a breakdown in working relationships and invites me to find that no potentially reason has been established by the respondent.

135. I accept that Mr MacPherson considered that the claimant's relationships with at least some of his colleagues had broken down. The allegations made by a number of colleagues during the investigation supported this belief. They described bullying and intimidating behaviour by the claimant towards various members of staff over a period of time. Although not all of Ms Shand's complaints were upheld, Ms Fraser had concluded there were themes of bullying and intimidating behaviour. Mr MacPherson's evidence on which relationships he considered had broken down was somewhat confused but it is clear from the contemporaneous documents that his concern related how the claimant could safely return to work with the colleagues who had made such serious allegations about his conduct. This was especially the case with Ms McDonald. She was the person with whom the claimant worked closest and where the poor relationship had caused periods of absences for stress. Mr MacPherson was aware that the previous difficulties had led to a mediated meeting taking place, that this had not been successful and that Mr King considered the reason for that was the claimant not being willing to accept he might be at fault. Ms McDonald had now made serious allegations during the investigation and the claimant, in Mr MacPherson's opinion did not appear to accept they had any validity. On the contrary he maintained the allegations made by colleagues were "not true". Mr MacPherson believed that relationships would require to be rebuilt through mediation and a SIP if there was to be a safe return to work for the claimant. Because of the nature of the allegations and the history between the claimant and Ms McDonald, he was also concerned about the well-being of colleagues and for patient safety if the relations in the laboratory were not working effectively.

136. I consider that this was a substantial reason that could potentially justify dismissal.

137. I then turned to consider whether dismissal for that reason was within the range of reasonable responses. I was conscious that the Tribunal must not substitute its decision for that of the employer. The question is not whether I would have dismissed the claimant but whether dismissal was something that an employer acting reasonably would have done.

138. It is not for this Tribunal to assess the truth of the allegations made by colleagues during the disciplinary process. It is concerned with the information that was before the respondent at the relevant time. Ms Fraser carried out a full investigation and it was not suggested that there was any procedural unfairness in that process (albeit the claimant did not accept the outcome).
5 The claimant was issued with a final written warning in respect of the conduct found to be proved and, based on the detailed investigation report, Mr MacPherson concluded there were themes or patterns of behaviour by the claimant that were of concern.
- 10 139. Although the Final Written Warning was not stated to be “conditional” upon the mediation and the SIP being implemented successfully, it is clear that Mr MacPherson considered this was an integral part of the claimant being able to return to work and this was a reasonable position to take. Had the claimant refused to engage with this process, I have no doubt that the respondent would
15 not have allowed the claimant to return to work. However, the claimant did not refuse. Instead Mr MacPherson’s concern was that the claimant did not acknowledge there were behaviours that needed to change and he considered that was essential to the success of the mediation and the SIP.
- 20 140. I was satisfied that Mr MacPherson (and subsequently Mr Jamieson) formed a view that the claimant did not genuinely accept that he had any behaviours that needed to change. Mr MacPherson believed that any apparent acknowledgment by the claimant following the adjournment of the meeting on 19 September 2018 was prompted by his trade union representative and did not come from the claimant himself. Mr Jamieson, having given the claimant
25 the opportunity to explain his position at the appeal hearing, formed the same view. Both of the managers expressed their shock at the claimant’s attitude.
- 30 141. Having considered the lengthy minutes of the various meetings and having heard from the witnesses (including the claimant) I consider that Mr MacPherson, and subsequently Mr Jamieson, had reasonable grounds for their belief that the claimant did not accept he needed to change. While it is not surprising that the claimant would maintain such a position during the disciplinary process and the appeal, once the sanction was confirmed, Mr

MacPherson was expecting the claimant to reflect on what his colleagues had said and, while he might not accept all the allegations, he expected he would acknowledge changes were required. Instead, in the meeting on 23 August 2018, the claimant maintained a position that the allegations were “not true” and when asked if he accepted that the behaviours identified in the process were unacceptable, he said “no”. Despite an adjournment and an explanation of what was required in the invite letter, the claimant maintained this position at the meeting on 19 September. Following an adjournment where Ms Dunsmore essentially told him what he needed to say, there is an apparent acknowledgment of certain behaviours. However, Mr MacPherson and Mr King did not believe this was genuine. Even on the face of the acknowledgment, it is extremely limited in its scope. The claimant says he will try to reduce sarcastic comments (although he says that these are humorous and not intended to be hurtful). He says what was perceived by Ms Carstairs as “undermining” was probably him being flippant and he would try not to repeat that. He said he would try to think a bit more before coming out with a quip and take time to be “more communicative”. He said that he needed people to tell him if they were unhappy.

142. I consider it was reasonable for Mr MacPherson to conclude that this limited acknowledgment was a long way short of recognising the seriousness of the allegations that had been made in the investigation. Mrs Fraser had identified themes of using patronising and undermining language; that colleagues found it uncomfortable, if not humiliating to ask him questions; that he was not approachable, implying he practised a hierarchical relationship that was a risk to patient safety; that he was intimidating and sarcastic and that he discussed colleagues’ poor performance with others. I have set out the minutes of the meetings in some detail to show how often the claimant was asked to make some acknowledgment and refused, the extent of Ms Dunsmore’s intervention and how late in the day the limited acknowledgment came. It was reasonable for Mr MacPherson, by that stage, to require more from the claimant than a grudging statement that he would try to be less sarcastic and not to be flippant and would try and communicate more.

143. Mr McGuire and Ms Dunsmore suggest that it was unclear to the claimant what behaviours needed to change and that the respondent should have spelled that out for him in more detail. I do not consider that is a valid criticism. The claimant is clearly an intelligent man. Ms Fraser's report is detailed. The claimant had been through a disciplinary hearing and an appeal hearing. There is a summary in Mr MacPherson's letter of 17 May. It was reasonable for the respondent to consider that they had given sufficient notice of the behaviours that were of concern before the meeting in August.
144. I consider the reality is that the claimant did not accept that the allegations nor the findings in the investigation report had any validity. Even knowing his job was on the line, he was only willing to make a very limited concession. During the hearing before this Tribunal, the claimant's position appears unchanged. He does not accept his behaviour needed to change and feels he has been the subject of a "witch-hunt". It is not for me to assess whether he is right in his position. I can only assess whether it was reasonable for Mr MacPherson to decide to dismiss in the circumstances where that was the claimant's belief..
145. Mr MacPherson genuinely believed that some measure of acceptance was required from the claimant if mediation or the SIP was to be successful. He considered that that acceptance by the claimant was necessary before he could start the process of reintegration (including mediation or a SIP).
146. The question was essentially crystallised at the appeal stage and is summarised by Mr Jamieson at paragraph 51 of the appeal minutes where he says *"It was clear that Mr O'Connell's position was that the supported improvement plan should come first and Mr MacPherson's opinion was that the acknowledgment of behaviour should lead to the supported improvement plan"*.
147. The question for the Tribunal is whether the respondent's position, that the acknowledgment had to come first and then to dismiss when it considered that acknowledgment had not been forthcoming was within the band of reasonable responses.

148. On one view, there was nothing to lose by allowing the mediation to take place and see whether a resolution could be found. This was an option open to the respondent. However, Mr MacPherson was aware that Ms McDonald had had two periods of absence which she attributed to stress as a result of the claimant's attitude towards her. She had stated that the second period of absence was so stressful that her hair fell out as a result. Mr MacPherson was also aware that a previous attempt at a mediated meeting to resolve matters between the claimant and Ms McDonald had not gone well and that the person who facilitated that meeting, Mr King, considered the claimant to be "dismissive" of Ms McDonald's feelings and that he had not recognised the behaviours she was describing. Mr King had said there was no attempt by the claimant to see how he may be in the wrong. In these circumstances, I do not consider it was unreasonable for the respondent to wish to ensure that the claimant would have a different approach to any subsequent mediation. It has an obligation to Ms McDonald as well as to the claimant himself.
149. The claimant was unwilling to consider that he might have been at fault in any significant way. His position at the meeting on the 23 August was that the statements by colleagues were not true. I pause here to stress again that I make no findings about whether he was, in fact, at fault. However, the respondent was entitled to believe that he was at least partly to blame for the breakdown in relationships based on the investigation report and, in particular, the statements provided to Ms Fraser by staff members.
150. The claimant was given fair notice that the respondent needed him to acknowledge behaviours before the mediation would take place. He had a further opportunity at the appeal hearing to change his position. Had he done so, I consider it is likely that Mr Jamieson would have upheld the appeal.
151. At the end of the meeting on 19 September 2018, Mr MacPherson was left with a situation where a number of members of staff had made statements which complained about the claimant's behaviour. There were themes in the complaints of bullying and undermining behaviour by the claimant. There were allegations that this behaviour had led to periods of illness for the colleague the claimant worked closest with and that junior members of staff were afraid

to ask questions. If the claimant was unwilling to recognise that changes needed to be made, and in fact was suggesting that colleagues had lied about him, it is hard to see how these relationships could have been rebuilt. It is possible that mediation might have been successful but, particularly with an
5 unsuccessful previous attempt, I do not consider it was unreasonable for the respondent to conclude that this was not a course it was prepared to follow without some acknowledgment from the claimant of the need to change. I consider they were entitled to believe that this was not forthcoming and to move to dismissal.

10 152. It has not been suggested that there were redeployment opportunities that were not considered.

153. Issues were raised by the claimant about the procedure and it is true that the procedure did not follow any of the respondent's established procedures. That does not, of itself, render the dismissal unfair. The question for the Tribunal is
15 whether the procedure that was followed was fair. I consider it was. The claimant was advised of what the respondent required. He was advised that dismissal might be an outcome if the respondent did not get the reassurance it was looking for. He had the benefit of a trade union representative. He was able to appeal the decision and Mr Jamieson carried out a full review of the
20 decision made by Mr MacPherson.

154. Mr McGuire suggested this was a kind of "double jeopardy". The claimant had been given a final written warning for the conduct and was then dismissed for the same conduct. I do not accept that assessment. The final written warning was not stated to be "conditional" on a successful mediation and SIP but it is
25 implicit that this is seen as necessary. The claimant's reluctance or refusal to acknowledge his behaviours was an intervening and additional step that led to dismissal. I consider it would have been inappropriate to categorise this as "misconduct". The claimant is entitled to maintain his position that he is not at fault if that is genuinely what he believed. However, without that
30 acknowledgement, I consider it was reasonable for the respondent to consider that relationships could not be rebuilt and a safe return facilitated.

155. In all the circumstances, I consider the decision to dismiss was within the band of reasonable responses and the dismissal was not unfair.

Employment Judge:

S Walker

5 Date of Judgement:

20 November 2019

Entered in Register,

Copied to Parties:

21 November 2019