



EMPLOYMENT TRIBUNALS

Claimant: Miss Janet Ramsden

Respondent: Ministry of Defence

Heard at: Newcastle (Via remote CVP) **On:** 14, 15 & 16 December 2020

Before: Employment Judge A.M.S. Green

Representation

Claimant: Mr A Serr - Counsel

Respondent: Mr A Crammond

JUDGMENT

1. The claim for ordinary unfair dismissal is dismissed.
2. The claim for holiday pay is dismissed upon withdrawal.

REASONS

Introduction

1. For ease of reading, I have referred to the claimant as “Miss Ramsden” and the respondent as “MoD”.
2. I conducted a remote video hearing using the CVP platform. The hearing related to liability. There was a large joint digital bundle running to 936 pages. The following people adopted their witness statements and gave oral evidence:
 - a. Dr Mario Konfortov
 - b. Mr Andrew Smart
 - c. Captain Mark Henry

d. Miss Ramsden.

Mr Serr proffered written submissions. Both representatives made closing submissions.

3. In reaching my decision, I have carefully considered the oral and documentary evidence, the submissions, applicable legislation, the case authorities, my record of proceedings and the ACAS Code on Disciplinary and Grievance Procedures (the “Code”) and the ACAS Guide: “Discipline and Grievances at Work” (the “Guide”). The Code is relevant to liability and will be considered when determining the reasonableness of the dismissal.
4. The fact that I have not referred to every document produced in the bundle in my decision should not be taken to mean that I have not considered it.
5. Miss Ramsden must establish her claim on a balance of probabilities.
6. CVP hearings are far more tiring than face-to-face hearings. With that in mind, we took regular breaks. Sometimes Miss Ramsden became upset when she was asked questions and needed time to compose herself. This was understandable given the emotive subject matter and the importance of this case and should not be taken as criticism. In this regard, Mr Crammond conducted his cross-examination of Miss Ramsden patiently and sensitively.
7. I had no concerns regarding the reliability of the MoD’s witnesses. They answered the questions that they were asked. I did not consider them to be evasive or vague. Regarding Miss Ramsden, I occasionally had to remind her to answer the question that she was being asked. Furthermore, on several occasions, she was prone to go off at a tangent. I have made specific credibility findings regarding her evidence relating to the allegations about her behaviour towards Maj Walsh which marginally detracted from my overall impression of her reliability as a witness (see below).

The claim and the response

8. On 11 February 2019 Miss Ramsden presented claims to the Tribunal following a period of Early Conciliation via ACAS which started on 23 November 2018 and ended 11 December 2018. She originally claimed ordinary unfair dismissal and holiday pay. She subsequently withdrew her holiday pay claim. Her holiday pay claim is dismissed on withdrawal. The effective date of Miss Ramsden’s termination of employment was 19 November 2018. She was required to present her claims within 3 months of the effective date of termination of her employment. Her claims were presented in time.
9. Miss Ramsden’s grounds of complaint are detailed, cover 9 pages, and comprise 35 paragraphs. In summary, she claims as follows:
 - a. She qualified as a nurse in 1997.
 - b. The MOD employed her from 10 July 1999 until she was dismissed on 19 November 2018.

- c. Prior to 2016, she had a completely clean disciplinary record and was a valued and trusted member of staff.
- d. In 2016 Dr Konfortov became her new line manager.
- e. On 23 September 2016 she was given a written warning for being absent without leave [113-114].
- f. On 2 November 2017, Mr Smart gave her a final written warning to last 2 years [290-292] relating to two matters connected with storage of a password for her computer and an altercation with a patient/member of staff (Major Walsh).
- g. On 6 July 2018, Dr Konfortov gave her two written warnings relating to capability and absence issues [459-463].
- h. On 19 November 2018, she was dismissed. Her dismissal was upheld on appeal on 23 January 2019.

10. Miss Ramsden believes that her dismissal was unfair for the following reasons:

- a. The first written warning dated 23 September 2016 was manifestly inappropriate because it was given without a hearing where she was neither present nor represented and was wholly unjustified on the facts. Colonel Dalal, the appeal officer, apologised for the warning but said that he had no power to overturn it.
- b. The final written warning dated 2 November 2017 was manifestly inappropriate for the following reasons:
 - i. All decision-makers and fact finders met early on and discussed the case expressing their views [161-163].
 - ii. Dr Konfortov ratcheted up the charges [156].
 - iii. Dr Konfortov and Mr Smart repeatedly made baseless allegations of fraud against her [199-201; 206-207; 209-to 211]. This was mandated by Defence Business Service (“DBS”) (the HR business support unit for the MOD) which called into question the independence of all the decision-makers. Before they made any decision, including dismissal, they reverted to DBS.
 - iv. Miss Ramsden had issued grievance proceedings against Major Walsh which was never actioned [224-230]. She argued that Major Walsh was the aggressor rather than the other way round.
 - v. She was suspended for 8 months which was an inordinate and unnecessary length of time.
 - vi. The password issue was innocuous and did not warrant a sanction. She was given the password for her computer on the day of the alleged misconduct because her existing password

did not work. She wrote it down in a diary which was not on view. This was accepted.

- vii. A 2-year final written warning was exceptional under the MOD's disciplinary policy [80] and is reserved for gross misconduct. Ms Ramsden's conduct did not amount to gross misconduct as per the policy [66-69]. She did not threaten Major Walsh as alleged.
 - viii. Miss Ramsden was not represented at her appeal [319-328].
- c. The capability warnings given by Dr Konfortov on 6 July 2018 [459-463] were manifestly inappropriate for the following reasons:
- i. There was no advance notice that Miss Ramsden would be subject to a warning at the meeting on 5 July 2018 in the invitation letter [434-435].
 - ii. The context was that Miss Ramsden was making steady improvement in her capability after a very lengthy period of suspension by the MOD, a move to a different location [289] and a serious period of ill health. She had only returned in April 2018 on a phased return to work and she had passed her Patient Group Direction ("PGD") at the second attempt in June 2018 [440].
 - iii. The most recent Occupational Health Report indicated that Miss Ramsden needed 2-3 months to get back to full fitness [436-437] which would have taken her 2 October 2018.
 - iv. An occupational health report on 21 June 2018 suggested that Miss Ramsden should have an Occupational Therapy ("OT") assessment [441]. This had not been undertaken at the date of the capability warnings.
 - v. The warning in respect of absence was particularly unjustified given that Miss Ramsden had returned to work by that date and Dr Konfortov did not consider the likelihood of further absences [674-684].
- d. Miss Ramsden further claims that her dismissal was unfair for the following reasons:
- i. It relied on warnings that should not have been given. This was pertinent because she was dismissed for "an escalation of penalties" [730] and the fact that she was not found to have been guilty of gross misconduct.
 - ii. Dr Konfortov should not have been the investigation manager because he was not independent. He had been involved in several different disciplinary matters with Miss Ramsden previously and had instigated many of them. Furthermore, Dr Konfortov provided evidence and all the charges and, in particular, key evidence on two of the charges that were upheld:

vaccinating without a Patient Specific Direction (“PSD”) and seeing patients without authority.

- iii. The allegation in respect of Corporal Payne/Patient D shifted. It was investigated as an incident with a staff member and patient [549] but ultimately became an incident just with a patient [659]. The evidence of the patient was extremely limited [513] and wholly insufficient to make any adverse findings. Corporal Payne’s allegation which instigated the disciplinary needed to be viewed with skepticism because he already had displayed animus towards Miss Ramsden having videoed her covertly on 10 July 2018 when he suspected her of conducting personal matters on worktime [569].
- iv. It was wrong to classify any of Miss Ramsden’s conduct a serious misconduct. In particular, there was no deliberate failure to ignore management instructions which was seemingly accepted by the decision-makers.
- v. No consideration was given to Miss Ramsden’s length of service or her medical history/medical context of allegations prior to her dismissal [728-731]. None of these floors were rectified on appeal.

11. The MoD denies liability for unfair dismissal for the following reasons:

- a. Regarding the first warning, Miss Ramsden failed to attend work without reasonable excuse or permission at a time when medical support to provide vaccinations was critical for the deployment of service personnel. There was a reasonable investigation and disciplinary hearing. The MoD reached a fair and reasonable conclusion in accordance with its disciplinary policy and the appropriate sanction was a first written warning for misconduct. Miss Ramsden did not appeal but challenged the warning by raising a grievance which was fairly and reasonably dealt with by the MoD in accordance with its grievance procedure.
- b. Regarding the final written warning, there had been further allegations of misconduct against Miss Ramsden after an incident on 2 March 2017. She was suspended pending an investigation into the following allegations:
 - i. She engaged in personal business during work hours and in the sight of customers/patients.
 - ii. She did not follow security protocols regarding the storage of login credentials for a secure MOD system.
 - iii. She did not follow policy regarding storage of medical information.
 - iv. She behaved in a way that compromised professional and organisational integrity and reputation.

- v. She did not follow instructions to cease patient contact when instructed to do so.

Miss Ramsden raised a grievance about the incident. She was asked to provide details to enable the MOD to investigate it. She did not do that.

Given that Miss Ramsden had a first warning on her disciplinary record, following a fair and reasonable disciplinary investigation, hearing and appeal process, the MoD decided that an appropriate sanction in all the circumstances was a final written warning.

- c. Regarding her dismissal, Miss Ramsden had received a warning relating to unsatisfactory attendance in July 2018 and another in respect of poor performance. On 18 July 2018, Miss Ramsden was suspended, following further allegations of misconduct. There was a thorough and fair investigation, followed by a fair and reasonable disciplinary hearing and appeal. The claimant was dismissed with effect on 19 November 2018.
- d. The reasons given by the MoD for her dismissal were:
 - i. During a patient consultation, she raised her voice. This was witnessed by a medical colleague (Corporal Payne) and Patient D. She asked Patient D to delay his treatment so that she could have a discussion with Corporal Payne, regarding his alleged attitude. When she was asked if she thought that this was an acceptable course of action, she stated that she felt she could not let things go with Corporal Payne any longer and she saw no issue with her course of action. Consequently, patient care was unnecessarily affected, and she compromised the organisation's professional integrity.
 - ii. She failed to record a number of patient consultations.
 - iii. She illegally vaccinated patients without authorisation.
 - iv. She did not cease all lone patient contact when instructed to do so by the MoD's Senior Medical Officer.
 - v. Although the MoD found these offences of gross misconduct had been made out, it considered Miss Ramsden's long service and imposed a lesser sanction and dismissed her on notice.
 - vi. Miss Ramsden appealed against her dismissal. Following a thorough investigation and appeal hearing, the appeal was not upheld.
- e. The MoD's position is that the conclusion reached at its third disciplinary hearing to dismiss Miss Ramsden was reasonable. Her responsibilities as a medical professional were clear and patient safety and regulatory compliance were very important. Miss Ramsden was fully aware of the MOD's expectations of her and the working practices that she was required to adopt.

- f. The MoD had a fair reason for dismissing Miss Ramsden in that further misconduct had followed a final warning and it acted reasonably in all the circumstances, following a fair and reasonable procedure, having carried out a full and proper investigation. The decision to dismiss fell within the band of reasonable responses, notwithstanding Miss Ramsden’s length of service and mitigating factors that she had raised particularly in relation to her health, given the serious nature of the misconduct concerned. The MoD considered her mitigating circumstances, but these were not of sufficient weight to change the decision.

The issues

12. The parties have agreed the following issues relating to liability for unfair dismissal:

- a. Was the Miss Ramsden dismissed for a potentially fair reason within the meaning of Employment Rights Act, section 98 (“ERA”)? The MoD relies upon Miss Ramsden’s conduct as a potentially fair reason for dismissal.
- b. Did the MoD have a genuine and honest belief that Miss Ramsden had committed misconduct?
- c. Did the MoD have reasonable grounds for the belief detailed above?
- d. Was the dismissal fair or unfair in all the circumstances having regard to the size and administrative resources of the MoD?
- e. Was dismissal within the band of reasonable responses available to the MoD?
- f. If Miss Ramsden’s dismissal was procedurally unfair, what are the chances that Miss Ramsden would have been dismissed in any event had a fair procedure been followed?
- g. If Miss Ramsden’s dismissal was unfair, did she contribute to her own dismissal and, if so, what, if any effect should this have on her compensation?

Cast list

13. The following individuals from the MoD are relevant to the claim:

Name	Job Title	Involvement
Colonel Rakesh Bhabutta,		Appeal Manager – First Written Warning

Ms Sharon Fox	Nursing Lead	Referred Miss Ramsden to the Nursing and Midwifery Council following her Final Written Warning and her Dismissal
Captain Mark Henry	Regional Clinical Director	Appeal Decision Maker – Dismissal
Dr Mario Konfortov	Civilian Medical Practitioner	Miss Ramsden’s Line Manager Decision Manager – First Written Warning Investigation Manager – Final Written Warning and Dismissal
Mr Andrew Smart	Operations Manager (North)	Decision Manager – Final Written Warning and Dismissal

Findings of fact***Background***

14. Miss Ramsden qualified as a nurse in 1977. She started working for the MoD on 10 July 1999 and was employed as a Band 6 nurse, a senior role, until her dismissal. She originally worked at the MoD’s medical centre in Ripon and from 2018 at its centre in Dishforth.

15. Miss Ramsden was part of the medical team providing services to service personnel. As well as regular military personnel, she was also responsible for the care of Territorial Army soldiers. She specialised in providing health services for service personnel pre-and post-deployment. This included patient clinics, giving vaccinations, smoking cessation advice, managing cervical smears and recalls and health monitoring. This was a singleton post with no other nursing staff on site. She was responsible for all clinical nursing decisions.

16. When Miss Ramsden first started working for the MoD there was a general practitioner (“GP”) on site for approximately two hours in the morning after which time she had full responsibility for all medical and clinical decisions in their absence. Later on, GPs were replaced by military medical officers. There were occasionally gaps between recruiting medical officers and consequently, at this Ramsden was solely responsible for all medical and clinical decisions. She also deputised for the Practice Manager in his/her absence. In her witness statement, she states that she “wore several other hats”.

The MOD’s misconduct policy

17. The MoD operates a misconduct policy, a copy of which was produced [47]. The following extracts from the “Frequently Asked Questions” section are relevant:

Q1 it is alleged that I have committed misconduct-how is it going to be assessed?

Levels of misconduct are as follows:

- *Minor misconduct is a minor breach of rules, for example, an isolated incident which falls short of the standards expected.*
- *Serious misconduct is either repeated minor offence or significant breach of the standards expected. It will require formal management action, but is not of itself serious enough to amount to gross misconduct in the case of a first offence.*
- *Gross misconduct is serious enough to destroy the working relationship between the employee and employer and the likely sanction is dismissal.*

Levels of misconduct and how they are dealt with are explained in the Misconduct Process. Examples the levels of misconduct can be found in Misconduct: How to Assess the Level of Misconduct.

Q2 How can I be sure that my alleged misconduct is being dealt with fairly?

Your alleged misconduct will be investigated to establish facts and gather evidence. You will not be treated as guilty of misconduct before the fact-gathering/investigation is completed and you have been given the opportunity to present your case, including any mitigating factors at the misconduct meeting. Only then will a decision be made as to whether you have committed misconduct or not.

The Misconduct Policy and related documents have been produced in line with the principles set out in the Advisory, Conciliation, and Arbitration Service (ACAS) Code of Practice on disciplinary and grievance procedures, which outlines best practice in handling employment issues.

Q3 What are the possible penalties for misconduct?

The penalties will depend on the level of misconduct and whether there are any mitigating factors. The penalties are:

- *First written warning-this penalty may be used for an informal action which has not resulted in improvement or for some cases of minor misconduct where informal action is considered inappropriate for the offence and there are no live warnings in place. You will be issued a first warning letter which will be put on your personal HR file and remain “live” for 12 months.*
- *Final written warning-this penalty may be appropriate when an act of misconduct has taken place during the live period of the first written warning or the misconduct is serious. You will be issued a final warning letter which we put on your personal HR file and remain “live” for 12 months.*
- *Dismissal-this may be appropriate when an act of misconduct has taken place during the live period of a final warning or for gross misconduct*

...

If you commit any further misconduct whilst you have a live warning on your record, you may be issued a final written warning or dismissed. Once your warning has expired, it will be disregarded.

...

Q8 *What is the fast track process and when will it be used?*

The fast track process is an option that allows cases to be resolved using a streamlined process, where a lengthy investigation is not necessary but a relatively quick fact-gathering exercise is sufficient to establish the facts of the case.

This process will normally be carried out by your line manager. For minor misconduct fast track cases this should be a minimum of a band D or a military officer equivalent of at least Lieutenant (RN), Captain or Flight Lieutenant. In serious misconduct fast track cases this must be a minimum of a C1 or a military officer equivalent of at least Commander (RN), Lieutenant Colonel or Wing Commander. The fast track process will not be suitable for all cases but it will be used where the facts of the case are relatively straightforward, are not likely to be in dispute and it is appropriate for the line manager to do both fact gathering and decision making.

...

Q9 *Will I be suspended during the misconduct procedure and will it impact on my rights?*

This will depend on the seriousness of your alleged misconduct and will be decided on a case-by-case basis with your manager. Suspension is not a

penalty. It should also not be confused with management action which may be used following an incident to defuse a conflict situation where you may be sent home for the rest of the day or instructed to work in a separate area of the office.

Your manager may consider suspension where:

- there has been a serious breakdown in your relationship with management/colleagues*
- there is a perceived risk to other employees, property or customers*
- there is a perceived risk that you may tamper with evidence required for the investigational influence colleagues who are potential witnesses of misconduct.*

...

You need to bear in mind that suspension is a precaution and a temporary measure and not an assumption of your guilt. The suspension period will be as brief as possible and will be regularly reviewed by your line manager.

...

Q 14 I have been found guilty of misconduct. I have never done anything similar before and have a history of good conduct. Will this be taken into account?

You may put forward mitigating factors together with supporting evidence either early in the procedure or at the end of the misconduct meeting after a decision has been made that the case has been proven but the decision about the penalties not yet been made. Mitigation may include the fact that your misconduct was out of character. It is important that you provide information on mitigating circumstances to ensure the Decision Manager has all the relevant information for consideration.

18. I note the following from the section entitled "Following the Process":

5. Investigations

Misconduct cases that are not straightforward will need a formal investigation rather than just the simple fact-gathering that is suitable for the fast track process. The aim of the investigation is to collect and record the facts necessary to decide whether there is a case to answer or not.

...

Different people should carry out the investigation and act as Decision Manager. In such cases, the line manager should be the investigation

manager and seek appointment of Decision Manager... Line managers can seek further advice from DBS Civilian Personal.

...

An Investigation Manager will

- *not decide if a case is proven or whether a penalty should be imposed, but*
- *Compile a written report to the Decision Manager indicating whether, they believe there is a case to answer or not.*

6. Informing and Meeting with the Employee

...

If there is a case to answer, the Decision Manager will need to take further formal action and should write to the employee who has been investigated within five working days of receiving the report and invite them to a formal meeting to discuss the findings of the investigation. The report and witness statements should be enclosed.

The Decision Manager should:

- *give the employee at least five working days' notice of the meeting*
- *tell the employee they have the right to be accompanied by a companion....*
- *If the employee or their companion cannot reasonably attend the meeting, the employee should propose several new dates to the manager to allow the meeting to take place within five working days of the original meeting date. If the employee fails to engage or cooperate with meeting arrangement and/or fails to attend the scheduled or re-scheduled meeting, consideration of the misconduct case will go ahead in their absence based on the available information. A DBS HR Consultant should be present at serious and gross misconduct meeting is to provide advice on the Misconduct policy and procedures.*

...

7. Deciding the Outcome

The Decision Manager must decide whether the alleged misconduct is, in their genuine belief:

- *proven, or*
- *not proven.*

...

Mitigation

The decision Manager should decide whether the case has been proven or not before taking mitigation into account. If the case is proven, penalty should be decided after the employee has been given the opportunity to put forward any mitigating circumstances and after providing evidence of mitigation where available.

7.1 Deciding an Appropriate Penalty

Decision Managers must ensure that penalties are appropriate to the level of seriousness of the offence, with a minor, serious or gross misconduct. DBS Civilian Personal advice should be sought as necessary.

Instances of minor misconduct do not necessarily merit a penalty.

Penalties could be the following:

- *First written warning. Appropriate in some instances of minor misconduct, or where informal action has not stopped further instances of similar minor misconduct. Valid for a minimum of 12 months from notification.*
- *Final written warning. Usually appropriate when another incident or minor misconduct occurs during the live period of the first written warning or when the misconduct is serious. Normally valid for a minimum of 12 months from notification, which could be extended exceptionally.*

...

- *Dismissal. For gross misconduct or when another incident of misconduct occurs during the currency of the final written warning.*

For repeated misconduct, penalties will normally follow in the above order. However, the process is not sequential and, depending on the seriousness of the misconduct, a final written warning or dismissal may be an appropriate first penalty. The same type of offence may warrant a different penalty depending on its nature and impact: for instance, where an employee has failed to follow departmental procedure.

All penalties attract a right of appeal.

8 Appeals

...

Appeals on misconduct matters must be heard, where this is possible, by someone senior to the person who made the decision being appealed....

The Appeal Manager should be impartial and wherever possible independent. DBS Civilian Personal advice can be sought as required.

19. The MoD's document "How to: Assess the Level of Misconduct" [64] provides that [66]:

Minor misconduct

10. Minor misconduct is defined as a minor breach of rules, for example an isolated incident which falls short of the standards expected. Some examples are:

- *poor timekeeping*
- *failure to follow departmental policy/procedure with minor consequences, for example failure to follow reasonable management instruction*
- *minor misuse of departmental assets such as phone/email/Internet*
- *Discourtesy*
- *Loss and/or compromise of security building pass/personal identity card due to negligence with low-impact or of minor consequences*

Formal action

11. However, some instances of minor misconduct should be dealt with formally from the outset, which could include the examples given above and may warrant a first formal warning, other examples include:

- *breaches of information security that are accidental, genuine errors where reasonable care was taken and where there is no criminal act; no known harm or distress caused and no reputational damage or cost of the department*
- *minor breaches of the Civil Service Code such as an appropriate behaviour and social media sites or in public where the Department may be identified*

Serious misconduct

12. Serious misconduct is defined as repeated minor offences or significant breaches of the standards expected.

13. It will require formal management action, but is not of itself serious enough to amount to gross misconduct in the case of a first offence; for example:

- *Repetition of minor misconduct which the employee has already been warned about either formally or informally*
...
- *Offensive personal behaviour, for example, verbal abuse of a colleague*

Gross misconduct

14. Gross misconduct is serious enough to destroy the working relationship between the employee and employer and its likely sanction is dismissal. The following are examples but this list is not exhaustive:

- *theft, corruption or fraud*
- *physical violence or threatening behaviour, including more serious cases of bullying, harassment and discrimination*
- *significant breach of security*
- *significant breach of health and safety rules*

20. The MoD's document "How to: Decide a Misconduct Penalty" [78] provides that [80]:

... Final written warnings will normally be given for a minimum of 12 months but exceptionally may be extended to a maximum period of 24 months.

21. Prior to 23 September 2016, Miss Ramsden had a clean disciplinary record.

The first written warning

22. Between 17 and 30 August 2016, Miss Ramsden took leave of absence. In her witness statement, Miss Ramsden explains the reasons for her absences. She says at the time both her brother Stephen and her mother were seriously ill in intensive care in different hospitals. She claims that Dr Konfortov knew that her brother's illness was chronic, life-threatening, and ongoing and that she had spoken to him about her brother several times.

23. On 26 August 2016, Dr Konfortov wrote to Miss Ramsden in relation to her absence [101]. The letter was written pursuant to the MoD's Misconduct Fast Track Procedure and she was invited to attend a formal meeting on 14 September 2016 to consider the allegation that she had taken unauthorised leave. She was warned that allegations concerning unauthorised absence could result in a formal warning. She was notified of her right to be accompanied by companion who could either be a work colleague, a trade

union representative or an official employed by a trade union. If she or her companion could not reasonably attend the meeting, she was invited to propose a new date to allow the meeting to take place within five working days of the original meeting. She was warned that if she failed to do that or to attend the re-arranged meeting, consideration of the misconduct case would go ahead in her absence based on the available information.

24. On 9 September 2016, Miss Ramsden emailed Dr Konfortov to notify him that a union representative would be unable to attend the meeting on 14 September 2016. She proposed an alternative date of 19 September 2016.
25. On 12 September 2016, Dr Konfortov wrote to Miss Ramsden to rearrange the disciplinary meeting for 21 September 2016 at 14:00 hours [106]. Miss Ramsden replied to Dr Konfortov on 19 September 2016 by email [108]. She indicated that a union representative would be unable to attend on 19 September 2016 and she was trying to get someone else from Unison to attend. On 20 September 2020, Miss Ramsden emailed Dr Konfortov to update him on progress with finding alternative union representation. She concluded by saying that she assumed that the alternative would contact Dr Konfortov on 21 September 2020 with dates when he could attend the meeting. Dr Konfortov responded to Miss Ramsden by email dated 21 September 2016 to notify her that the rescheduled meeting would still occur on 21 September at 14:00 hours [109]. Under cross-examination, Miss Ramsden admitted that she had access to her email on that day and she acknowledged that this was another reminder of the meeting later that day. However, she said that she had no knowledge that the meeting was going ahead and she did not always read her emails in the morning. It was put to her that she knew that the meeting was going ahead on 21 September 2016, that she had been reminded of that fact but she chose not to attend because she was willing to take the punishment. She accepted that given that the hearing had been postponed once, that it had been rearranged and she had been notified of that fact that it was reasonable for the MOD to proceed with the meeting in her absence.
26. On 21 September 2016, there was a disciplinary meeting to consider a complaint against Miss Ramsden. The meeting was chaired by Dr Konfortov who was Miss Ramsden's line manager at the Ripon medical facility. Notes were taken by Ms Carole Ibbotson [110]. Miss Ramsden was not present. The purpose of the meeting was to investigate and establish facts pertaining to Miss Ramsden's un-authorised absences. Dr Konfortov concluded that leave was taken without authorisation and that a formal warning was an appropriate sanction.
27. On 23 September 2016, Dr Konfortov wrote to Miss Ramsden to notify her that she was receiving a first written warning for misconduct [113]. The letter stated, amongst other things, that he had considered all the circumstances including the mitigating circumstances a family illness that she had provided. Her absence from work between 17 and 30 August 2016 was taken without approval of her line manager and was, therefore, unauthorised as described in DBS policy. The warning was to remain live for 12 calendar months (i.e., until 23 September 2017). She was warned that if she committed another act of misconduct within that time, she could receive a final written warning, or if

gross misconduct, save in exceptional circumstances, she may be dismissed without notice and without pay in lieu of notice. She was notified of her right to appeal against the decision. Under cross-examination, she disagreed that it was appropriate for her to receive a warning because Dr Konfortov was aware of her circumstances and she did not think it was a reasonable and just outcome.

28. Miss Ramsden did not exercise her right of appeal. Under cross-examination, she accepted that she required Mr Konfortov, her line manager, to give permission for her to take leave and that she did not have that permission. She accepted that she had taken unauthorised leave.

The final written warning

29. On 2 March 2017, at 12:30 hours, Miss Ramsden telephoned the Dishforth Medical Centre asking to speak to Dr Konfortov urgently. In his witness statement, he states that she said she was “having a bad day” and asked for the rest of the day off work. It was agreed that she would take the rest of the day. Later the same day, Sergeant Byrne, the Practice Manager at the Ripon facility, telephoned Dr Konfortov to advise him that Miss Ramsden had been involved in an incident at the Ripon medical facility. There had reportedly been an altercation between Miss Ramsden and Maj Walsh, a patient, between 11:00 hours and 12:00 hours. Major Walsh had left the consultation after what he perceived was an unreasonable time waiting for Miss Ramsden to prepare herself and to identify the interventions necessary. It was reported that Miss Ramsden had followed Major Walsh into the Regimental Headquarters and had spoken to him in a tone raised enough for several of the other staff members to overhear.
30. In his witness statement, Dr Konfortov states that he was concerned that, if the allegation was true, Miss Ramsden’s conduct may have significantly undermined the relationship with the regiment which he referred to as “our customer” and effectively put the organisation into disrepute in addition to raising professional concerns. He asked Sergeant Byrne to collate an account and statements from those involved and he planned to visit the Ripon facility the following day to see Miss Ramsden, consider available evidence, and, if necessary, liaise with the regiment. He emailed Colonel Dalal with available details of the allegation and it was agreed that he would conduct an initial fact-finding exercise aimed at clarifying the need for a formal investigation.
31. In her oral evidence, Miss Ramsden accepted that there had been an altercation between herself and Major Walsh and that this had been brought to Dr Konfortov’s attention by Sergeant Byrne. She also accepted that Dr Konfortov was not going out of his way to find something against her.
32. In the following days, Dr Konfortov received several statements from employees at the Ripon facility relating to the incident. He conducted a fact-finding meeting with Miss Ramsden on 3 March 2017 which was adjourned and reconvened on 8 March 2017. The minutes of that meeting were produced [146-148]. There was disagreement between Miss Ramsden’s account of what happened and what was witnessed by several witnesses at the time. This was explored in cross-examination. It was put to Miss Ramsden that there were numerous statements and emails and interview records with people who had witnessed her behaviour indicating that she behaved well

below the standards expected of a nurse. She disagreed and stated, “no I cannot agree with statements that are not honest accounts of what happened in HQ”. However, she was unable to substantiate her allegation that those alternative accounts of her behaviour were dishonest. It was put to her that faced with the weight of evidence against her word, it was obvious that the MoD would find her guilty of misconduct or gross misconduct. Under further cross-examination, Miss Ramsden conceded that if the statements had been made in good faith then that would be evidence of misconduct or gross misconduct. She also accepted that the nature of the statements would be extremely damaging to her profession although she believed she had been provoked by Major Walsh. Miss Ramsden also accepted under cross examination that the incident had occurred while she had a live warning on her file.

33. Dr Konfortov reviewed the statements and consulted with the DBS HR team before taking matters further. In his witness statement, he states that on 6 March 2017 Grahame Bottle emailed him with the relevant policies including the misconduct policy [47-63] and “How to: Assess the level of Misconduct” [64-69]. He was advised that if shown to be true, the allegations would at least amount to serious misconduct as Miss Ramsden’s actions seem to have been out with the Civil Service Code of Conduct.
34. On 7 March 2017, Ms Ibbotson, the MOD’s Area Manager, emailed Dr Konfortov [151] to update him with further information having spoken to Maj Walsh and Miss Ramsden. This included a reference to Miss Ramsden keeping him waiting while she dealt with a personal phone call as well as attempting to locate her password for her computer which was on a Post-it note somewhere on her desk. He denied raising his voice but commented on the chaotic state of her desk and her flustered demeanour.
35. On 7 March 2017, Dr Konfortov corresponded with Sergeant Byrne concerning the allegation that Miss Ramsden had failed to correctly store confidential medical information [153-154]. He was told that there were numerous small piles of paperwork on the claimant’s desk, including prescriptions.
36. Dr Konfortov emailed Mr Bottle 7 March 2017 confirming his opinion that an investigation for gross misconduct was appropriate [156-157]. He was particularly concerned about the effect that the incident might have on the relationship between the medical department and the regiment if the incident was not investigated. He was also concerned that the implications of not investigating an incident which raised the very real possibility of a breach of professional regulatory guidelines. He also believed that Miss Ramsden appeared to show no regrets whatsoever, so he could not be sure that the incident would not be repeated. He also believed that it was appropriate to suspend Miss Ramsden from work whilst the investigation was ongoing. He believed that suspension would help her to a certain extent because it would remove her from the situation and alleviate her stress and her feeling of vulnerability.

37. Dr Konfortov notified Miss Ramsden in writing 8 March 2017 that she was being suspended from work on full pay to allow the investigation of misconduct to be investigated [158-159].
38. On 9 March 2017, Dr Konfortov met with Colonel Dalal, Mr Smart and Ms Fox. A note of that meeting has been produced [161-163]. The following extracts are relevant:

Background

Mrs Janet Ramsden, Band 6 nurse at Claro Barracks Medical Centre Ripon, has been suspended pending investigation. This meeting has been convened after the incident 02 March 17, to make the decision on whether to proceed with Serious or Gross misconduct, and to discuss the process to be taken for next steps.

Dr Marie Konfortov handed all attendees a pack with initial statements from all involved and a letter addressed to Nurse Ramsden. This was to give them a full account of the incidents (attached). Dr Konfortov explained the events leading to today's meeting. This incident occurred 02 March 2017 (see statements) and has highlighted the following issues.

- *Engaged in personal business during work hours and in-sight of customers*
- *Did not follow security process regarding storage of login credentials for a secure MoD system*
- *Did not follow Defence Primary HealthCare policy about storage of medical information*
- *Behaved in a way to compromise professional and organisational integrity and reputation*
- *did not follow instructions to cease patient contact when instructed.*

Since the incident Dr Konfortov has contacted DBS for advice of the severity of misconduct. Dr Konfortov informed us the DBS advised to log the investigation as gross misconduct and have appointed Mr Graham Bottle as the case adviser.

Dr Konfortov then asked that an appeals manager, a decision manager and investigation manager be appointed before the meeting proceeded.

*Dr Mario Konfortov-investigation manager
Mr Andrew Smart-decision manager
Col Sohrab Dalal -appeals manager*

...

Group discussion

Col Sohrab Dalal interjected to remind the forum of unconscious bias and Halo effect, this was taken on board by all.

Mrs Fox stated that aside from Nurse Ramsden being on a formal warning, the singular acts of disobeying a direct order, having no remorse or concept of wrong doing and repeated poor clinical performance, questioned her professionalism was grounds for investigation of gross misconduct.

Mr Andrew Smart said that taking into account the statements in the behaviour pattern displayed, there is a question over Mrs Ramsden's fitness for practice and purposeful role as a band 6 nurse.

Decisions made

Nurse Ramsden will be investigated for Gross Misconduct. Mr Smart, Decision Manager will inform Nurse Ramsden of investigation in accordance with Policy Rules and Guidance.

Next steps

Update Nurse Ramsden every 28 days at minimum. Defence Business Service (DBS) are to be informed of the decision. Enquire with Nursing Medical Council about registration. DBS contacted reference the grievance against the Maj Walsh by Nurse Ramsden.

39. Several things are noteworthy about the meeting on 9 March 2017. It appears to be more than simply an allocation of roles. Whilst Colonel Dalal reminded those present about the dangers of unconscious bias and "Halo effect" (whatever that may be), there was, nonetheless, a group discussion amongst those who were appointed to be the investigating officer, the decision maker, and the appeal officer. The group discussion bears the hallmarks of considering the merits and sharing opinions of the allegations. Indeed, Mrs Fox's statements are pejorative when she refers to Miss Ramsden expressing no remorse or having any concept of wrongdoing and questioning her professionalism. In his evidence, Mr Smart could see that those comments were inappropriate. Despite Dr Konfortov's explanation under cross-examination that it was not such a discussion, the note of the meeting clearly records views on the allegations. This was a very early stage of the process. Mr Smart was also cross-examined on what happened at that meeting. It was put to him that Ms Fox had led the group discussion and provided a summary that was wholly inappropriate at that stage because of the discussion of the merits of the allegations well in advance of gathering the evidence. In response to that, Mr Smart said that he had to ensure patient safety as well as Miss Ramsden's safety and many things had to be considered at that meeting. It was put to him that patient safety was not relevant at that stage because Miss Ramsden had been suspended. In response to that, Mr Smart said that he based his ultimate decision on the evidence provided by Dr Konfortov.

40. On 13 March 2017, Mr Smart wrote to Miss Ramsden to inform her that Dr Konfortov had been appointed to investigate the alleged incident on 2 March 2017 [172]. He explained that the purpose of the investigation was to gather

and present evidence. He explained that the investigation report would show whether, on the balance of probability, there was a case to answer. She was made aware that any information that emerged from investigation might be used in misconduct proceedings against her.

41. On 13 March 2017, Dr Konfortov emailed Mr Smart [174]. He wanted to confirm that his understanding aligned with what he would like the investigation to clarify. He set out the five allegations which he characterised as “outwith the standards expected by the Civil Service”. Mr Smart replied on 14 March 2017 by email stating that he was content that the five areas that he had listed would form the “5 pillars of investigation that you will need to conduct”. He went on to say that “my understanding from you is that issue 4 on the list is the one that makes this Gross misconduct and DBS have ratified this view”. From this exchange of correspondence, it is reasonable to infer the following:

- a. Dr Konfortov, the investigating officer, was liaising and seeking direction in respect of his investigation, from Mr Smart who was the dismissing officer. Mr Smart was confirming his understanding of the Dr Konfortov’s characterisation of one of the allegations as gross misconduct.
- b. DBS appeared to be playing a role that went beyond merely advisory in the sense that they had ratified the understanding of the characterisation of gross misconduct.

42. On 23 March 2017, Miss Ramsden submitted a formal grievance in respect of Major Walsh’s behaviour towards 2 March 2017 [192-196]. No action was taken in respect of that grievance by Mr Smart or Dr Konfortov. The matter was dealt with separately.

43. Dr Konfortov conducted investigation interviews on 17 March 2017 and 21 March 2017. He wrote to Miss Ramsden 10 April 2017 inviting her to attend a formal investigation interview on 19 April 2017 [199-201]. His letter set out the following allegations:

- a. Engaged in personal business during work hours and in-sight of customers/patients.
- b. Did not follow security process regarding storage of login credentials for a secure MoD system.
- c. Did not follow DPHC policy about storage of medical information.
- d. Behaved in a way to compromise professional and organisational integrity and reputation.
- e. Did not follow instructions to cease patient contact when instructed to do so by the Area Manager and Professional Lead.

44. The letter also stated the following:

The misconduct alleged against you appears to fall within the Cabinet Office definition of internal fraud. The full definition is as follows:

- *Dishonest or fraudulent conduct, in the course of employment in the Civil Service, with a view to gain for the employee or another person.*

45. The meeting scheduled for 19 April 2017 was postponed because Miss Ramsden did not receive the invitation with more than 5 days' notice. The meeting was rescheduled for 9 May 2017 which was intimated to Miss Ramsden by letter dated 20 April 2017 [206-211]. The letter contained an extract setting out the more detail on what constituted allegations of gross misconduct involving dishonest or fraudulent activity:

Annex A-this must be included with the letter of all cases of alleged gross misconduct

From 3 April 2017, the MOD will provide the Cabinet Office with information about employees who are dismissed for gross misconduct involving dishonest or fraudulent conduct.

There is a possibility that the misconduct process you are undergoing could lead to your dismissal. As part of the Department's obligations, we need to give you some information about the Cabinet Office Internal Fraud Database (IFD).

Definition of fraud

The Cabinet Office definition of internal fraud is as follows:

Dishonest or fraudulent conduct, in the course of employment in the Civil Service, with a view to gain for the employee or another person. The main categories are;

- *Fraud & Theft*
- *Bribery & Corruption*
- *Misuse of Computers (IT Policy) and data breaches*
- *Conditions of Service*

46. In her witness statement, Miss Ramsden explains her reaction to being accused of internal fraud. She says that being accused of fraud was very serious and the penalty was immediate dismissal which caused her immense anxiety. I have no reason to doubt this.

47. In his oral evidence, Dr Konfortov explained why the reference to internal fraud had been included in the letter. He was asked what the basis was for claiming internal fraud. His evidence was that it was MOD policy and he had been given templates by DBS who had told him that use of work time for

personal business could be fraud and this had to be included in the letter. He was pressed as to why he thought fraud was involved in this case. He repeated that when he discussed it with DBS, they told him to include the statement. It was put to him that as a doctor and a professional, an allegation of fraud and dishonesty if found would mean that it would have to go to Miss Ramsden's regulator, and she could be struck off. Such a finding would be incompatible with professional registration. In other words, it was a career ending allegation. It was put to him that it was cruel and baseless to have included it in the letter. Under cross-examination, he said that he had followed the policy as advised. He said that if he had been told by HR that he must include it and it was difficult for him to say that he would not. He accepted that the allegation suggested dishonest conduct. It was put to him that a nurse of 40 years in practice, accused of fraud could be career ending if established and he was asked how this could not have had an impact on her. His reply was that he had sent the letter and had been told that it was important. He also accepted that the altercation with Major Walsh formed the subsequent basis to the allegation of gross misconduct and yet nobody believed that the fact that she had made a personal phone call was gross misconduct. There was no allegation of theft or other dishonesty. Dr Konfortov agreed but repeated that he needed to include it because he had been told to do so by DBS.

48. Dr Konfortov said that he had questioned the rationale for including the reference to internal fraud but was unable to point to any documentary evidence in the hearing bundle to substantiate that. He accepted that the allegation should not have been included in the letter and subsequently, the MoD apologised.
49. When he was cross examined on the question of internal fraud, Mr Smart accepted that Miss Ramsden could be dismissed and struck off the nursing register if such an allegation was upheld and there was no more serious allegation to be made. He also accepted that there was nothing in allegations 1 to 5 that came close to the definition of fraud. However, he justified his position because he deferred to DBS' requirement to include this in the letter.
50. Miss Ramsden attended the investigatory interview on 9 May 2017. Minutes of that interview have been produced [214-221]. She was accompanied by Joe Gibbins, her trade union representative and Miss Ibbotson, who took notes.
51. Miss Ramsden attended a further investigation meeting with Dr Konfortov on 26 May 2017. Minutes of that meeting were produced [236-239].
52. On 30 August 2017, Mr Smart wrote to Miss Ramsden inviting her to attend a formal meeting under the MOD's Misconduct Procedure [260]. The purpose of the formal meeting would be to consider the five allegations arising from the morning of 2 March 2017. He enclosed a copy of Dr Konfortov's report. He warned Miss Ramsden that the allegations represented potential misconduct offences and the meeting could result in her dismissal without notice or payment in lieu of notice.
53. On 9 July 2018 Mr Smart wrote to Miss Ramsden to inform her that he had appointed Dr Konfortov to investigate the 4 allegations at which he identified as falling within the scope of serious misconduct. He stated that he had not

come to any conclusions about the alleged misconduct or what the appropriate sanction would be if misconduct were to be proven. However, he warned her that on escalation of penalties, this could lead to her dismissal. He stated that the investigation report would show whether on the balance of probabilities, there is a case to answer [593-594].

54. The disciplinary meeting was rescheduled and eventually took place on 26 October 2017. The meeting was chaired by Mr Smart. Miss Ramsden attended with her trade union representative, Mr Wheeler. Mrs Wrigglesworth was present as a DBS HR consultant and Miss McDonald took notes. Minutes of the meeting have been produced [281].
55. On 2 November 2017, Mr Smart wrote to Miss Ramsden with the outcome of the disciplinary meeting [290]. He found that allegations 2 & 4 were proven as gross misconduct. However, under cross-examination, Mr Smart clarified this and said that allegation 2 in itself was not gross misconduct. In summary, allegation 2 was that she had not followed security processes regarding the storage of her login credentials for a secure MoD system. Allegation 4 was that she had behaved in a way to compromise professional and organisational integrity and reputation. He stated that he had considered mitigation put forward by Miss Ramsden and the state of her mind that she was in on the day of the incident. The warning was to remain live for 24 months (i.e., until 2 November 2019). He warned her that should she commit another act of misconduct within that time, she would likely to be dismissed, or if gross misconduct, save in exceptional circumstances, she would be dismissed without notice and without pay in lieu of notice. She was also temporarily moved from Dishforth to Ripon. He notified Miss Ramsden of her right of appeal.
56. In his oral evidence, under cross-examination, Mr Smart said that the overall case of gross misconduct centred upon allegation 4. He told the Tribunal that DBS also considered this, and they determined whether the matter should have been investigated as gross or serious misconduct. Mr Smart admitted that he had a discussion with DBS prior to making his decision. However, he stated that ultimately it was his decision to make. I felt that I needed clarification on what Mr Smart said under cross-examination. He told me that he covered everything and “ran it past them”. He explained that he had not kept a record of his conversation because he regarded DBS as a sounding board in that they provided advice. I asked Mr Smart to expand on this. He told me that he adjourned the disciplinary meeting, and he went back to his office and spoke to Mr Matthew Triggs at DBS on likely action that could be taken. He then resumed the meeting with thoughts on what to do next and what decision to make. He said that he had five days to communicate his decision to Miss Ramsden. Once he had thought for about the matter further, he went back to Mr Triggs who agreed with his decision. I asked him how he would know to have discussions with DBS and the gist of his response was that it might be in the policy although he did not seem sure. He previously dealt with one gross misconduct case. He said that he was familiar with the Code in the sense that he was roughly aware of it. He had not received any training on it. On re-examination, he said that his decision was his to make.
57. Looking at the evidence in the round, I believe that DBS played a more significant role in the disciplinary and decision-making process than he suggests. They played a central and misguided role when they insisted on

including an allegation (for that was what it was in effect) of fraud. The gist of the evidence was that it was mandatory to include that allegation regardless of what Mr Smart or Dr Konfortov might have thought to the contrary. This points to a role that is far more than merely “advisory”. Clearly Mr Smart lacked any formal training in the ACAS code and was only roughly familiar with it. He went back to DBS at least twice at a key stage of the disciplinary process and when he used words such as “ran it past them” this suggests a person seeking approval rather than advice. Consequently, I do not believe that he was wholly independent when he made the decision to issue a Final Written Warning. Furthermore, it appeared to be the case that DBS determined whether the matter should be investigated as gross misconduct or serious misconduct.

58. On 3 November 2017, Miss Ramsden’s suspension was lifted. She had been suspended for a total of 240 days. Mr Smart accepted under cross-examination that the policy required suspension to be the shortest possible period of time. It was put to him that the period of suspension was wholly inappropriate given the length of time of the altercation between Miss Ramsden and Maj Walsh. Mr Smart’s justification was that there had been a lot of delay in getting to the hearing, with significant difficulties with Miss Ramsden signing for and accepting recorded deliveries. The initial hearing had been set for 5 October 2017 but because her union representative could not attend, it needed to be rescheduled for 26 October 2017 (i.e., 3 weeks).
59. Miss Ramsden appealed the final written warning on 14 November 2017 [294]. In essence, Miss Ramsden believed that the final written warning was issued in bad faith. The length of the warning (2 years) was excessive, grossly disproportionate unfair and she did not accept that there were reasonable grounds for imposing such a lengthy written warning given her previous exemplary clean disciplinary record. A hearing of the appeal was listed for 11 January 2018, but Miss Ramsden’s representative was unavailable. Ms Ramsden attended the hearing which was chaired by Col Bhabutta. He dismissed her appeal notifying her of that fact in a letter dated 24 January 2018 [338-339].
60. The MoD reported Ms Ramsden to the Nursing and Midwifery Council of the outcome of the disciplinary action against her.
61. Whilst I believe that the investigation, disciplinary and appeal process was flawed for the reasons that I have given above, I nonetheless have concerns about Miss Ramsden’s credibility regarding the allegations concerning her behaviour towards Major Walsh. I asked Miss Ramsden to clarify what she had said under cross examination regarding the several statements concerning her behaviour towards Major Walsh. In particular, it had been put to her that the evidence of those individuals presented a picture of her behaving in a threatening way which she had refuted as being a dishonest account. I asked to explain what she meant. She replied that it was not how she had behaved in HQ. The statements said that she had been shouting and suggested that Major Welsh was in danger. She went on to say at that some of the statement suggested that he took refuge to get away from her. In her opinion, that was not true. She elaborated and said that there was a suggestion made by Major Walsh in his statement during his interview with Dr Konfortov where he said that Miss Ramsden was wearing a coat. She said

that she would never wear a coat. Having heard Miss Ramsden's explanation I asked whether she was suggesting that the several witnesses who provided statements concerning her behaviour were being dishonest. She replied that some of the statements were dishonest and she was not allowed to discuss them at the meeting. I then took Miss Ramsden to the formal interview notes [709 & 711] and asked whether she had asked for the record to be corrected if she had been misquoted. She told me that she had not.

62. I remind myself, that if there is a preponderance of evidence on one side, as against a lesser amount of equally good or bad evidence on the other, a Tribunal may well be impressed simply by the volume of evidence in favour of one party. Put simply because, say, five witnesses are called to give evidence on the same point does not necessarily enhance a party's case. Generally, it is quality not quantity that matters most when assessing the weight to be given to the parties' evidence. However, this does not arise here. Miss Ramsden did not provide a plausible explanation concerning the alleged dishonesty of the witnesses. At its highest, she was simply speculating. Alternatively, it would be reasonable to infer that she was simply in denial. Given the preponderance of coherent and cogent evidence from several witnesses, it is entirely understandable and reasonable why Dr Konfortov believed that there was a case to answer. That was the essential role of the investigation; a fact-finding exercise. Furthermore, it is entirely reasonable that Mr Smart could rely on the evidence proffered to him as part of the disciplinary process. Ultimately, this established a prime facie case based on several eyewitness accounts.

Miss Ramsden's sickness absence

63. When Miss Ramsden's suspension was lifted, Dr Konfortov wrote to her on 2 November 2017 to notify her that she was expected to resume her duties at Dishforth Medical Centre at 9 AM on 6 November 2017 [289]. There was no return-to-work interview or arrangement to ease her back into the workplace.

64. In her witness statement, Miss Ramsden states that the prospect of returning to work was too daunting for her because she was suffering from anxiety, stress, and exhaustion because of the prolonged disciplinary process. Consequently, she was unable to return to work and she was signed off sick by her GP. She states that she was taking antidepressants and anti-anxiety medication.

65. On 15 January 2018, Dr Konfortov wrote to Miss Ramsden to invite her to a formal attendance review meeting in respect of her sickness absence [330]. He noted that she had been absent for 46 working days and he wanted to discuss her progress, her occupational health report and what could be done to help her to return to work as soon as possible. Miss Ramsden attended a meeting on 24 January 2018 [340-343].

66. On 31 January 2018, Occupational Health issued a report to Dr Konfortov [345]. It observed that based on the information provided by Miss Ramsden, she remained unfit for work because of ongoing symptoms associated with stress and anxiety that appeared to be linked to work situations. She remained under the care of her GP and specialists and was undergoing counselling/therapy and has been prescribed appropriate medication. On

receipt of her GP's report, it was arranged for her to be reassessed and to take account of any new medical information or proposed treatment options.

67. On 22 February 2018, Dr Konfortov wrote to Miss Ramsden to invite her to attend a formal attendance review meeting to discuss her absence [347]. As at the date of that letter, she had been absent for 117 consecutive days. She was invited to a meeting on 6 March 2018 and was notified of her right to be accompanied by a companion. Her attention was drawn to the Attendance Management procedure which aims to help her to meet the attendance standard expected of her. Dr Konfortov stated that he would continue to give her help and support to enable her to achieve this, but he reminded her that her employment could be affected if her sickness absence could no longer be supported.
68. Miss Ramsden did not provide consent for a report from her GP to be given to Occupational Health and she was reminded by letter dated 22 February 2018 to give her urgent attention to that matter as significant delays were likely to jeopardise the level of Occupational Input and this could hinder helping her to return to work [349].
69. On 6 March 2018, Occupational Health issued an updated report to Dr Konfortov [356]. It observed that Miss Ramsden should be fit to return to work on a phased plan from 27 March 2018 following absence associated with stress and anxiety. It observed that she continued to be under the care of a GP who had prescribed appropriate medication and continued to be having counselling/therapy. In week one of her return to work it was suggested that she should only work two three-hour shifts to help to rebuild her strength and stamina. In week two it was recommended that she should work three three-hour shifts. In week three was recommended that she should work three three-hour shifts and one five-hour shift. In week four it was arranged for her to have a telephone consultation on 16 April to review her progress. It was recommended that she should not undertake any critical clinical work during the phased return to work as she would be rebuilding her concentration, focus and confidence during that period. She should not undertake any critical decision-making during her rehabilitation plan, and she should not undertake any auditing or line management. She could undertake refresher training or updating of skills during the period to help to rebuild her confidence. It was observed that she would benefit from regular supportive meetings with her line manager to enable her to advise of any difficulties that she had encountered.
70. On 7 March 2018, Dr Konfortov wrote to Miss Ramsden to invite her to a formal attendance review meeting in respect of her continuous absence [358]. He noted that she had been absent for 120 consecutive days and he invited her to attend an interview 20 March 2018. He notified her of her right to be accompanied and also drew her attention to the Attendance Management Procedure.
71. Miss Ramsden attended the return-to-work interview and it was agreed that she was certified to be fit to return to work. It was agreed that she would begin a phased return to work from 28 March 2018. A note of the meeting has been produced [361]. During that meeting, she expressed her concerns about the length of time that she had been suspended and the adverse effects that she

felt this had on her health and not knowing the full outcome or financial implications. She also disagreed with the sentence from the previous minutes which stated she had felt a lack of support from her colleagues. She wanted it to be added to those minutes did not say that, but she wanted it to be recorded that she had said that she felt hurt and disappointed by what she felt was a personal vendetta. She said that she also felt unsupported by the management and felt very vulnerable. It is also noted that Miss Ramsden also expressed how hurt she felt by some of the statements which were produced by colleagues which made her feel that it was a personal vendetta against her. She felt that she did not say at the previous meetings that she could not return to work at Ripon because of the hurt and disappointment relating to the reports from her colleagues. She did not feel that Ripon would be the place to work at the current time because she felt she had no support and colleagues' statements were damaging and hurtful and untruthful.

72. Dr Konfortov and Miss Ramsden agreed a comprehensive Graduated Return to Work ("GROW") programme which was put in place to assist Miss Ramsden to return to work. The programme was made up of weekly Fit for Work plans [366-424]. In his witness statement, Dr Konfortov describes these as being structured to enable Miss Ramsden to complete all organisationally mandated training and graduated clinical exposure as required to return to her role. The plan separately allowed for Miss Ramsden to re-familiarise herself with the theory and practice of various clinical skills expected to be performed by a person in her role. Clinical practice was designed to build on a continuum beginning with theory, followed by observation of appointments, working through observed practice, and ending with graduated clinical appointments, before allowing routine nursing clinics.
73. Weekly meetings were held between Dr Konfortov and Miss Ramsden or, if he was absent, a senior member of the Practice Management team, to discuss her progress. Miss Ramsden was informed that some of those meetings that her progress was slower than expected. This was supported by evidence of several uncompleted tasks each week. Consequently, the GROW was extended to 12 weeks from the normal 8 weeks to give Miss Ramsden more time to settle back into her role.
74. On 15 June 2018, Dr Konfortov wrote to Miss Ramsden inviting her to a formal attendance review meeting to discuss her continuous absence [434]. A meeting was scheduled for 5 July 2018. The purpose of that meeting was to discuss her progress, her occupational Health report and to see if there is anything further that needed to be done to ensure her return to work was successful. She was notified of her right to be accompanied and her attention was drawn to the Attendant Management procedure and that her employment with the Department could be affected if her absence could no longer be supported.
75. On 5 July 2018, Miss Ramsden met with Dr Konfortov. Notes of the meeting have been produced [448]. They discussed her sickness absence and her performance. During that meeting, Dr Konfortov issued the following to Miss Ramsden:

- a. Poor performance policy;
- b. Management attendance policy;

- c. Band 5 Nursing job Description;
- d. Band 6 Nursing Job description.

76. On 6 July 2018, Dr Konfortov wrote to Miss Ramsden setting out the outcome of the meeting which was a first written improvement warning [459]. He decided to issue a first Written Improvement Warning and to monitor her attendance for 3 months until 5 October 2018. This was referred to as the Improvement and if her attendance was unsatisfactory at any time in the Improvement Period, her case would be considered again which could result in him issuing Miss Ramsden with a Final Written Improvement Warning. It was noted that her attendance would be unsatisfactory if absences reached 3 working days during the Improvement Period. She was notified of her right of appeal which should be exercised within 10 working days of receiving the decision.

77. On 6 July 2018, Dr Konfortov issued a written warning in respect of Miss Ramsden's poor performance [461]. He referred to the following issues which were discussed at the meeting:

- a. All administrative practices needed to be aligned with the organisational standard including:
 - i. DMICP recording practices;
 - ii. All clinical contacts should result in an entry in the patient's iHR;
- b. All clinical practices needed to be aligned with organisational standards including:
 - i. Audiometry consultation;
 - ii. Routine and travel immunisations;
 - iii. Venesection.
- c. Mandatory training that was outstanding.

He recorded that it had been agreed that Miss Ramsden would:

- a. Seek additional training for all the above aspects;
- b. Have supervised consultations for administrative and clinical practices, until she felt confident in the procedures and was deemed as competent by the observer;
- c. Have protected time of two hours each working day to conduct training.

Her work performance would be reviewed for three months from 6 July 2018 until 5 October 2018. It was agreed that they would meet during the review period every two weeks to discuss progress. She was notified of her right to bring a companion. She was notified of her right of appeal.

78. In her witness statement, Miss Ramsden says that she regarded the warnings as highly oppressive, unfair, and inappropriate. She goes on to say that she was given no advance warning of them and has no right to be accompanied at any meetings. However, I note that when she was cross examined, she said that she did not appeal either warning. This was despite being notified of the right to do so in the outcome letters. I also note that the letter inviting her to the meeting on 5 July 2018 specifically stated that she had the right to be accompanied. She was also referred to the Attendant Management procedure and the impact on her employment.

Miss Ramsden's dismissal – Dr Konfortov's investigation

79. On 11 July 2018, Dr Konfortov received an email from Ms Kim Wakeham [569] who had forwarded an email sent to her the previous day by Ms Abby Shardlow, the Administrative Officer at Dishforth. Ms Shardlow's email alleged that Miss Ramsden had been sitting outside the Dishforth medical Centre between 16:20 hours and 16:50 hours either looking at or talking on her mobile phone. Later the same day, Dr Konfortov received another email from Ms Wakeham informing him that Miss Ramsden had been consistently arriving late for work which had caused "upset and friction between staff" [570].

80. On 13 July 2018, Ms Ramsden was involved in an incident with a colleague, Corporal Payne. There is disputed evidence about what exactly happened. Corporal Payne emailed Dr Konfortov to say that he had been treating a patient ("Patient D") which took place earlier on that day. He said that whilst he was treating Patient D on unscheduled patient care ("Sick Parade"), Miss Ramsden slammed his door open and pushed Patient D out of the room before shouting at Corporal Payne [572]. Dr Konfortov also received an email on 13 July 2018 from Ms Andrea Muirhead-Starr, Practice Nurse at Dishforth [577-578] updating him on Miss Ramsden's clinical progress. Ms Muirhead-Starr informed Dr Konfortov that Miss Ramsden persistently failed to obtain patients' bloods. In his witness statement, Dr Konfortov states that he was deeply concerned because it appeared that Miss Ramsden was unwilling to learn or take instructions and wanted to do things her way. Dr Konfortov forwarded this email to Mr Smart and Ms Fox on 17 July 2018 [579] as he was concerned that there might be a misconduct case to answer. Ms Fox replied by email on the same day [581] summarising what she understood to be the main areas of concern regarding Miss Ramsden's clinical skills. She suggested that Miss Ramsden's clinical contact with patients should be stopped as soon as possible.

81. On 17 July 2018, Dr Konfortov replied to Ms Fox [587-588] setting out each of the issues that he was aware of that related to Miss Ramsden.

82. Mr Smart, Ms Fox and Miss Ibbotson discussed the issue set out in his email. Dr Konfortov was appointed to investigate the following allegations of misconduct:

- a. Acted in a way contrary to organisational and professional expectations, during an incident on 13 July 2018 involving a staff member and a patient;

- b. Failed to make adequate records of clinical consultations on 12 & 13 July 2018;
- c. Supplied prescription-only medication, including carrying out vaccinations under PGDs without valid authorisation; and
- d. Engaged in private business during work time without authorisation of her line manager, resulting in a misuse of work time.

83. On 18 July 2018, Dr Konfortov wrote to Miss Ramsden to notify her that she was being suspended [591]. She was permitted to continue patient contact under direct supervision and guidance of another clinician because of the allegation of misconduct and its nature and concerns about her clinical skills. The decision would be reviewed when the investigation was concluded, and adequate evidence was presented that clinical practice was in line with the expected standard and appropriate DBS evidence existed. She would continue to remain an employee and to receive pay.

84. On 19 July 2018, Mr Smart wrote to Miss Ramsden [598] to notify her that several allegations had been made against regarding her behaviour and contact as well as clinical care breaches. He notified her that Dr Konfortov had been appointed to investigate the following allegations:

- a. An incident on 13 July 2018 involving a staff member and patient;
- b. Consultations on 12 & 13 July with no apparent clinical record.
- c. Use of PGD without signed authorisation.
- d. Misuse of work time.

Mr Smart indicated that each of the allegations fell within the scope of serious misconduct. He also stated that he had not come to any conclusion or what the appropriate sanction would be if misconduct were proven. He did, however, notify her that on escalation of penalties, this could lead to her dismissal. She was notified that Dr Konfortov would contact her to arrange an interview date at which she had a right to be accompanied.

85. At this juncture, it is helpful to set out what a PGD is. PGDs allow healthcare professionals specified within the legislation to supply and/or administer a medicine directly to a patient with an identified clinical condition without the need for a prescription or an instruction from a prescriber. PGDs can be used in several scenarios including seasonal and other types of vaccination. A PGD signed authorisation provides the legal framework for a group of patients to be vaccinated. This is the doctor's signed authorisation to do so. In this case, Dr Konfortov would be the doctor to sign the authorisation. He required the assurance the practical aspect of vaccination could be delivered by Miss Ramsden before signing the authorisation.

86. As part of his investigation relating to the allegation of supplying prescription only medication, including by carrying out vaccinations under PGD's without valid authorisation, Dr Konfortov emailed Mr Christopher Perry, the Regional Pharmacist to ask his view on the process for PGD use and authorisation [477-478]. He confirmed that a signed copy of authorisation form must be held

in the medical centre by either the individual or their Practice Manager. Mr Perry told Dr Konfortov, that if there was no evidence of authorisation, the individual would be deemed to be acting illegally in the supply or administration of medication under PGD.

87. Dr Konfortov wrote to Miss Ramsden on 19 July 2018 to invite her to attend an investigation meeting on 2 August 2018 [595]. He specified 4 allegations:

- a. Acting in a way contrary to organisational and professional expectations.
- b. Failed to make adequate records of clinical contact.
- c. Supplied prescription-only medication without valid authorisation.
- d. Engaged in private business during work time without Manager authorisation.

He stated that the purpose of the meeting would be for him to find out what had happened. He stated that Miss Ramsden had the right to be accompanied to the meeting.

88. Dr Konfortov wrote another letter to Miss Ramsden on 19 July 2018 [597] to notify her that consideration had been given to suspending her from duty, but it was decided that she could remain at work subject to the following restriction: she could continue patient contact only under the direct supervision and guidance of another clinician.

89. The investigation interview that was scheduled for 2 August 2018 was postponed at the request of Miss Ramsden because of an unforeseen illness of her trade union representative. The meeting was rescheduled for 9 August 2018.

90. During the meeting of 9 August 2018, Dr Konfortov asked Miss Ramsden questions in respect of each allegation. Notes of the meeting have been produced [608-620]. Miss Ramsden admitted that she had neglected to record patient consultations on two occasions [612]. She stated that she genuinely believed that she had entered a consultation record on the system in respect of the first appointment. Regarding the second appointment, the patient in question had been put into her clinic by mistake.

91. Dr Konfortov asked Miss Ramsden about whether she had vaccinated under PGD's without authorisation. She confirmed that she had done this because she assumed that she had received authorisation. Dr Konfortov asked Miss Ramsden whether she recalled the formal meeting that they had on 5 July 2018 during which he had told that he would not give signed authorisation until she had proved a competency by administering several supervised vaccinations [614]. Miss Ramsden did not recall discussing this. Dr Konfortov also asked Miss Ramsden about the "NO Vaccinations NO Smears" warnings on her Defence Medical Information Capability Programme ("DMICP") diary [479 & 494]. Ms Ramsden explained that she had assumed that those appeared in error because she believed that she had been signed off. Miss Ramsden admitted that she did not stop giving vaccinations despite noticing those warnings.

92. After the meeting, the minutes were sent to Miss Ramsden and Dr Konfortov encouraged her to provide amendments or further details. She did not do this before 19 September 2018 notwithstanding frequent reminders to do so. Consequently, her response to the minutes were not included in Dr Konfortov's investigation report although she did provide her observations to Mr Smart prior to her disciplinary hearing.
93. As part of his investigations, Dr Konfortov interviewed Corporal Payne, Patient D, Ms Wakeham, Ms Shardlow and Miss Ibbotson.
94. On 2 August 2018, Miss Ramsden breached the restrictions placed upon her by conducting clinical consultations with patients presenting for Sick Parade without supervision. She stated that she had misunderstood the restriction placed on her on 18 July 2018 because she believed it did not apply to Sick Parade. Dr Konfortov discussed this with Mr Smart and DBS and decided to suspend Miss Ramsden. In his witness statement, Dr Konfortov explains that he no longer had trust and was concerned about patient safety because he believed Miss Ramsden would not follow any other restrictions imposed on her. He confirmed her suspension in a letter to Miss Ramsden on 2 August 2018. She was suspended on full pay pending the outcome of the investigation and disciplinary process.
95. Dr Konfortov completed his investigation report on 20 September 2018 and recommended that there was a misconduct case to answer because he believed that there was evidence to substantiate each of the allegations against this Ramsden. The investigation report is very detailed and lengthy running to 105 pages [464]. He sent his report to Mr Smart on 24 September 2018.
96. Prior to attending her disciplinary hearing, Miss Ramsden contacted Dr Konfortov asking him to provide with several additional documents. She also requested a copy of patient D's consultation record because she believed that the condition for which he was being treated on the day of the incident may have affected his statement. It was not possible to provide this document because Patient D was deployed in Norway and unable to give his consent. The other information requested was provided to Miss Ramsden.
97. I find the following facts arising from Miss Ramsden's cross-examination:
- a. She accepted that when Dr Konfortov returned from his leave in July 2018, he was faced with several emails regarding her behaviour. She accepted that these emails raised serious issues that needed looking into.
 - b. She accepted that she had been allowed to remain at work subject to restrictions which essentially required her to be supervised when having patient contact.
 - c. She accepted that if concerns had been raised about her clinical skills, regulatory issues and patient protection, the MoD could not ignore that. She accepted that when she saw patients on Sick Parade that was patient contact. She accepted that the contents of the two letters that she had received stipulated that she could only have contact with

patients under supervision and guidance of a clinician. However, she also said that whilst the contents of the letter were clear they were not clear to her. Frankly, I do not understand this answer which is nothing but contradictory. If the letters stipulated that she should not see patients without supervision and she accepted that stipulation was clear, that must have been her understanding. She knew that she was not allowed to have unsupervised patient contact. She accepted that she had seen patients on Sick Parade without supervision.

- d. Miss Ramsden accepted that she had administered vaccinations without authorisation although she erroneously assumed that Dr Konfortov had agreed to her to vaccinate and was in the process of getting the authorisations in place and that he was happy for her to administer under PGD. However, she also accepted that as an experienced nurse, who had passed the PGD course, she needed written authorisation and a certificate in her possession. She also accepted that she had neither and that she administered a vaccine which was illegal. She was aware of the policy of the PGD. She also accepted that as a nurse she had to act within the law at all times and that if she broke the law this was serious. The obvious inference to draw from this is that her assumption could not exculpate her.
- e. She accepted that she had spoken to Corporal Payne and had delayed the patient consultation as a result of that.

98. Dr Konfortov told me that he was familiar with the Code. He received training on this from ACAS in 2014. I have no reason to doubt this. He understood a balanced investigation that to mean that it was important to look at evidence from all side of relevance to include all sides of the argument and evidence for and against an allegation. He believed that it was essential for an investigation to be fair, open, and transparent. He understood his role was to determine whether there was a case for Miss Ramsden to answer. I believe that he discharged that role despite being the instigator of some of the allegations (e.g. vaccination without authorisation). His report is detailed, balanced and thorough.

Miss Ramsden's dismissal – the disciplinary hearing

99. On 8 October 2018, Mr Smart wrote to Miss Ramsden inviting her to a Decision Meeting (i.e., a disciplinary hearing) on 24 October 2018. [659]. The purpose of the Decision Meeting would be to consider the following allegations namely that Miss Ramsden:

- a. Was involved in an incident of the patient where she raised her voice and displayed hostile body language including physical patient contact.
- b. Failed to record patient consultations on 12 & 13 July 2018.
- c. Used PGDs without signed authorisation.
- d. Misused work time on 10 July 2018.

- e. Did not follow written instructions to cease all lone patient contact when instructed to do so by the Senior Medical Officer.

100. The letter enclosed a copy of Dr Konfortov's investigation report. Mr Smart indicated that the allegations concerning her conduct could result in her dismissal, if upheld. She was also reminded that she had been issued with a 24-month final warning for misconduct on 30 October 2017 which was extant. The letter reminded Miss Ramsden of her right to be accompanied by companion who could be a work colleague, trade union representative or an official employed by a trade union.

101. The Decision Meeting was rescheduled for 15 November 2018 at Miss Ramsden's request. Mr Smart chaired the meeting. Miss Ramsden attended the meeting with Ms Linda Cartwright, her trade union representative. Also present were Mr Matthew Triggs (DBS HR representative) and Ms Sian MacDonald (notetaker). Minutes of the hearing were taken [709-719]. Having read those minutes, it is clear that Miss Ramsden was given a full opportunity to state her case and present mitigating circumstances. After the hearing, Miss Ramsden provided written submissions of additional points that she had not raised at the hearing [720-726].

102. Mr Smart reviewed all of the information and decided that there was insufficient evidence to uphold the allegation that Miss Ramsden had misused work time on 10 July 2018. He upheld the other allegations which amounted to serious misconduct. He considered that the appropriate penalty, given the existence of her live Final Written Warning, was to terminate her employment with payment in lieu of her 13 weeks' notice.

103. On 19 November 2018, Mr Smart wrote to Miss Ramsden to confirm his decision [728]. He referred to her Final Written Warning and the fact that she had previously been warned that if her conduct fell below standards again, she was at risk of dismissal. He summarised the meeting. He then went on to explain his reasoning for his decision as follows:

We discussed 5 of your alleged behaviours. I will detail my decision for each of the 5 behaviour separately.

1. *Were involved in an incident with a patient where you raised your voice and displayed hostile body language including physical patient contact. You disputed the allegation that you had made physical contact with the patient and I also note that the patient cannot recall you making contact with him therefore I conclude that on the balance of probability this did not happen. You did however admit that you had raised your voice, witnessed by Corporal Payne and the patient and that you asked the patient to delay his treatment in order that you could have a discussion with Corporal Payne regarding his alleged attitude. When I asked if you thought that this was an acceptable course of action you stated that you felt you could not let things go with Corporal Payne any longer and that he saw no issue with your course of action. As a result, I have partially upheld this allegation as patient care was unnecessarily affected and that you compromise the organisation's professional integrity.*

2. *That you failed to record patient consultations on 12 and 13 July 2018. You stated that regarding the previous two informal discussions that Dr Konfortov as stated occurred, you remember the occasion in January 2017 however denied the June 2018 discussion took place Whilst the calling letter for the meeting on 5 July 2018 was titled "Invitation to a formal attendance review meeting-Continuance Absence" it did also state that he would be discussing any performance and skills issues and how to improve things. You denied receiving this letter but attended the meeting and a formal written warning for Managing Poor Performance was issued 6 July 2018 which stated that poor DMICP regarding practices were an issue.*

One week after receiving this formal warning there were two instances where consultations were not recorded/recorded fully. You stated that the first instance, as there was no clinical patient contact you saw no reason to record the event on DMICP, however, all interactions with patients must be recorded to ensure that a full record of intervention is on file. The second instance you stated that you may not have pressed the save button firmly enough to save the full consultation, but that a partial record was made, however you admitted that you had not fully recorded the consultation. This allegation is fully upheld.

3. *That you vaccinated patients using Patient Group Directions (PGDs) without signed authorisation. The evidence shows that there were 4 occasions that this occurred. You stated that as Dr Konfortov had said to you that he would sign you off except for MMR you assumed that you had the required authorisation, although you admitted that you had not received the signed certificate and therefore had not signed it yourself. Dr Konfortov in his statement states that he would get back to you but did not sign the certificate as there were too many concerns over your clinical performance. You went on to vaccinate even though there was a warning in red letters on your DMICP diary which stated that you should not undertake vaccinations or smears. You state that you made the decision to ignore this warning as you felt that it was an error and that you discussed this with the Practice Manager, a discussion of which there is no record and you stated that the Practice Manager has no recollection. I have determined to fully uphold this allegation since you had not been authorised to immunise under PGD, the act of which is illegal.*
4. *Misused work time on 10 July 2018. You stated that you were researching questions for mandatory training at the time when this allegation was made. There is no evidence to suggest that this was not the case therefore I have not upheld this allegation.*
5. *Did not follow written instruction to cease all lone patient contact when instructed to do so by Senior Medical Officer. You stated that you had misinterpreted the letters to mean that only for the area in which you were already restricted, namely vaccination and smear taking. The wording of the two letters, dated 18th and 19th of July*

2018 and received by you, is very clear in that all patient contact was to cease unless you are under direct supervision and guidance of another clinician. This restriction was put in place to protect both the patients and yourself during the period of investigation and due to the ongoing clinical performance issues. I have determined that this allegation is upheld as a failure to follow clear instruction which may have resulted in patient harm.

After considering all the relevant factors it has been decided that your employment with the Ministry of Defence is being terminated due to an escalation of penalties from the final warning of 2 years issued on the 2 November 2017 and your last day of service is the 19 November 2018. You are entitled to 13 weeks' notice and you will be paid in lieu of notice.

...

As a result of my findings I have also recommended to Mrs Sharon Fox, SO2 Nursing, DPHC (SN), that an NMC referral is made by 23 November 2018.

You have a right to appeal against this decision as long as you do so in writing within 10 working days.

104. Ms Fox referred Miss Ramsden to the Nursing and Midwifery Council ("NMC"). On 13 December 2018, the NMC notified Ms Fox that they would not be investigating the matter further. This was based on the fact that her registration had lapsed, and they did not have jurisdiction to investigate. However, the NMC stated that they would consider the information if Miss Ramsden attempted to rejoin the register [762].

Miss Ramsden's dismissal – the appeal

105. On 29 November 2018, Miss Ramsden appealed the decision to dismiss her [737].
106. This was the first occasion on which Captain Henry had conducted an appeal and he states, in his witness statement that he was keen to work closely with DBS HR throughout the process.
107. Captain Henry received the hardcopy pack of documents relating to the case from Mr Smart. This included the investigation report, the minutes of the disciplinary hearing, the disciplinary outcome letter, and Miss Ramsden's previous live Final Written Warning.
108. Miss Ramsden had raised a grievance on 28 August 2018 about Dr Konfortov and Corporal Payne. Colonel McDicken had been assigned to deal with the grievance and he wrote to Ms Ramsden on 9 January 2019 to inform her that he had considered her complaint carefully and that it should be dealt with at the appeal stage against her dismissal. He referred to the relevant DBS policy on grievance and complaint management which provided that wherever possible, a grievance should be dealt with at the appeal stage of the

relevant process where an employee has raised a grievance during another procedure [809].

109. On 10 January Captain Henry wrote to Miss Ramsden inviting her to an Appeal Meeting on 23 January 2019. He notified of her right to be accompanied by companion and stated that the purpose of the meeting was to examine the decision-making progress and to decide whether these were reasonable. It was not to be a full rehearing of her case [812].
110. Captain Henry heard Miss Ramsden's appeal on 23 January 2019. Miss Ramsden attended the hearing with Ms Cartwright, her trade union representative. Mr Matthew Triggs, DBS Case Advisor attended to take notes. Minutes of the hearing were produced [818-825]. It is clear on reading the minutes that Miss Ramsden was given a proper opportunity to state her case and she also provided an appeal statement. Captain Henry also considered Ms Ramsden's mitigating circumstances surrounding her mental health and the impact of stress upon her. Captain Henry noted that Miss Ramsden had been seen by A Community Psychiatric Nurse who had spoken with her about disassociation resulting in being unable to open letters. Captain Henry was also invited to consider letters from Miss Ramsden's Community Psychiatric Nurse as well as her GP. He agreed to delay his decision to allow for those letters to be received.
111. Having considered Miss Ramsden's appeal, Captain Henry dismissed it setting out his reasons for doing so in a letter to Miss Ramsden dated 5 February 2019 [839].
112. On 12 February 2019, Captain Henry wrote to Miss Ramsden to update her having received letters from her as well as letters from Dr Bradman and Ms Alison Wilson. The letters from Dr Bradman and Ms Wilson provided background regarding her medical care. He concluded that these letters did not materially alter his judgement and maintained his original decision to dismiss her appeal.

Applicable law

113. The circumstances under which an employee is dismissed are set out in section 95 of ERA as follows:

(1) for the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2)...., only if) –

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

...

114. The fairness of a dismissal is set out in section 98 of ERA as follows:

(1) in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

...

(b) relates to the conduct of the employee,

...

(4) Where the employer has fulfilled the requirement of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason) shown by the employer –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee,

(b) shall be determined in accordance with equity and the substantial merits of the case.

115. The MoD must show that Miss Ramsden's misconduct was the reason for the dismissal. According to the Employment Appeal Tribunal in **British Home Stores Limited v Burchell 1980 ICR 303**, a threefold test applies. MOD must show that:

- a. it believed that Miss Ramsden was guilty of misconduct;
- b. it had in mind reasonable grounds upon which to sustain that belief; and
- c. at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

This means that MOD need not have conclusive direct proof of the Miss Ramsden's misconduct; only a genuine and reasonable belief, reasonably tested.

116. An employer who establishes a reasonable belief that the employee is guilty of misconduct in question should still hold a meeting and hear the employee's case, including any mitigating circumstances that might lead to a lesser sanction.

117. Rarely will previous warnings be irrelevant when an employer is considering dismissal. In deciding the fairness of such a dismissal, I remind myself that the Tribunal will take into account the previous warnings issued,

even if such warnings related to different kinds of conduct from that for which the employee is ultimately dismissed (**Auguste Noel Ltd v Curtis 1990 ICR 604 EAT**). However, where a final written warning was clearly unreasonable, and where that final warning contributes to a later dismissal, the dismissal may be unfair (**Co-operative Retail Services Ltd v Lucas EAT 145/93**). The EAT in **Lucas** noted that, as a general rule, it is not for the Tribunal to sit in judgement on whether a final warning was reasonably given, but it is entitled to satisfy itself that the warning was issued in good faith and that there were prime facie grounds for it. In particular, if there is anything to suggest that the warning was issued for an oblique motive or if it was manifestly inappropriate, the Tribunal could take that into account in determining the fairness of a later dismissal in reliance on that warning.

118. This was confirmed by the Court of Appeal in **Davies v Sandwell Metropolitan Borough Council 2013 IRLR 374, CA** although Lord Justice Mummery entered a few caveats. First, the starting point should always be section 98 (4) ERA, the question being whether it was reasonable for the employer to treat the conduct reason, taken together with the circumstances of the final written warning, as sufficient to dismiss the claimant. Secondly, it is not for the Tribunal to reopen the final warning and consider whether it was legally valid or a nullity. And thirdly, the questions of whether the warning was issued in good faith, whether there were prime facie grounds for imposing it and whether it was “manifestly inappropriate” are all relevant to the question of whether the dismissal was reasonable, having regard, among other things, to the circumstances of the warning. Lord Justice Beatson confirmed that only rarely would it be legitimate for a Tribunal to “go behind” a final written warning given before dismissal. Where there has been no appeal against a final warning, or where an appeal has been launched and not pursued, there would need to be exceptional circumstances for a Tribunal to, in effect, reopen the earlier disciplinary process.

119. The **Sandwell** case was relied upon in **General Dynamics Information Technology Ltd v Carranza 2015 ICR 169, EAT**, where the EAT commented that guidance in that case showed that an employer was not required to reopen a final written warning save in limited circumstances. According to the EAT:

If an issue of the kind set out in Sandwell is raised (i.e. if the earlier warning was allegedly issued in bad faith, manifestly improper or issued without any prime facie grounds) an earlier stage of a process may require revisiting; but otherwise an employer is entitled to proceed on the basis of what has already been decided.

120. If, however, a Tribunal has cause on the facts to consider whether a prior warning was manifestly inappropriate, it should do so (**Simmonds v Milford Club 2013 ICR D 14, EAT**). In that case, the EAT held that if a prior sanction applied by an employer was not in accordance with the terms of the employer’s own disciplinary policy, this could give rise to a concern that the sanction was manifestly inappropriate. However, the term “manifestly inappropriate” indicated a higher threshold than the test of reasonableness of a dismissal and manifest inappropriateness would accordingly not be easily established.

121. Where it is alleged that a warning was given in bad faith, the tribunal must hear evidence on the point. In **Way v Spectrum Property Care Ltd****2015 IRLR 657, CA**, an employment tribunal excluded evidence to the effect that a final written warning — which was later relied on to dismiss W — was given in bad faith. It went on to hold that the dismissal was fair. The EAT concluded that, while the tribunal had been wrong to exclude the evidence of bad faith, it would have made no difference to the tribunal's decision, even had it been admitted. The Court of Appeal held that this was an error of law: the EAT had, in effect, proceeded upon the basis that a warning given in bad faith may be relied upon to justify a dismissal which, absent the warning, would not have occurred. This was contrary to the decision in **Davies v Sandwell Metropolitan Borough Council**.

122. The question of what the Tribunal's approach should be where an employer has dismissed an employee for misconduct following a final written warning that the tribunal deems manifestly inappropriate was considered by the EAT in **Bandara v British Broadcasting Corporation EAT 0335/15**. The EAT explained that, in such a case, the tribunal should examine the employer's reasoning — including the extent to which it relied on the final written warning — to see whether or not the decision to dismiss was reasonable having regard to equity and the substantial merits of the case. In the EAT's view, if the employer treated the warning as no more than background or as indicative of the standard to be expected of an employee, and in fact dismissed for the misconduct alleged in the new proceedings, then it might be that the dismissal was fair. If, however, the employer attached significant weight to the warning, for example, starting from the position that because the employee was already subject to a final written warning he or she should be dismissed for any significant further misconduct, it was difficult to see how the employer's decision could be reasonable. In the instant case, the tribunal had instead considered the hypothetical question of whether B's dismissal would have been fair had he been subject to an ordinary, as opposed to a final, written warning, and in doing so it had erred

123. When determining whether or not dismissal is a fair sanction, it is not for the Tribunal to substitute its own view of the appropriate penalty for that of the employer. The position was stated most succinctly by Phillips J giving judgment for the EAT in **Trust Houses Forte Leisure Ltd v Aquilar [1976] IRL 6 R 251**:

It has to be recognised that when the management is confronted with a decision to dismiss an employee in particular circumstances there may well be cases where reasonable managements might take either of two decisions: to dismiss or not to dismiss. It does not necessarily mean if they decide to dismiss that they have acted unfairly because there are plenty of situations in which more than one view is possible.

124. Consequently, there is an area of discretion with which management may decide on a range of penalties, all of which might be considered reasonable. It is not for the Tribunal to ask whether a lesser sanction would have been reasonable, but whether or not dismissal was reasonable: see the Court of Appeal decision in **British Leyland v Swift [1981] IRLR 91**, more recently applied by the Court of Appeal in **Securicor Ltd v Smith [1989] IRLR 356** (which concerned an alleged inconsistency in treatment between two

employees). But this discretion is not untrammelled, and dismissal may still be too harsh a sanction for an act of misconduct.

125. In paragraph 3 of the Code, it is stated that:

Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case.

126. Paragraph 5 of the Code provides that:

It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.

127. Paragraph 6 of the Code provides that:

In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.

128. Paragraph 4.12 of the Guide addresses investigating cases. It says:

When investigating a disciplinary matter take care to deal with the employee in a fair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against.

...

Any investigatory meeting should be conducted by a management representative and should be confined to establishing the facts of the case. It is important that disciplinary action is not considered at an investigatory meeting.

129. There are a whole range of potential factors which might make a dismissal unfair. Many of these are likely to be relevant in all unfair dismissal cases. In misconduct cases they include especially the employee's length of service and the need for consistency by the employer. The importance of length of service and past conduct were emphasised by the EAT in the early case of **Trusthouse Forte (Catering) Ltd v Adonis [1984] IRLR 382** as being proper factors for a tribunal to take into account when considering whether the sanction imposed falls within the band of reasonable sanctions. Moreover, it was later accepted by the Court of Appeal that the severity of the consequences to the employee of a finding of guilt may be a factor in determining whether the thoroughness of the investigation justified dismissal: **Roldan v Royal Salford NHS Foundation Trust [2010] EWCA Civ 522**, (dismissal likely to lead to revocation of work permit and deportation). While

this latter point has obvious sense behind it (particularly where, for example, some form of professional status is in grave jeopardy), it was suggested subsequently in **Monji v Boots Management Services Ltd UKEAT/0292/13** (20 March 2014, unreported) that some care may be needed in its application; the basic principle was not doubted, but three caveats were mentioned:

- a. this is an area where the EAT must be particularly careful not to substitute its own view on the facts for that of the Tribunal;
- b. it may be that the **Roldan** principle may be most applicable to facts such as those in that case itself, namely where there is an acute conflict of fact with little corroborating material either way, and/or where the case against the employee starts to 'unravel' as it proceeds, in which case it makes sense to expect a higher level of investigation and adjudication on the part of the employer in the light of the severe effects of dismissal on that employee;
- c. the question is whether the Tribunal has in fact applied the **Roldan** approach, not just whether they have done so expressly, though the EAT did add that in such a case a tribunal is advised to make it clear in their judgment that this has been part of their reasoning.

130. One other area where it is particularly important for the Tribunal to apply the correct 'range' test is where the claimant argues that he or she should have been given a lesser penalty than dismissal on the facts. In principle that is not the question posed by the legislation, which is whether the dismissal actually imposed was or was not fair. However, the (split) decision of the NICA in **Connolly v Western Health and Social Care Trust [2017] NICA 61**, may at first sight appear to question this because the majority held that dismissal on the (rather harsh) facts was disproportionate and thought that the possibility of a lesser penalty (ignored by the Tribunal) was relevant to the question of proportionality when applying the ultimate ERA 1996 s 98(4) test of 'in the light of equity and the substantial merits of the case'. Did this imply criticism of the range test itself? The clue may be in the passage in the majority judgment which poses the question 'whether a lesser sanction would have been the one that right thinking employers would have applied to a particular act of misconduct' (emphasis added). In applying the ultimate lodestone, all factors are relevant and the italicised phrase suggests that the possibility of a lesser penalty can be one such factor provided it is used in applying the correct range test – not whether the Tribunal thinks the employer should have imposed that lesser penalty but whether a reasonable employer could still have dismissed in spite of that lesser possibility.

131. One final point to note is that, although misconduct can take so many forms, there is no hierarchy or gradation of the 'range' test, which simply must be applied in all the circumstances. Clearly, there can be instances where an employer wishes (or indeed needs) to take a 'zero tolerance' approach to a certain form of misconduct, an obvious and pressing example being abuse of children or vulnerable adults. This can of course be a factor (and indeed in that particular example it can occasionally justify dismissal on suspicion rather than belief), especially if made sufficiently clear to employees in advance. However, conceptually this does not alter the range test itself. This was made clear by the Court of Appeal in **Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677, [2015] IRLR 734** in another particularly sensitive

area. Breaches of health and safety rules by an employee are usually treated particularly seriously by employers but in this case the court affirmed that they do not constitute a separate subset in unfair dismissal, in which the range of reasonable responses open to the employer is wider than normal.

132. In Newbound, the claimant was dismissed for a serious breach of procedures in going into an enclosed space without breathing apparatus. His senior who had permitted it was given a lesser penalty. The claimant had over 30 years' service with the employer, but the latter considered that in these circumstances this acted as an aggravation of the misconduct, not mitigation. The tribunal found that the dismissal was unfair generally, partly in the light of the long service, and also specifically because of the disparity in treatment in comparison with his senior; this was subject to 40% contributory fault. The EAT allowed the employer's appeal, considering that the Tribunal had substituted its own view for that of the employer. Allowing the employee's further appeal, the judgment of Bean LJ is largely concerned with the role of the EAT in such cases, finding that it had overstepped the mark and that the tribunal had applied the law properly and reached conclusions open to it; the EAT had been wrong to intervene. On the specific health and safety point above, however, the employers had argued that in such cases the margin of appreciation given to employers ordinarily by the range test should as a matter of principle be widened, but the Court of Appeal disagreed and held that the normal rules on fairness still must be applied.

Discussion and conclusions

133. Miss Ramsden was dismissed for a potentially fair reason within the meaning of section 98 ERA. I have no doubt that the potentially fair reason for her dismissal was her conduct.
134. Central to this case is the question whether I can revisit the first written warning and the final written warning in my overall assessment of the fairness of the dismissal. Regarding the first written warning, I disagree with Mr Serr's characterisation that it was manifestly inappropriate because it was given without a hearing and was wholly unjustified on the facts. Miss Ramsden had been reminded of the fact that the meeting on 21 September was going ahead but she chose not to attend because she was willing to take the punishment. She accepted that given that the hearing had been postponed once, that it had been rearranged, and she had been notified of that fact, it was reasonable for the MoD to proceed with the meeting in her absence.
135. Regarding the Final Written Warning, I have some concerns. All the decision makers and fact finders met early on to discuss the case and expressed views which were negative and inappropriate at that stage. To an extent, Mr Smart directed Dr Konfortov, in his investigations, which was inappropriate as both required to be independent of one another. DBS was acting in more than an advisory role. I would have found that these amounted to being manifestly inappropriate but for the fact that the MoD had prime facie grounds for disciplining Miss Ramsden given the preponderance of evidence from multiple witnesses speaking to her threatening behaviour towards Major Walsh. Her counter argument that none of those witnesses was telling the truth was no more than speculation or simply denial on Miss Ramsden's part. Given the severity of her conduct towards Major Walsh a

final written warning was clearly reasonable, and the MoD was acting in good faith.

136. I feel that should say something about the completely baseless and shameful allegation of fraud was made repeatedly against Miss Ramsden by the factfinder and the decision maker. I was shocked that this was not challenged by Dr Konfortov or Mr Smart when it was patently obvious that it was not applicable to the species of misconduct for which Miss Ramsden was being called on. It clearly and understandably caused her great distress and should never have been made. I would have found evidence of the MoD acting in bad faith had it not been retracted and not formed part of the sanction.
137. Regarding the capability warnings, I disagree with Mr Serr's analysis that Miss Ramsden was not notified in advance that she could be subject to these warnings. The facts do not support that. She was referred to the Attendance Management procedure and warned that her employment with MoD could be affected if her absence could no longer be supported. Furthermore, weekly meetings were held between Dr Konfortov and Miss Ramsden or, if he was absent, a senior member of the Practice Management team, to discuss her progress. Miss Ramsden was informed that some of those meetings that her progress was slower than expected. This was supported by evidence of several uncompleted tasks each week. Consequently, the GROW was extended to 12 weeks from the normal 8 weeks to give Miss Ramsden more time to settle back into her role. She knew there were issues with her performance and her absences.
138. Turning to the dismissal, the MoD had reasonable grounds for believing that Miss Ramsden was guilty of misconduct as alleged. A very detailed and extensive investigation was conducted by Dr Konfortov. Furthermore, Miss Ramsden accepted that she administered vaccinations without authorisation and that she had attended patients unsupervised and, had at least on one occasion, not properly recorded the consultation. Mr Serr submitted that Dr Konfortov should not have been the investigating officer because he was not independent. In support of this his prior involvement in previous disciplinary matters. I disagree with that submission because that, in itself, would not disqualify him in the absence of animus or bias. It is true that he provided evidence on all of the charges and, especially, the allegation concerning administering vaccinations without a PSD and consulting patients without supervision. That does not in itself undermine his role in fact finding as part of his investigation or necessarily lead to failure to act in a balanced way. Dr Konfortov was trained by ACAS on the Code and he knew what he was doing and understood his duties. He acted in accordance with the MoD's policies which themselves were modelled on the ACAS Code and Guide. Furthermore, I agree with Mr Cramond's submission to the effect that Dr Konfortov was probably the best person to investigate matters given his knowledge of medical matters in issue and of Miss Ramsden. He was not the decision maker, and, in any event, there was no factual dispute about the fact that she administered vaccinations without authorisation and saw patients unsupervised. The fact that she thought she was authorised to administer vaccines is irrelevant.
139. The dismissal was fair under all the circumstances having regard to the size and administrative resources of the MoD. It is a large organisation with

extensive and comprehensive procedures, including an internal appeals mechanism, which it followed. The allegations were thoroughly investigated. Miss Ramsden had ample opportunity to present her case before Mr Smart who also considered her mitigating circumstances including her mental health and her length of service. Miss Ramsden exercised her right of appeal to Captain Henry who heard what she had to say, and who considered mitigating circumstances.

140. Dismissal was within the band of reasonable responses. For the reasons that I have already given, the earlier Final Written Warning was not issued in bad faith, manifestly improper or issued without any prime facie grounds. This was a dismissal based on escalation which was permitted under the MoD's policy. The fact that the allegation concerning Corporal Payne shifted from being investigated as an incident involving a staff member and a patient ultimately to become an incident with just a patient is irrelevant, because other allegations were upheld which, in their own right, amounted to serious misconduct within the extant Final Written Warning. Miss Ramsden had previously been warned that she could be dismissed if she committed acts of further misconduct during the currency of a Final Written Warning.
141. Finally, on a human level this is undoubtedly a tragic case given Miss Ramsden's length of service, the circumstances of her dismissal and the underlying difficulties that she experienced in her family and private life. Nonetheless, the inescapable fact is that administering vaccinations without authorisation is illegal and consulting patients without supervision (when supervision is mandated) is serious. Ultimately, patient safety is paramount.

Employment Judge Green
Date 5 January 2021