EMPLOYMENT TRIBUNALS

Claimant: Mr M Castle

Respondent: Oldham Metropolitan Borough Council

Heard at: Manchester **On:** 25 – 28 January 2021
(In Chambers)
2 February 2021
15 March 2021

Before: Employment Judge Feeney
Ms M Conlon
Mr S Khan

REPRESENTATION:

Claimant: Mr F Jaffier, Consultant
Respondent: Mr J Searle, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the claimant's claims of :

1. Unfair dismissal under section 92 Employment Rights Act 1996.
2. Victimisation under section 27 Equality Act 2010

fail and are dismissed.

REASONS

1. The claimant following his dismissal by the respondent on 24 October 2019 brought a claim of unfair dismissal and victimisation. The claimant had sought to include a number of race discrimination claims but these were refused at a Case Management Preliminary Hearing on 19 November 2020.

Claimant's submissions

2. The claimant claimed his dismissal was unfair because the investigating officer was biased and looking only for evidence which supported wrongdoing by himself, that the respondents had failed to take into account sufficiently his mitigation of casework overload and in addition, that if there was a problem

with how he had dealt with his cases it was suitable for a performance management rather than a misconduct issue. The claimant also claimed that his dismissal was victimisation in relation to complaints of racial discrimination he had previously made.

Respondent's Submissions

3. The respondents submitted that the investigation was exhaustive and forensic, that the respondent had taken his mitigation into account but still made the decision that dismissal was the appropriate sanction and that in respect of victimisation his earlier complaints of race discrimination had absolutely no connection with the decision to launch an investigation or to dismiss him or turn down his appeal.

The Issues

4. The issues in this case were

5. (a) victimisation, Section 27 Equality Act 2010:-

3.1 Did the claimant do a protected act by making an allegation in good faith that there had been racial discrimination or harassment related to race on any of the following occasions:-

(a) his grievance about discrimination language by service user Mr Gordon in or around May 2014;

(b) his grievance alleging racial abuse by Mr Bridgehouse in October 2015; and

(c) his complaint to his manager JC and DL that he had been racially abused by a service user Mr Taylor.

3.2 If so, are there facts such that the Tribunal could conclude that in deciding to dismiss the claimant the respondents subjected him to a detriment because of a protected act.

3.3 If so, can the respondent nevertheless show that there was no contravention of Section 27 in the decision to dismiss the claimant.

(b) Unfair Dismissal Part X Employment Rights Act 1996

1. Can the respondent show that the reason or the principal reason for the dismissal of the claimant was a reason relating to his conduct.

. 2. If so, was that dismissal fair or unfair under Section 98(4). In particular was it within the range of reasonable responses of the reasonable employer

Witnesses and Evidence

6. Where we did not hear from an individual but their name was quoted we have just refferred to them by their initials"

7. The Tribunal heard from the claimant and for the respondent from Joanne Nuttall, Investigating Officer, David Garner Dismissing Officer, Barbara Brownridge Councillor Appeal Panel member. There was an agreed bundle.

Credibility

8. We had some doubts regarding the claimant's credibility as a result of two matters – the fact that the had destroyed his blue notebook and secondly that he suddenly in cross-examination challenged the accuracy of the disciplinary hearing notes which had been available to him for some time and which were not referred to in his witness statement.

9. We found the respondent's witnesses consistent and credible although we were concerned regarding the appeal panel's decision not to consider the claimant's race complaints this did not affect their credibility.

10. The Tribunal finds as a fact:-

    6.1 The claimant began working for the respondent on 16 January 2006 as a Social Worker. Whilst employed by the council he was supported in undertaking a further course at Salford University which resulted in him being designated a level 3 Social Worker. The claimant was employed in the Learning Disability and Autism Team managing a caseload, undertaking assessments, developing care and support plans and monitoring and reviewing those plans. He was also responsible for improving life opportunities for service users, their families and carers and this would require him visiting service users, their families and carers on a regular basis, in particular the service users.

    6.2 The claimant had worked under five managers during his time with the respondent his last 3 managers were: JC from July 2015 to August 2017; DL from January 2007 to October 2018; KH from April 2018 to October

    6.3 The claimant raised matters in his witness statement that were not matters relating to the protected acts he relied on and we include them for background. He complained about JC and DT with regard to bullying and racial harassment. In respect of DT the claimant had two complaints;

        6.3.1 That she in effect propositioned him at a social occasion; and

        6.3.2 That she had implied that he should come over to her organisation Mio Care, a partner of the respondent and

act as 'security' in a certain situation, the claimant felt this was stereotyping him because he was black.

6.4 There was no evidence of a grievance against JC although there was reference throughout these proceedings to the incidents involving DT and it was documented in the disciplinary procedure that on a previous occasion DT had been clearly told by the respondent that the claimant was not to be used in any security capacity and emphasised what his role was.

6.5 The complaint he made regarding JC was not documented anywhere apart from again as referred to in the disciplinary process, and was a complaint about her commenting on him carrying many bags and also his aftershave and it was his case that she would not have commented in such a way in respect of a white employee.

6.6 The claimant also referred to a complaint he had made against his manager DL however he does not rely on that incident and appeared to have a warm relationship eventually with DL prior to his absence on sickness leave.

6.7 The claimant also advised and it could not be disputed by the respondent that in a supervision meeting at the time with Martcha Thomas, a senior Practitioner she said she had been asked by senior management to grill him as to why he had gone to his union and taken a grievance when it was something they could have sorted out themselves.

6.8 The claimant says as a result of this he felt discouraged from raising further grievances.

11. The claimant explained also that he had a very high caseload of 40 cases, this was in spite of the recommendations of the regulatory body SWE Social Work England that practitioners should only carry between 20 and 25 cases.

12. There was a documented complaint where the claimant did bring a grievance in respect of a colleague, PB. The claimant recounted this incident from 2015 when he was at the lift and PB came along and stated that he was dressed like a gollywog and all he needed to do was to be placed on front of a jam jar. The claimant felt these comments were racial harassment and unacceptable. He complained to the respondent in an email and a meeting was arranged for PB to attend with the previous Head of Service Peter Tomlin, it was attended by the claimant and his BASW union representative but PB did not attend. The claimant felt no action was taken against PB for his non-attendance or in respect of the complaint. However, the claimant was later written to by JC where she stated that there was no evidence to support either version of events (although she did not specify what PB's version of events was) and that if he wished to take the matter further he should make a formal complaint. The claimant did not take the matter further in that way. Regarding the other two protected acts these concerned service users, we accept these incidents took place as the claimant's evidence in the absence of relevant witnesses could not be challenged.

13. At the time of the events with which we are concerned the claimant had a new Acting Manager Mr Howarth who was on the cusp of looking at the claimant's caseload with a view to weeding out what cases could be closed and what cases might be able to be transferred to someone less qualified. The claimant alleged he had numerous discussions with DL and JC about his case load and the problems he was experiencing and he stated he complained about his caseload to DL, KH and JC. In particular that on 12 June 2017 he had complained about his caseload.

14. An issue arose on 22 December 2016 when SM, a senior manager complained to the claimant about the situation regarding MB's case where care had been extended but the finances and the paperwork to request and set up the finances for that had not been agreed. The claimant emailed SM and stated that on 20 September he had emailed her requesting an increase to support user A's support package and a further 14 hours personal assistance and service user A to attend Newbridge Horizons five days a week. He said that she had agreed this but asked for a review of how the care provisions were proceeding, that he had attended the panel that day and explained the situation to Peter Tomlin, Head of Service and Mr Tomlin had agreed the support package. SM replied stating that if it had been agreed and the provider had been told to provide care it was not acceptable for the payment not to be processed in a timely fashion, when she had referred to a quick review she was thinking weeks and not expecting that it would only be workflow to the panel three months later with no changes or reviews identified. She said she would appreciate him taking the time to (i) urgently resolve this episode so the provider can be paid; (ii) review whether this care is proportionate and appropriate given the resolution of the police aspects and (iii) screen for CHC given behaviours described, CHC is a source of funding so that if service user A qualified for their funding the respondent would not have to pay for the additional support, or at all.

15. She copied this to the claimant's manager JC who said she would raise it during his supervision. Mr Tomlin in December had also stated that service user A should be CHC screened so JC was concerned in January in supervision that the screening had not taken place the claimant and reminded to progress this issue. In relation to this the relevant application to the CHC was not completed until July 2017 and although it was completed it was not submitted until 18 October 2017. Our understanding is that it was bounced back at this stage by the CCG because the claimant had not attached up to date reports to it. It was then resubmitted in January. But the reports were still not up to date and /or sufficient later the CCG would refer to a note that the claimant had been telephoned about this on 9 February 2018.

16. On 14 March 2018 SM was again looking into a query regarding ervice user B (another service user) as the home where service user B was staying had queried the fact they had not been paid properly. When looking into this query she noticed there was a lack of notes of visits and she emailed the claimant about this.

17. On 16 March 2018 there was a further email contact from SM to the claimant, in her email to him she said, "I am sure you realise that contemporaneous record keeping is an essential component of your registration with the HCPC

and the practice standards" as she had previously noted that according to the case notes there had been no contact with service user B since November 2017 which was a concern where somebody was staying in short stay care. There was no response to that email, the claimant believed there had been one however there was not one in the bundle and he believed that if Ms Meakin had been concerned about his case notes being out of date that she would have raised further concerns.

18. On 25 April a funding panel hearing took place to consider service user A's funding.

19. It was called a risk enablement panel in the minutes but in fact was a funding panel. The claimant was not given any notice of this meeting and we are not aware whether there was any connection with the correspondence in March, logically it appeared there was as the matter that had previously been raised about the extension of the care and the additional costs required for the care were discussed. At the meeting the claimant confirmed that he completed risk assessments on Mosaic, (the respondent's online recording system) the panel advised that these needed to be more detailed and clearly state the risks involved and how these were going to be managed. The claimant was instructed to amend and update them. He was asked about the CHC screening and he confirmed that he had done a CHC funding screening, he stated this was initially requested in November 2017 but the application had been misplaced, he submitted another application in January 2018 but this was not processed due to being left in a desk drawer. The three-month time frame for application had now lapsed so he had submitted a further application, due to the delay that occurred at CHC the funding start date would need to be challenged. The minutes of this meeting it should be noted were not sent out straight away and the claimant did not see them until disclosure.

20. It was also noted at the meeting that although there were numerous case notes there were no recorded home visits since September 2017, the claimant advised he visited the family on a four-weekly basis and would update the records, he was reminded that contemporaneous record keeping was a registration requirement.

21. Following this it appears that Ms Meakin rang the CCG who administer the CHC screening and funding and asked them whether it was true that in effect they had lost or erroneously delayed the two assessments and applications for funding. They denied this to Ms Meakin at the time.

22. Just prior to the meeting on 25 April the claimant had sent an email to Mr Howarth who was now his temporary manager on 18 April requesting training, he said he had sent this on behalf of the team because they were struggling with different applications that were regularly returned to them because they had been filled in incorrectly.

23. The claimant says that at the meeting there appeared to be no concern regarding the matters he was reporting, however, he had not seen the minutes and therefore had never been able to comment on whether he had

said that the CHC had delayed twice or not. He said the panel were looking at documents on a laptop which he could not see.

24. The CCG advised SM that it was not correct that they had lost two forms, the one in November and in January had been received with out of date checklists and incorrect details, he had been sent an email to advise him however this was no longer available. It had been noted that on 9 February they were still awaiting a new checklist, on 26 April a new checklist was provided. The Case Manager was questioned on 3 May 2018 and she said "I cannot recollect saying the file was in a drawer as we don't use drawers, I may have informed Michael it not been dealt with and still did not provide us with the relevant evidence, requesting he provides details for the person's needs rather than stating that the school has them".

25. It appears therefore that the reference to of being in a drawer was something reflected back by the claimant and the casework manager could not recollect saying that and in any event, it did not mean it was lost, the issue was still that the incorrect information had been provided. However, there was some issue regarding the CCG having two files on the same matter and this may have caused a delay in January 2018 but this emerged later.

26. On 27 April the claimant sent an email to KH which he described as a grievance, however, we find it was not a grievance, it was a complaint about how the duty system worked whereby if somebody was on duty and they dealt with the case they then had to keep that case whereas the claimant felt that as he had so many cases he should not have to do that, so, this email says:-

> "I have previously forwarded an email of concern regarding the role of the duty backup person. My understanding of the duty backup person is to complete the duty in box and the duty workers are to attend assessment reviews. I know I have been invited to attend a review on the day of my duty Tuesday 1 May, it is important to note that it was neither duty work that invited me to attend this review. This is the sixth occasion that this aspect has happened which adds further work pressures to my caseload. I find it unfair I have been asked to attend this review and request that a duty worker attends the review instead. As mentioned, as a duty backup person I will complete the duty inbox".

27. KH replied and there was later a dispute about this email as the claimant suggested it was suspicious due to not having the usual headings and also to not being provided to the later investigation by KH In his reply he said

> "I genuinely appreciate the pressures on the team and the individual team members however the current system whatever its benefits or burdens is currently custom and practice within the team and has been for a long time. I do not feel it is appropriate for individual social workers to unilaterally decide whether or not they choose to participate or not participate in this process and to decide that they are changing the process unilaterally. This would cause damage to the team systems and potentially cause all kinds of repercussions which would undermine the team stability and functioning".

28. He declined the claimant's request but advised that "as recently discussed with yourself and other team members I am planning to take the time to do a deep cleanse on caseloads. The purpose of this is to make decisions in relation to which people will remain open and which will close or transfer to team review as very little movement or throughput is occurring on caseloads and we need to be in a position to respond to new work as it comes in. I am planning to start this process this week and if it would help I can offer to begin with your caseload rather than other peoples". He suggested two of the claimant's cases that he would transfer to someone else and that would reduce the pressure on the claimant. He also stated that he normally receives supervision from David and as David was off at present he was happy to book a supervision system in where they could meet and discuss any concerns and he would rather do this once he had been able to go through the claimant's caseload.

29. On 30 April after lunchtime the claimant was in the office when he was approached by SM who explained he was required to attend a meeting and he could bring a witness. A colleague attended the meeting with the claimant and when he arrived SM was present along with a senior HR advisor. SM stated he had been invited to the meeting because there was a concern raised about the case involving MB and on that basis, he was to be suspended with immediate effect. He had had no idea what the matter was about and SM confirmed he would be written to and kept updated. He stated that he had done two visits in the morning and needed to input his notes onto Mosaic, she said no that would not be possible, he was told to clear his desk and leave the building. The claimant said nothing was explained to him apart from about why he was being suspended.

30. Subsequently after taking advice from his union the claimant sent the information from his two morning visits to KH using his own email/laptop. This would eventually form the basis of the allegation he had breach data protection requirements.

31. The suspension letter was received around 3 May which stated that his suspension was as a result of the following allegations which potentially constitute gross misconduct. The five allegations were:-

    (i) On 25 April 2018 you made false representations to the Risk Enablement/High Cost Panel regarding your work on the case of service user A.

    (ii) That you failed to maintain contact with service user A on the frequency a complex case requires.

    (iii) That you have failed to follow management instructions issued by previous Head of Service regarding service user A.

    (iv) That you failed to maintain contemporaneous records for service user A. That you have failed to maintain contemporaneous and sufficiently detailed records on cases on your caseload;

32. And that the allegations amounted to a breach of the Council's practice standards and the HCPC standards of proficiency of the social workers. He was advised the allegations could be amended or added to and that suspension was not a disciplinary sanction. He was advised JN, a Social Care Lead, would be appointed to undertake an investigation and that he would be required to attend an investigatory interview at which he could be accompanied by a trade union representative or work colleague. He was advised he could not speak to anybody about the investigation. He was also advised of the Employee Assistance Programme and the contact officer who had been appointed for him.

33. JN interviewed a number of people and advised that their statements would be typed up and they would have the opportunity to correct them and then sign them.

34. Danny Jackson was interviewed because he was at the panel meeting on 25 April. He explained that this was the second panel meeting about MB and they seemed to be in exactly the same position that they had been before. In addition, although the social worker, i.e. the claimant was advocating for more support they clawed back £9,000 in respect of money not spent on support for the individual. He advised that if the CHC process isn't followed there would need to be an argument about whether any support should be backdated once the CHC process has been completed and the funding accepted by the CCG. He stated he thought the form had been completed and submitted but it was lost or missing and the same thing happened to the second meeting when the same reason was given, lost or misplaced in a drawer, he just felt a bit uneasy.

35. She interviewed Yvonne Hayes, Nurse Assessor who was the CHC contact person. She was asked about the general process for CHC assessment and then about the specific case of service user A and she reiterated there was not enough evidence on the behaviour domain on the initial checklist, she asked for more information and sent an email asking MC to provide more information on behaviour, the checklist came in on the 30 January 2018 but was dated November 2017 so she then had to ask for an updated assessment, it was more than three months out of date, she left him a message.

36. In respect of the 'it's in a drawer comment' she didn't remember saying that, she did have a look around, she said normally they are awaiting further information they would document then but now they have changed from paper to electronic, if it was paper documented it would be put in a file awaiting that information, that was the usual process. There was a note also she was asked about saying that it appeared to be a fast track, she would have to have a look she said at the documents. Regarding the drawer she said it was in a green file, it was awaiting further information and that she said the CCG had not delayed the process in this case. She was asked what the delays in the case were caused by, from January she said that a new application was sent on 31 January and it took her a while to find it, it was hard to find. She did not find it until April Then she said that the application from 31 January was in the duty tray, she was asked if it was there for three months and she said "no" on top of the documents there is different coloured sheet, one denotes 'JWA'

and one fast track and checklist and that may be why she thought it was fast track, it wasn't fast track, when she found it in April there were two separate files so there was a contact log which she had completed on 30 January and the next reference was 9 February 2018 saying that they still had not received further information but we had, it was in a separate file. When she found it in April there were two contact logs and two checklists which had different headings on. So, it does seem there was some confusion at their end.

37. Ms Nuttall arranged to interview the claimant on 17 July

38. KH was interviewed on 22 May and he explained that DL and himself split the supervision of the claimant's team, DL did band 7 social workers such as the claimant and Mr Howarth did band 6 and care coordinators. He had been trying to cover them all while DL was off sick. There was no supervision of the grade 7's while DL was off. He was asked what contact he had had with the claimant, he said there were a couple of matters he had got involved in and he was concerned the claimant wasn't attend multi-disciplinary teams in respect of one client and he had made a note of it and spoken to DL and said the claimant could have gone to it. He said he had decided to start a chronology on service user A, it was lower level things, he has not taken an interest in that case, you'd speak to Mio Care and they said he is not interested in cases, in respect of Mio Care his contact was SB and DT and they had also said the claimant was not effective.

39. He said he thought it was odd he said at the meeting that a form had been stuck in a drawer for three months and Mr Howard said he thought somebody would be in bother about that and wondered whether the claimant had told the truth. He believed the claimant had been asked to do follow up from a previous panel but he wasn't sure that he had actually done it.

40. On Friday morning SM had told KH that the claimant had lied in the meeting and she was considering suspending him which she then did on the Monday afternoon. He agreed the team was under a lot of pressure and they were understaffed even so all the high-profile cases should be up to date. From what he had seen people seemed to be uptodate. Visits should be four to six weekly at least. He believed that the social workers in the team were hitting about 30 cases on average. He believed the claimants was about 42 but then he was intending to do a deep clean on the claimant's cases and he felt nothing was happening on some of them and therefore somebody less senior could take some over.

41. There was also discussion about the issue of the claimant sending information after he had been suspended via an insecure laptop. The claimant said the union had advised him to do that as he had information from the day of his suspension which required recording. This incident was eventually added as one of the complaints.

42. Although alluded to the situation that the claimant had brought up regarding the duty referrals.

43. On 1 August KHh was interviewed again and advised regarding the meeting on 26 April and said it wasn't a risk enablement panel it was just possibly

somebody had used that template to do the minutes. He was asked about the procedure for putting notes on Mosaic and for raising safe guarding concerns. He was asked about the claimant's caseload again and said that as the number 42 was too high but he didn't believe the complexity (he meant lack of in some cases) meant that it was too high as he had passed some of the claimant's cases to care coordinators and they had been done and dusted in no time, before and after the claimant was suspended. There was also a criticism that the claimant was disappearing for long periods of time to sort out cash payments. He did say that he understood the claimant visited service user B every other Friday. KH eventually referred to an email he was trying to find saying that he did raise an issue before he went off that he wasn't happy with being allocated a duty case, he also said that on duty they could not let him near the inbox as he doesn't do anything, he doesn't pick up on anything and KH was constantly being told that things weren't being dealt with. He felt that MC was going to' try it on' because DL was off and that he wondered if he was testing boundaries Because he didn't supervise him directly KH wasn't in a position to raise these matters with the claimant, his approach was that he would do a deep cleanse and transfer some of the more complex cases to other members of the team and he would book him in for supervision but he was then suspended. DL had only been off four weeks at that point in time.

44. He also agreed that he would have a look at all the cases and state how many and what level of difficulty they were in and how many of them were really live. (this later was called a RAG assessment) He said other concerns about the claimant's timekeeping had been raised with him, that he had come in late, his calendar was not up to date and that he would put things in his calendar to say he was doing things 8.30 or at 5 and he wouldn't actually be doing those. He was asked regarding visiting service users on spec, he said that was something that he wouldn't encourage social workers to do, better to plan it, put it in the diary properly, that any appointments should be on the whiteboard in the office and on the outlook calendar. He said he wasn't aware anybody was doing ad hoc visits but if they did they should at least ring the office and let somebody know where they were, he was asked whether people logged the wrong information on the wrong file, he said it's not common, it rarely happens and he has to email Mosaic when that is brought to his attention in order to get the information moved to the right file. The social worker cannot email Mosaic directly.

45. We have provided some detail on KH's interview as the claimant was deeply shocked regarding some of the pejorative remarks KH had made about him and he felt this supported his case that the investigation was biased. It was a negative interview.

46. After seeing the information, the claimant pointed out to the Tribunal that KH's evidence was highly prejudicial and speculation, that he made a number of speculative allegations and yet had not raised any of these matters with the claimant, that SM had had a conversation with KH where she told him he had lied to the panel, it was never clear what the lie was or how the lie had actually been pinned down. He was also concerned about how the investigation had widened once Ms Nuttall had started to investigate the CHC matter, that had JN had not looked into whether any other members of staff

had delayed filling in CHC checklists or were late updating their notes on Mosaic

47. JC was interviewed on 14 August. She agreed he had a high caseload, he had well over 30 cases, she kept a spreadsheet and she helped him close and move cases. She said some of his colleagues had over 70 cases, she managed it through supervision, closing them down and moving them to the right level. The recommended number was 25. She agreed he should not have kept some open, they discussed safeguarding cases and then the funding issue. She was asked about service user B and she agreed he was in unsuitable accommodation but it was very difficult to find suitable accommodation for him and he couldn't stay at home, she said service user A wasn't always proactive as much as he needed to be but in many respects service user B was difficult to place, one placement had declined to take him, it was true they were struggling to find somewhere. She asked whether any concerns about how he managed that case, she would say he was relaxed about it, the family didn't feel like he was being proactive enough to find alternative accommodation. She said, "I have to be balanced because we didn't have the accommodation". She stated in respect of CHC, CHC screening wasn't being done as a routine and she was quite surprised at this so one of the things she introduced was that all panel applications had to have a copy of the CHC checklist attached, she said the team were horrendously busy and she advised staff to prioritise and the claimant did like to share a lot of information with managers and needed reassurance. She could see why he might make an ad hoc visit if you were in the vicinity. She was asked whether people claimed mileage, she said some people don't claim cause it is too time consuming and in respect of the whiteboard she said people were coming in late, it wasn't just service user A but he did generally work to the end of the day and that is why she had introduced a whiteboard, also for safety reasons because they needed to know where people were and so if they didn't return on time she would get somebody to chase that up. She was asked about the wrong record issue. She said she did find the claimant frustrating at times but she told him so, and because he was a band 7 she expected him to manage without as much recourse to her. She knew he would make appointments and not turn up and she would get complaints but she always pulled him up and she had a blue book where there was a record of the issues she raised with him, expectations and outcomes.

48. Overall, we felt that JC's interview was supportive of the claimant.

49. JN added some further allegations: That he had falsified records on Mosaic in respect of service user A and service user B and that he failed to follow safeguarding procedures following reported incidents with service user A and service user B, that he had input records on the wrong case and he had sent detailed case notes via an unsecure email on 3 May to KH. She stated that he had been grossly negligent and they amounted to serious breaches of the Council's practice standards and HCPC standards of proficiency for social workers.

50. The claimant was interviewed on 17 July. He clarified that the meeting on 25 April was just a funding panel, it was neither a high cost panel nor a risk enablement panel. He was asked what he recalled about CHC checklist, he

said he explained he had completed the checklist and sent them through but had been informed there had been a delay processing the original form so he then explained to senior management he was asked to send another and he sent through another one to CHC and he advised that it was a female member of staff at the CHC who told him this. Regarding his referring to the forms being misplaced and in a drawer, that is what he had been told by the person on the end of the phone.

51. He was asked why he had submitted outdated checklists, he said it was the system they had copies of CHC, even though he submitted a new application he doesn't think that all the documentation was originally sent or that the CHC thought it was the old one because of the old date may have been on the front page and the right date further on in the form. He didn't recall being chased for up to date checklists on more than one occasion. He was asked why it took so long to provide the updated forms, he said that it was due to excessive caseload but on other occasions they hadn't received the updated checklist, he had sent them by post perhaps a different system would be better. He could not remember why he completed one in July but had not submitted it until October/November. He does understand that if the information was not provided within a three-month timescale it would be out of date and would have to resend.

52. He was asked why he had submitted one on 24 April, they day before the panel and it was uploaded to Mosaic on 25 April, seven minutes before the panel meeting was due to start. He said that it was admin who normally updates documents onto Mosaic but he checked because he had an inkling it wouldn't be and asked the admin to upload it as soon as possible, he was asked was he panicking because he knew he should have acted sooner. No, he was just conscious that he wanted to make sure it had been uploaded. Business support uploaded them. It was not clear when he had sent that one to admin.

53. He was asked about the fact that on 23 December the then Head of Service Peter Tomlin had asked him to submit a CHC screening for MB in December 2017 but he didn't do it until July 2018. He said he didn't have an actual discussion with Peter and he hadn't looked at the minutes, he didn't realise that was the case. Any delay was due to workload pressures, it might have been an oversight and he thought he had already done it.

54. He was then asked about the fact that there was no recorded home visits on MB since September 2017. He said he did visit the family on a four-weekly basis and that he would update the records and that he had retrospectively entered visits on 25 April after the panel meeting. He had updated 4 October 2017, 7 December 2017 and 5 January 2018, all with service user A's parents, all put in on 25 April, however they weren't recorded in his Outlook calendar. He said he didn't always put them in the Outlook calendar or the paper diary, many visits were off spec. There were also times that he has put things in the diary and not gone out. He was asked how he knew when he visited if it wasn't in his calendar, he said sometimes I would make a note somewhere else that I visited. He said that he might keep a note in his car. He was asked why the notes were generic, he said he was hoping to catch up

with more detail later. Why wasn't there was one in November, he thinks he had gone to there in November but was an oversight.

55. How did he know when he had gone if he didn't have his dates recorded somewhere. Yes, he used the notes in his car, there was no mileage claims for those visits, he said that there were numerous claims for numerous visits and home visits, he doesn't always claim for every single visit. He was asked if he had made them up and he said no, and he explained he didn't complete the records at the time because he had a high workload, and he complained many times about this in supervisions and emails to DL and KH.

56. It was pointed out that service users could request access to their records at any time and therefore it was important that they were kept up to date. He said, yes, he realised that but it was an oversight because of workload, and that he hadn't met practice standards because of that. He was also asked about a safeguarding issue as well which was eventually resolved. He said that DL told him he didn't need to report it in those circumstances.

57. Regarding another safeguarding incident, again he said he had spoken to DL who said it didn't need to be reported as a safeguarding matter. He was also quizzed about some entries into Mosaic that he had inputted two days before the panel in respect of the CHC, he stated that it was workload pressure again and he said there were numerous members of the team in the same position. He was asked how he could record actions that were two or three months old, he said he kept his notes in a blue book in the office and then he puts them on the system later. He said he had quite a number of 44 cases and he didn't have regular supervision.

58. In respect of service user B he had been in short stay for so long because it's very difficult to find anywhere else suitable for him. Regarding no visits recorded between September 2016 and January 2017 this was because of the high number of cases. They had discussed two other possible places for service user B to go but his family weren't happy with that. He was asked whether he always signed in when he visited service user B at Treelands, he said not necessarily because sometimes he would meet him by the entrance and they would walk through but a member of staff would always know he was present in the building. He was advised that following concerns raised by SM on 14 March he had input several home visits onto Mosaic however they were inconsistent with his outlook calendar, mileage claims, paper diary and Treelands signing in records, could he explain this? He said it was an oversight where he has been doing spec visits, not to put them on the calendar, if he was in the area he would pop along to see him, he was asked did he not understand the safety implications of doing that, he said yes but there was a signing in board or he would phone and let someone know, but it wouldn't always be in his Outlook calendar. Could he explain why where he has signed into Treelands there is no recorded visit on Mosaic for the same date. He again said it was a high number of cases he had.

59. JN said, "can you explain why it appears you have fabricated visits at the frequency of fortnightly which happens to be the frequency set out in the implemented strategy". The claimant just acknowledged that he had done fortnightly visits. He did not pick up on JN's use of the word fabricated. She

also asked him why there were mileage claims for visits to Treelands in his Outlook calendar and recorded on Mosaic but no record of him visiting Treelands, these appear as both fabricated visits as they were inputted retrospectively with an identical record of the visit to other visits. He said service user B was always so excited to see him when he arrived that it was an oversight he hadn't signed into the book, the notes were identical because things hadn't changed. He put backdated entries in because due to the high case load he couldn't them contemporaneously. She also said there were mileage claims for visiting service user B but no records on Mosaic or Treelands. He said he hadn't fraudulently claimed mileage for Treelands visits.

60. He was asked why he had not met HCPC standards. His union rep intervened that the employer had a responsibility as well, they had allocated forty-four cases to the claimant and this was more than the 28 recommended. It wasn't possible to do it to HCPC standards.

61. JN pointed out she had noticed that there were two entries were he had put the wrong entry on the wrong file, the claimant said that this had been done numerous times by other members of staff and he contacted Frame working asking for it to be removed, he said now a Team Manager would have to contact Mosaic to agree it and move it. He did not chase it up further because he assumed it had been moved onto the correct record. He was asked about the insecure email he sent to Kevin Howarth and he said that BASW advised him that the information needed to be sent, it was prior to him being allocated a specific representative by BASW. This was after he was suspended and he could not access the system.

62. JN sent the claimant her full report around 2 October. She provided many tables setting out correlated information between the visits the claimant said he had made, whether he had made mileage claims on the dates he said he had visited, whether a visit was in his calendar, whether it was recorded in the Treelands signing in documentation (she had contacted them to elicit this information), whether there were mileage claims on dates when he did not attend (based on the signing in records) and likewise for his calendar. She ascertained there were dates when there was no record of a visit but a mileage claim and dates when there was a record of a visit but no mileage claims, sometimes there would be an entry in outlook sometimes there would not be.

Joanne Nuttall's conclusions were:

Allegations 1 and 3,

63. That she believed the allegations were proven that he misled the panel on 25 April by informing them that two forms had been lost and misplaced by the CHC, as a result of this it was noted that the start date of the funding would need to be challenged as it was a CCJ error. She went that it appears to be the case that one of those forms was misplaced by the CHC however Michael failed to tell the panel that he initially failed to act on the instruction of Peter Tomlin in December 2016 until July 2017 however even that form was not actually submitted until October 2017. Further the checklist sent with it was

three months out of date. He then repeated this by sending a further checklist that was also three months out of date.

Allegations 2, 4 and 5

64. She believed allegation 2 is proven, she believed that when Michael was asked why there had been no contact on both of the cases of service user A and service user B that he inputted visits on Mosaic that had not taken place and which otherwise would show he had failed to maintain contact on the appropriate frequency. She also believed allegation 5 was proven and that Michael has falsified visits on Mosaic from the records she had looked at, producing a table setting out the inconsistencies regarding the visits to Treelands. In relation to allegation 4 she believed the evidence showed Michael had failed to keep contemporaneous and sufficiently detailed records in relation to both service user A and service user B. He had not completed records within the two-day time scale set out in the practice standards and he has often duplicated brief notes that did not convey the full details of the visits.

Allegation 6

65. She believed this allegation was proven as Michael had failed to follow safeguarding procedures, both by not following the procedure correctly and within timescales and in the case of one serious concern not following safeguarding procedures at all.

Allegation 7

66. She believed this allegation was proven as on the two cases she focussed on she found three records about other service users which included sensitive information and Michael had not realised and corrected this error.

Allegation 8

67. She believed this allegation was proven as Michael sent detailed case notes to KH via unsecured email on 3 May 2018 and could not satisfactorily explain why he had done this without considering the sensitivity of the information.

Allegation 9

68. As a result of the findings and evidence she found Michael had breached both the Adult Social Care Practice standards and the HCPC standards.

Allegation 10

69. Similarly, she believed there is a fundamental breach of trust and confidence in Michael as an employee of Oldham Council.

70. As a result of this report a disciplinary hearing was arranged for 17 October with David Garner as the Chair, the claimant was represented by Kevin Waldock, a BASW representative.

71. At the hearing JN was questioned about the report. In respect of considering workload issues they spoke to the claimant's manager (presumably she is

referring to JC and KH). She said she had not spoken to DL as he was on sick leave and she was guided not to approach him whilst on sick leave. Neither was he asked for a statement. Mr Waldock suggested there was not a lot of evidence from the managers about the volume of work. JC had acknowledged that the claimant had a heavy workload. She was asked about her statement that the allegation was proven but it wasn't part of her role to determine the outcome. She felt that it was. They then returned to the question of DL and it was said that the Head of Service (i.e. SM) asked them not to approach him in the circumstances. Mr Garner asked whether there was any comparison of caseloads within the team, she said she didn't do a comparison with other members of the team, it was agreed that only service user A and service user B were looked at because they were the two raised by SM. She was asked whether there were concerns regarding anyone else in the team but she said she wasn't aware of any.

72. The claimant commented that his caseload was excessive and the CHC screening process complicated. He failed to recall when he attended the 25 April panel attending an earlier panel or having a discussion with Peter the previous Head of Service. He had worked together with the nurse for service user B to submit the CHC funding and it was difficult to meet the deadlines. He believed that it had been completed earlier than July and that he had completed subsequent check lists with the LD nurse, he confirmed there was no training on CHC's checklist. He was asked whether he had made the requisite visits to service user A and service user B and he said that he had but he had difficulty in keeping it recorded due to its caseload. His caseload was unmanageable. He explained about not signing in at Treelands and stated he had a very good relationship with service user B and he was always at the front door waiting for him to arrive there were times that he did not sign in because service user B was there and he wanted to give service user B reassurance they were looking for alternative accommodation for him, he had a good working relationship with his family, service user B had a good memory and he would relate information back to his family.

73. In terms of recording of visits DG raised that there was a series of visits put in to Mosaic, sometime after they had happened and all recorded the same statement, why wasn't there more detail on the efforts being made to move him? He said his intention was to put a brief line in with a view to going back later to put more case notes in but he didn't always get the chance and the notes were in a book, in a blue book in his car. They wouldn't always be in his calendar as sometimes he would go' on spec' he was asked if you were going 'on spec' how would service user B know you were visiting and be waiting at the door, he said sometimes he would ring Treelands beforehand and say he was coming in. He was asked that in the pack there were a number of visits on one day but his calendar stated he was office based all day. He said there were times he was generally office based but had nipped out to pick up benefit forms and things and had called' on spec.' He said he didn't always claim for his mileage and that was common within the whole team, he has never claimed for mileage he wasn't entitled to.

74. Regarding the safeguarding allegation this was investigated and it was accepted that the concern was unjustified eventually.

75. Re CHC He wasn't advised to fill in any other forms. He said the forms kept changing so even though there was training it would still be difficult. Regarding putting notes on the wrong file this was human error, they are very busy, he did try and have some corrected but now you had to go through a manager and the manager wasn't always available and of course DL had now been off sick for a while.

76. Regarding sending the unsecured email BASW had advised him to send the information as it was important. He accepted he had been on training regarding data protection. He did not have access to a secure system once he had been suspended.

77. He said the team in general was overloaded with casework and it was not possible to get new workers or agency workers.

78. He also talked about discrimination, he said he had been there for twelve years. He said the discrimination arose through his work with service users rather than colleagues. He referred to the request from Mio Care although he didn't name them asking to go and sort a problem out because he was tall and big, but he agreed that JC and Marsha Thomas had said that wasn't Michael's role to do that, and advised Mio Care to call the Police. He felt like he wasn't being valued, treated as some kind of doorman or security but he confirmed that managers had said he shouldn't do that. He referred to another incident where another black colleague had been abused and then when clients came to collect money they would often hold their handbags tight behind their backs when they saw the claimant. He said he fed that back to management. Another time in the underground parking somebody asked him if he worked for the local authority, he was asked whether he reported that but he said it didn't happen again but he was saying that there would be something always on a daily basis. He said he did report another member of staff that was acting inappropriately saying I must have children here, there and everywhere.

79. DG said he was sorry he experienced that and that whilst he was sure that there are numerous things that the claimant could highlight in terms of such incidents but in relation to "what we are talking about are those incidents related. "Pressure of work I get but it was dealt with and you were supported by managers". The claimant whilst he did not positively agree according to the minutes did not disagree but moved on. In cross examination when it was put to him that he had agreed the incidents had been dealt with the claimant said that the minutes were incorrect and there was more discussion regarding these incidents than was recorded. He had not raised this before.

80. The claimant continued that there are times that he was feeling he was making and forwarding opinions refunding issues for example for more posts,' I find it difficult to understand that all of a sudden there had been three posts filled. I feel that maybe some of these pressures on the team and myself wouldn't have happened now as more efficient with more staff. 'He was asked why if he was so busy he would make on spec visits to service user B. Because service user B asked for him personally and to make sure that staff were doing what they were supposed to be doing.

81. There was then a break, and JN summarised by saying that at the claimant's level he had a level of autonomy so he could make his own decisions about safeguarding and risk assessment without directions. She was still concerned that his practice was unsafe and his negligence may have led to a serious incident with a set of service users regarding the failure to follow proper safeguarding procedures.

82. Regarding lack of contemporaneous and detailed records on Mosaic that was a concern as it would not be possible for somebody to work out what was happening if they had to pick up the case.

83. She considered he had been grossly negligent in performing his duties as a Social Worker. She accepted the team were under extreme pressure which was confirmed by JC and KH, however, it is still his responsibility and he should report to his manager if he felt his practice was becoming unsafe. However, there was no email evidence of this, the only email evidence was about the duty work, not the high case load itself.

84. At the hearing YH from CCG was called as a witness and KH. Therefore, there was full opportunity to challenge KH about the matters he had raised in his interviews. He confirmed to DG that after the claimant's suspension he had gone through his cases and closed some. He said service user B would not be rated as complex because he was safe and secure in his accommodation.

85. KW summed up by saying that they needed to put things in context and look at mitigation, he has made some mistakes, his recordings of meetings wasn't great, but he was working at 50% over capacity, there was no malice or intention it was just overwhelming and intense workload. Managers did not respond to the high workload because they were under pressure themselves. He also felt that there was bias on the part of the investigator as she had made findings when that was not her role.

86. Regarding the caseload Kevin Howarth had provided what is described as a RAG assessment of the claimant's caseload which was provided to the hearing and to the claimant, this was his own assessment of how weighty the claimant's claims were - he did not view very many as weighty.

87. The claimant's representative did challenge the RAG rating of service user B but no other comments were made although at Tribunal the claimant said that the RAG rating should not have been relied on as it hadn't been agreed with him

88. DG sent the claimant an outcome letter on 24 October. This stated that he was dismissing him summarily on the basis that the allegations amounted to gross misconduct, either in their own right or collectively. He set out the background stating the final version of the allegations against the claimant referred to above, and he went through each allegation.

89. In relation to allegation one false statements to the risk enablement high cost panel regarding his work on the case of service user A and the fact that he had said that there had been issues with the CHC checklist suggesting it had

been misplaced by the CHC team in November 2017 and January 2018, however, the CHC teams evidence was that the checklist was returned to him as it was months out of date, the third checklist on 31 January was misplaced by the CHC team, the fourth checklist submitted on 26 January was received and was accepted as a positive checklist. Therefore, he found that the claimant had misled the panel by suggesting the issues with the checklist were due to errors by the CHC team at the CCG. Further in fact he had been first requested to submit it on 22 December, it was reiterated in supervision with JC on 17 January, it was still not completed until July 2017 and not submitted until October 2017 when it was rejected as out of date. He submitted another application with an out of date checklist and the third submission appeared to be misplaced which DG said he could not be held responsible for however the issues with the two initial checklists were the result of the claimant's failure to submit the checklist in an efficient and timely manner and he did not inform the panel of this, suggesting that the CHC team was at fault*).*

90. It was noted that he had already been reminded that no home visits to service user A had been recorded since September 2017 and he had advised he would update his notes as he was visiting every four weeks. He referred to his blue book kept in his car to update on Mosaic, DG found that he had failed to keep accurate and secure records of the work he had done relating to both service user A and service user B.

Allegation two,

91. In relation to maintaining contact with service user A and service user B on the frequency a complex case requires, DG found that in view of the lack of evidence that he had signed in at Treelands that the fact that meetings were recorded late, that there was no evidence via any other source, i.e. the Outlook calendar, paper record or mileage claim that these visits had been made, that on the balance of probabilities he found that the visits to service user A and service user B did not take place, and that his failure to make efficient and timely notes and the use of a separate book to record notes in breached the Council's and HCPC standards.

Allegation Three

92. DG found that the claimant had failed to follow a management instruction issued by the previous Head of Service regarding service user A, which may have resulted in unacceptable financial loss to the Council. DG had already outlined the timing in respect of this, he said he considered the claimant's workload did not explain the inordinate amount of time it had taken for the matter to be properly submitted to the CHC and therefore he found his conduct was not acceptable.

Allegation Four – Failing to maintain contemporaneous and sufficiently detailed records for service user A and service user B.

93. He said the documentary evidence showed that records were not updated in a timely manner up to four months following the visit and the detail was lacking, accordingly he found that this allegation was correct and he had failed to meet

the requirements of the council and HCPC standards regarding the recording of cases.

94. **Allegation five** – he found that the claimant had falsified records on Mosaic in respect of contact on the cases of service user A and service user B. Basing his view on the fact that in relation to allegation two on the balance of probabilities visits he claimed occurred for service user A between October 2017 and January 2018 and for service user B, between October 2017 and March 2018 did not occur, any records showing that they did led him to find the allegation proven, his failure to submit case records in an efficient and timely manner in line with practice and standards also supported the decision as done the limited nature of some of the entries relating to the visits, essentially repeating the same brief information.

95. **Allegation six** – re that he had failed to follow safeguarding procedures following reported incidents on the case of service user A. Considering all the evidence he did not find that allegation proven.

96. **Allegation seven** – that you have input records on the wrong case notes on more than one occasion. This was accepted by the claimant so he found it was proven. It was taken into account that his evidence that of his workload and attempts to rectify the errors and does not believe this should be a separate disciplinary penalty relating to this allegation.

97. **Allegation eight** – sending an unsecured email on 3 May to KH. This allegation was proven as it was agreed.

Mitigation and Deliberations

98. DG said that he considered the claimant's explanation that he had been extremely busy with a caseload that ranged from 33 to 40 cases and he accepted that it had regularly been higher than the recommended level for a social worker. However, there was little evidence that he had addressed this with his line manager, given his experience he would have expected the claimant to have reported his own practice. He was also sat uneasily with the claimant alleging that he called on spec to service users at times when he had blocked out calendar office to be office based and although that he had offered support and coaching to colleagues when again saying he was struggling with the high caseload and making many admitted mistakes.

99. In respect of the concerns regarding the investigation and DL not being spoken to and the fact that other team members had not been subjected to the same scrutiny, however, further investigation would not have resulted in some of the more serious allegations being materially changed. He had taken into account what was said about JN acting as judge, jury and executioner however there was a lot of evidence there which stood individually and he considered each allegation individually and weighed up all the evidence himself as well as looking at the case as a whole. Accordingly, he found that the number of allegations amounted to gross misconduct in their own right and collectively and that resulted in a decision to summarily dismiss the claimant, that they were also breaches of the Council's practice standards and HCPC standards of proficiency for social workers and that it had led to a

fundamental breach of trust and confidence in him as an employee of Oldham Council.

100. The claimant then appealed on 30 October. This was a brief letter saying that he was unhappy with three aspects:-

(i) that the investigation wasn't fair;

(ii) not enough weight was given to mitigation;

(iii) the sanction was excessively harsh given his previous disciplinary record and he gave some dates.

101. He later produced a more detailed appeal which was presented to the Appeal Panel which consisted of Councillors and we heard from one of those, Barbara Brownbridge. The appeal took place on 10 December.

102. In his longer appeal he went through each of the allegations and made the following points. He said first of all he wasn't sure what sort of panel it was, and he was asked to discuss a funding request for additional funding for service user A. He said he disagreed he misled the panel, he explained his CHC funding application process in that checklists have to be completed and forwarded to the CHC. The delays in forwarding the checklist resulted because of the high caseload he held, 44 cases, in addition to further cases allocated because he was on the duty rota. He had explained his concerns about his high caseload and then his manager was absent. There was a long waiting list of allocated cases which was symptomatic of the high caseload. At one point, DL just allocated all those cases and there were enormous work pressure and stress on the team. He asked if they could have additional Social Workers but both DG and DL said that they would approach senior management but the request was declined. He believed that there were numerous cases throughout the team and the borough whereby CHC funding applications were not being applied for and thus while there had been delay in completing it this was attributable to the high caseload, regarding therefore financial detriment there was financial detriment to the council as a result of other colleagues not claiming this money at all.

103. Regarding contemporaneous notes he did visit once every four weeks. He did do on spec visits to service user B but on occasions he did not enter visits on his Outlook calendar but he always did on the whiteboard system, or ring to say where he was.

104. Failing to make contact with service user A and service user B on the frequency required. He repeated that due to CH's excitement there were occasions he did not sign in or out as CH would get a private room to enable them to talk. He also did not always claim mileage or enter those visits on his Outlook calendar. He said it was quite common not to claim mileage.

105. Management instruction re service user A. He agreed he hadn't submitted in a timely manner due to his high caseload but he did submit it and other people were not applying for CHC funding and he felt he was being unfairly treated and targeted on this matter. Other colleagues had not completed the required checklist. He also was aware that the authority had lost money due

to claims not being made or mistakes being made by staff. No audit was completed on the team to see whether his colleagues had made errors, he said this further highlights racial discrimination and in him being singled out and targeted for being a black male employee within Oldham MBC that I have faced and that all the colleagues within Ian's team are all white (this is a reference to Ian Barclay, it was his team who lost the money).

106. Allegation Four. You failed to maintain contemporaneous and sufficiently detailed records. Again, he said his mitigation was managing high case load and managing additional work pressures and that he had expressed his concern to DL and KH. He held the highest caseload within the team and he had been set up to fail, he had not had a day off sick in six years and therefore had an excellent work attendance, he was also looking after his sick father for two years who died in June 2018.

107. Allegation Five. Falsifying records on Mosaic in respect of service user A and service user B. The claimant confirmed that he had completed visits to service user A and service user B but did not necessarily put them in a timely fashion on Mosaic. Where he did put brief notes in he intended to go back to complete additional information however he felt he had too much work to be returning to Mosaic on some occasions to expand those case notes.

108. Allegation Eight. Unsecured email. Again, he advised that there was urgent information he needed to pass on to Kevin Howarth, he did not have access to the Mosaic system and his union advised him to write to KH by email. He said he felt it was pedantic as there was a lot of sensitive email information in the post regarding the disciplinary hearing which was sent by unsecured email.

109. Allegation Nine. This was a generic one about grossly negligent and serious breaches of the practice standards and HPC standards of proficiency. He felt he had been treated unfairly due to his caseload, managing duty cases as well. That he had raised the issue of high caseloads and he should have no more than 25 but he had more than these, he also had the problem of caring for his father for two years and supporting his sister and her family who reside in the Caribbean when she had poor ongoing health issues. That he had raised that additional workers should be recruited but this was never implemented.

110. He also mentioned that he was not respected when he faced racial discrimination from both service users and colleagues within the council. He was racially abused by numerous service users and he reported these to JC and DL and by another colleague called PB but no action was taken. The claimant said PB had stated that he was dressed like a gollywog and all he needed to do to be placed on a jam jar. He reiterated that a meeting was arranged with PB which he failed to attend, no further action was seen to be taken against PB and no action was conveyed to him or information. Also, that Martcha Thomas has said she had been asked by senior managers to grill him as to why he went to his union and took out a grievance when it should have been sorted out amongst themselves. He was disappointed and upset that he was not listened to and the racial slur failed to be addressed.

111. Allegation Ten breach of trust and confidence. He disagreed with this, he had worked for twelve years and no issues of trust and confidence had ever been raised or highlighted by his various managers. He was trusted with direct contact with service user's money, due to potential financial abuse from members of the family the claimant's unit would take custody of his money and the office would be attended for the money to be collected and this had been deemed good practice. He also felt he was confident and approachable in his work with service users and families and had been singled out for praise in the past. He also had purchased a 4 x 4 so that he would be in a position to access service users with food and beverage etc if there was bad weather but comments were then made about him having purchased a 4 x 4. In mitigation he said there was unprofessional bias and racial discrimination, the witness statements of JC, KH, Mio Care Services, DT, SB and EW. He had taken out a grievance against JC and DT in terms of bullying and harassment which had been filed with HR Services but no action or follow up had been taken.

112. He complained that JC had commented on his aftershave and why he had a briefcase and an additional bag, he had explained it was for food, she did no question or interrogate other colleagues who attended work with more than one bag. Comments were made by three colleagues that she was singling him out and treating him unfairly therefore he needed to watch his back. He observed her also harassing and bullying Mr Carter who although he was white was married to a black woman, it was also felt that KH's witness statement was very offensive alleging he was trying it on to see what he could get away with, he felt he gave 100% to the respondent and Kevin Howard never once mentioned anything that he felt the claimant was doing wrong. He felt it also highlighted the concerns of ethnic minority staff that were not being heard, listening to or respected and he gave some examples of colleagues who had been in the same position, one of whom ate her dinner now in her car as there were always comments from white staff on the food she was eating.

113. DT and SB had also made derogatory comments about him and DT was the individual who wanted him to act as a security guard in relation to service users. This was racial stereotyping when there were other men who were white in the team who were not asked to do this. He was confident if they did a level of audit of the scale they had done with him then other members of the team would be shown to be having the same difficulties. He said he had nobody to turn to when experiencing institutional racism, direct discrimination, he felt lonely and unsupported and he felt bias was displayed in the disciplinary hearing. He failed to understand the pressure that his high caseload resulted in.

114. On the questions put by JN were loaded questions. He had also made a grievance against DT for sexual harassment which he detailed in this letter, there was no contemporaneous evidence of the claimant's grievance that he referred to.

115. At the appeal on 10 December 2018 one of the claimant's points was that the investigation was biased and aimed at proving allegation not evidence that pointed away from guilt. Mr Waldock pointed out there should have been a

higher test for more serious allegations in that they could have affected his professional career. He said the emphasis had been on proving the allegations not looking for alternative explanations. He accepted that mistakes were made but the mitigation was racism, the mitigation was his high caseload. He had made several allegations of racism that were not dealt with by managers, no action taken against other white colleagues who were equally behind in recording, the claimant was singled out and believed a racist approach and can find no other reason, based on negative unbalanced and biased views, DL was not interviewed. DG said it made no difference but they disagreed. DG said they were raised at the hearing but the claimant had agreed they had been dealt with and did not relate to the matter in hand. The claimant said they had not been addressed. He also made the point that he thought that the investigating officer should have made an effort to contact DL and he understood she was told not to by SM. They had not tried to contact him.

116. With regard to ethnic balance he was the only black male, level 3 social worker in the team. There were two black females, the rest were all white, the team was approximately 16 people. The claimant was asked by Mr Garner to explain his racism point and said it was that he was being singled out and that no action had been taken regarding his complaints of discrimination. DG's view was it had been raised at the disciplinary, he said they had been dealt with and there was no connection with the allegations.

117. DG summed up saying there was ample evidence to support findings that either singly, or collectively, amounted to gross misconduct based on the balance of probabilities and there was evidence on the balance of probabilities meetings with clients did not happen and case notes had been falsified. He accepted the volume of cases was high but he was experienced social worker and about 50% of those cases were lower level complexity, he had had time to undertake ad hoc visits and support other workers despite he had an impossibly high caseload. There was evidence from KH and JC at the same level of DL and therefore he did not think it was necessary to pursue the DL point.

118. The claimant's representative summed up, he was asked about the blue book and that being left in the car where it would not be secure. There were ten instances documented where visits did take place, it was agreed that he did attend on some occasions but evidence also suggested that he did not. There was no evidence to show all of the visits on Mosaic did not place, lack of signing in evidence does not mean he was not there, there was other evidence too to say that he didn't attend when he had. The claimant's representative said that that the lack of records did not prove that he hadn't attended on the days he said he had. He did raise that he was not consulted on the RAG assessment which DG then based his decision on, David Garner said he used it as a guide. PB did ask whether other social workers were following practice standards and DG said it was difficult to answer as they hadn't looked at other social workers. The panel also questioned him about DL and he said, well JC and KH could give evidence about the concerns that had been raised with them and Jackie had acted as Team Leader when DL was off sick on a previous occasion.

119. One of the other counsellors said was leaving the blue book in the car gross misconduct, DG said yes

120. In respect of visits there was no evidence regarding eighteen visits, nine were evidenced, he wasn't sure if it was through mileage evidence or otherwise. It was suggested that the deficiencies on the CHC applications were capability rather than not following instructions. No question of capability had been raised with DG and so he considered the allegations as they were put to him. He said allegation four the mitigation was caseload, mitigation five it was a mistake not deliberate or a cover up, again allegation seven a genuine error and DG said that should be no separate penalty. There were other alternatives, Mr Garner said he considered a final written warning but the numbers and severity of the allegations meant that dismissal was an appropriate penalty. He said no-one had raised capability with him.

121. The claimant concluded by saying that managers were aware of the workload, that he worked excessive hours, they knew how hard and long he worked, he couldn't call any witnesses because he was told not to have contact with anyone. DG said he could ask for permission to contact anyone.

122. Mr Waldock in his summing up suggested that for misconduct there has to be a 'mens rea', it has to be a deliberate intent, he was working under immense pressure in difficult circumstances, the investigation was flawed and biased and the mitigation wasn't considered properly. There was no evidence in the letter of a consideration of a lesser penalty. He accepts he made errors due to the pressure of the caseload and his personal circumstances regarding his father. The process should be corrective not punitive and would seek a lesser sanction.

123. The panel undertook some follow up after the meeting particularly with SM. On 11 December SM sent an email to Stewart Hindley an HR advisor regarding the claimant's hearing. She provided further information regarding DL, he went off sick and KH agreed to act up. He was absent on sick leave after 19 March following an interview for his post on 16 March which he did not get. She said DG had already spoken to her expressing concerns regarding the claimant before he was suspended, KH was worried regarding his working practices, not clear where he was, not adhering to his diary and was seeking to address this with him. Mr Howarth obtained the substantive post on 10 May. Regarding record keeping she noted that she had emailed the claimant on 14 March expressing concerns regarding his contemporaneous records in relation to service user B and again on 16 March and she copied DL in to that. She had checked herself on some outstanding funding and could not find case notes dating back a couple of months. She was concerned the service user had not been seen and if he had it had not been recorded. She copied his manager in so that this could be followed up as part of supervision. DL's sickness absence had probably affected that however, further serious matters came to light at the panel meeting on 26 April (a mistake -it was 25 April) which led to the claimant's suspension. She mentioned that there was one other social worker in the team where she had expressed concerns to managers re contemporaneous record keeping on the electronic system, this was being managed via action plans as supervision, she had a tendency to record in a notebook and a delay in transferring her

notes to the electronic recording system, however her notes were kept in the office but this is not the standard or expected practice of the team. She said that there were spot checks on cases managed by other staff (usually where funding requests were raised or queried or case concerns that she had had raised with her) and in those cases she had seen appropriate and timely records on the system.

124. Regarding Contact with DL. She was contacted by the investigating officer re access to David's supervision notes of MC. She notes "I contacted David via his personal email for this purpose, he provided direction of where the notes were. DL was off sick and I met with him as part of the HR process and found him quite unwell, however, at no point was I asked about contacting him further re interviewing for this investigation, had I been asked I would have contacted DL to ask him and provided the response to the investigating officer. However, it is worth noting that I asked him I was not confident he would have agreed to have taken part due to his ill health and his previous experience of managing service user A (previous grievance etc). DL took redundancy and left the council on 6 August 2018. I presumed he was not needed for interview due to the line of investigation and other evidence available such as the supervision notes. "

125. The claimant was advised that further information was being obtained and the panel would reconvene in the new year. The email from SM was sent to him.

126. On 17 December the claimant emailed Stewart Hindley having seen the email from SM, he raised the difficulties of operating in the sickness absence of his manager and another member of staff being off sick. In respect of that member not keeping timely records, this was another example of work pressures being placed on the team. He said "I have a suspicion this is another grade 7 social worker and she had her own additional health needs which was evident within the team. "He also pointed out that JN had said that she had been told not to contact DL by SM and the reference to the previous grievance he had had against DL and being bullied by him but he noted that "our working relationship had improved immensely since this grievance matter".

127. KW was provided with more information on the 18 December about another worker who had been identified as having a similar issue, i.e. not keeping contemporaneous records, not recording in a timely manner and she was being managed through an action plan and supervision. He stated if this was the case why wasn't a similar approach afforded to Michael and why wasn't support given to Michael?

128. At the reconvened appeal on 30 January 2019. The additional information from SM was noted regarding management support and oversight, record keeping in the team and contact with DL. SM attended this hearing. She advised regarding the other member of staff who had been put on an action plan that regarding the other members of staff the records in the notebook were kept in the office so the notes were there and she was managing to put them into the electronic system. SM said she had not been asked to contact DL as part of the process, he was unwell when SM met with him and she had

stated he may not have agreed to take part anyway and he has now left the council (on 6 August 2018).

129. Mr Waldock raised on behalf of the claimant why no action plans for the claimant why was he dealt with differently than the other member of staff.? SM stated that that a plan would have been put in place following the email exchange around 14 March 2018 here was no opportunity to put action plans into place because events such as the meeting in April had taken over and DL had started a sickness absence on 19 March. The claimant's suspension was not just about record keeping. The allegation was that the claimant had given information to the panel that was not true, that is what led to the suspension and investigation. KW put additional questions to SM, he said given the claimant's workload he could not keep records up to date. SM stated it was not acceptable conduct – it was professional misconduct. There was another member of staff in the same position SM indicated it was different – the notes were there just not electronically. There was a break then and on returning KW complained that he had not been advised that SM would be attending however he did not ask for a longer period of time to consider her information.

130. There was then a further summary when DG said he found nine out of ten proven and that it was gross misconduct and Mr Waldock had nothing to add to his previous summary.

131. The outcome letter was sent to the claimant on 5 February 2019. They found the first allegation proven in respect of misleading the panel that the CHC was at fault for applications not being processed. In respect of not recording his notes things were in a blue book and it was gross negligence failing to keep accurate and secure notes and recording those appropriately.

132. In respect of number two the evidence provided substantiated that due to the inconsistencies in recording information relating to visits the signing in records showed no record of alleged visits on a number of occasions, there was a lack of information on the outlook calendar and whilst the claimant had said that the whiteboard was used for saying where people were this information was removed every day. They found on the balance of probabilities that the allegation was proven.

133. Allegation three, regarding the management instruction on service user A. Again, this was proven, he had been asked to do it in December 2016, he had been reminded on 17 January 2017, it wasn't completed until July 2017 and only submitted in October 2017, they did not accept that the pressure of work was mitigation in the light of a management instruction and the impact on the service user and the length of time taken in a priority case.

134. Allegation four, contemporaneous and sufficient detail records for service user A and service user B. Records were not put on Mosaic in a timely fashion and this allegation was proven.

135. Allegation five, regarding falsified records on Mosaic, based on the evidence provided in reference to the other allegations the panel found this proven and that the mitigation was insufficient for this.

136. Allegation six safeguarding procedures. They followed DG's view that this was not proven in the light of the discussions the claimant had with DL.

137. Allegation seven, wrong case notes. This was admitted; therefore, the allegation was proven.

138. Allegation eight regarding the data breach. This was also proven and it was concluded that he had breached the relevant standards and there had been a fundamental breach of trust and confidence in him as an employee of Oldham Council.

139. The panel believed there was enough support and assistance available within the service even though there was no formal line management in place for a short period of time. Alternatives were there and assistance could have been accessed. In the light of the proven offences it was clear it was gross negligence in breaching data protection legislation, failing to meet HCPC standard of proficiency and breaching the council's practice standard,

140. The panel also looked at the other mitigation, the longevity of his employment and no previous disciplinary sanctions however, the seniority of the claimant meant that this did not outweigh the matters that were proven and dismissal was appropriate given the allegation was so serious.

141. The claimant then issued these Tribunal proceedings. The matters which arose in Tribunal which were relevant were that the clamant was asked what he had done with his blue book by the Tribunal panel, he had advised that unfortunately that had been shredded. PB was cross examined as to why the claimant's complaints of race discrimination had not been pursued and in her view, they had no connection with the matters the panel was looking into and the claimant had brought grievances or could have brought and pursued those grievances at the relevant time.

The Law

Unfair Dismissal

142. Section 98 of the Employment Rights Act 1996 sets out the relevant law on unfair dismissal. It is for the employer to show the reason for dismissal, or the principal reason, and that the reason was a potentially fair reason falling within section 98(2). Conduct is a potentially fair reason for dismissal. In **Abernethy v Mott, Hay & Anderson [1974]** it was said that:

"A reason for the dismissal of an employee is a set of facts known to the employer or it may be of beliefs held by him which caused him to dismiss the employee."

143. Once the employer has shown a potentially fair reason for dismissal a Tribunal must decide whether the employer acted reasonably or unreasonably in dismissing the claimant for that reason. Section 98(4) states that:

"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 sufficient reason for dismissing the employee; and

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

144. In relation to a conduct dismissal **British Home Stores Limited v Burchell [1980] EAT** sets out the test to be applied where the reason relied on is conduct. This is:

(1) did the employer Did the employer genuinely believe the employee was guilty of the alleged misconduct?

(2) were there reasonable grounds on which to base that belief?

(3) was a reasonable investigation carried out?

145. In relation to a professional job subject to a regulatory body where a finding may affect the individual's ability to continue in their chosen career the employer must be particularly careful in its investigation and in reaching its conclusions **A vs B EAT (2003**) and **Salford Royal NHS Foundation Trust v Roldan CA (2010)**

146. In respect of deciding whether it was reasonable to dismiss **Iceland Frozen Foods Limited v Jones [1982] EAT** states that the function of the Tribunal:

"…is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted."

147. The Tribunal must not substitute its own view for the range of reasonable responses test.

148. In respect of procedure, the procedure must also be fair and the ACAS Code of Practice in relation to dismissals is the starting point as well as the respondent's own procedure. In **Sainsbury's PLC v Hitt [2003]** the court established that:

"The band of reasonable responses test also applies equally to whether the employer's standard of investigation into the suspected misconduct was reasonable."

149. In addition, the decision as to whether the dismissal was fair or unfair must include the appeal (**Taylor v OCS Group Limited [2006]** Court of Appeal). Either the appeal can remedy earlier defects or conversely a poor appeal can render an otherwise fair dismissal unfair.

Polkey

150. The House of Lords in a decision of **Polkey v A E Dayton Services Limited [1988]** decided that where a case is procedurally unfair a decision would still be of unfair dismissal even if there was a strong argument the procedural irregularity made no difference to the outcome unless the procedural

irregularity would have been utterly useless of futile. Rather the question of the irregularity making no difference would be addressed in terms of remedy. This principle has also been extended to cases where dismissal is substantively unfair, although it is most likely to apply to procedural irregularity cases. The outcome can be that it would have made no difference and the claimant, although unfair dismissed, would be entitled to no compensation or the rectification of the problem would have resulted in a delay in the claimant being dismissed and therefore the claimant receives compensation for that delayed period.

Contributory conduct

151. The Tribunal must always consider whether it would be just and equitable to reduce the amount of the compensatory award pursuant to section 123(6) of the Employment Rights Act 1996, where an employee by blameworthy or culpable actions, caused or contributed to his dismissal. If the claimant did so do the Tribunal will have to assess by what proportion it would be just and equitable to reduce any compensatory award, usually expressed in percentage terms. The three principles are:

(1) That the relevant action must be culpable or blameworthy;

(2) It must have actually caused or contributed to the dismissal; and

(3) It must be just and equitable to reduce the award by the proportionate specified.

152. These principles were set out in **Nelson v BBC No. 2 [1980]** Court of Appeal.

Victimisation

153. Section 27 of the Equality Act 2010 provides that:-

(1) A person (A) victimises another person (B) if A subjects B to a detriment because

a. B does a protected act; or

b. A believes has done or may do a protected act.

(2) Each of the following is a protected act:

a. Bringing proceedings under this act;

b. Giving evidence for information in connection with proceedings under this act;

c. Doing any other thing for the purpose or or in connection with this act,

d. Making an allegation whether or not express, that A or another person's contravened this act.

(3) Giving false evidence or information or making a false allegation is not a protected act if the evidence or information is given or the allegation is made in bad faith. In **Martin -v- Devonshire Solicitors 2011** the Tribunal is required to consider whether an employee had been dismissed by reason of a protected act in circumstances where she brought persistent and unfounded grievances complaining of harassment and victimisation against her employer. In that case it was a question of was she dismissed for a protected act or was she dismissed because she brought persistent unfounded grievances.

154. A protected act can be discerned from more than one piece of evidence or documentation, i.e. a series of letters from the solicitor taken together were viewed as a protected act.

155. If the claimant had established a protected act then there must also be a detriment, here the claimant relied on his dismissal In order to examine whether the detriment arose from the protected act a number of cases are relevant. In **Greater Manchester Police -v- Bailey 2017** the employer's motivation has to be considered and obviously there is a requirement that the employer has knowledge of the protected act. The cases relevant to this are **Nagarayan -v- London Regional Transport** 1999 House of Lords, **Chief Constable of West Yorkshire Police -v- Khan 2001** House of Lords, **Court of Appeal in Cornelius -v- The University College of Swansea** 1987.

156. In **St Helens Metropolitan Borough Council -v- Derbyshire** 2007 the House of Lords also said that the under the victimisation provisions it was primarily from the perspective of the alleged victim that one determines the question whether or not any detriment has been suffered and it it's not proper to just whether or not a particular act can be said to amount to victimisation from the point of view of the alleged discriminator. In Nagarayan and Khan, the House of Lords ruled that a simple but for test was not appropriate. It is not necessary to show the discriminator was consciously motivated by a wish to treat somebody badly because of the protected conduct, it is likely to be unconscious or subconscious. The previously referred to case **of Martin** was also relevant here and the Tribunals are warned against the dangerous territory of finding that bringing a complaint in an unreasonable way allows the complainant to lose protection against victimisation. The discriminator need not be wholly motivated to act by the complainant's behaviour in bringing or doing the protected act. The discriminatory motive should be of sufficient weight **O'Donoghue -v- Redcar and Cleveland Borough Council** 2001 Court of Appeal.

157. In addition, two of the claimant's protected acts concerned 'third parties' ie clients, not employees of the respondent. Third party discrimination/harassment is no longer per se the responsibility of an employer under the equality Act 2010 (as confirmed in **Bessong vs Pennine Care NHS Trust EAT (2019**). Accordingly, if the protected act concerns a matter which is not unlawful discrimination can it be a protected Act, even if made in good faith, because unbeknown to the employee such actions are not covered by the 2010 Act? The main authority is a pre-2010 case where the issue was that the protected act concerned a matter not in the course of employment (**Waters vs Commissioner of Police for the Metropolis**

HL(2000) - issue decided at CA). However, subsection 27 (2)(c) quoted above is wide enough to cover most circumstances in any event. Also, whilst third party harassment may still be arguably caught by the act where the failure to take action results in a hostile environment, where there is action which could be taken, or it may in some circumstances be indirect discrimination. Accordingly, we have accepted that legally the claimant's protected acts can be described as such.

Burden of Proof

158. Section 136 of the Equality Act 2010 encapsulates the reversal burden of proof provisions set out in the equal treatment framework directive, saying that the reversal burden of proof applies to "any proceedings relating to any contravention of this Act, i.e. it includes victimisation". It involves a claimant establishing sufficient facts which in the absence of any other explanation point to a breach having occurred, the burden then shifts the respondent to show he or she did not breach the provisions of the act. In **Greater Manchester Police -v- Bailey** 2007 Court of Appeal it was held that "it is trite law that the burden is not shifted simply by showing that the claimant has suffered a detriment and that he has a protected characteristic or has done a protected act", see Madarassy 2007 Mummery LJ.

Submissions

159. In respect of unfair dismissal, the claimant's case was that the process was fundamentally flawed, that the investigatory officer was biased and only looked for evidence which supported allegations against the claimant. The claimant had been dismissed for matters which the respondent did not regard as serious as for example in relation to the CHC matter this had not been followed up. Neither did SM do anything about the fact that the claimant had not made good enough notes or made any comment regarding the statements he made to the meeting on 25 April. There was no detail on what information Ms Meakin had obtained from the CCG before she had decided that an investigation should be launched. The claimant had also on 27 April raised a grievance regarding his workload and this had not been dealt with. It was clear that the claimant had an abnormally high workload and this was not properly taken into account in respect of mitigation. None of KH's concerns were brought to the claimant's attention, the evidence was blatantly biased against the claimant. JN asked biased leading questions and made findings which is not appropriate in the role of Investigation Officer. DL should have been interviewed and there was a conflict regarding why this did not occur.

160. Regarding victimisation the claimant believed that he was dismissed because he had raised a number of grievances, the Tribunal could raise inferences from the fact that these grievances were not dealt with, either at the time or when he raised them during the disciplinary hearing and the appeal.

Respondent's submissions

161. The claimant was dismissed for conduct in that he was grossly negligent in how he carried out his job and there were nine specific allegations. Eight of them were found proven, it was within the range of reasonable responses to dismiss, DG did consider an alternative sanction, he did consider the claimant's mitigation but he felt it was not sufficient to balance the serious nature of the claimant's wrongdoing. The respondents were aware of the Roldan vs Salford Royal case and were aware that these issues would be referred to the claimant's regulatory body. In respect of the investigation it was incredibly detailed and DG in any event made up his own mind on the evidence presented, there was nothing about the evidence that was challenged by the claimant as being inaccurate. In many ways the claimant agreed that he was guilty of the matters charged with. Again, at the appeal stage there was some new evidence in respect of the investigations the panel made themselves however this did not alter any of the findings of DG and the appeal panel considered all the matters properly when upholding DG's decision. The claimant had accepted in cross examination that it was found to have recorded fraudulent visits that would be a dismissing matter.

162. In respect of the matters related to race discrimination these were raised at the disciplinary hearing explored by DG and the claimant accepted that they had been dealt with. The BHS and Burchell test was met and the dismissal was within the range of reasonable responses and DG explained why he did not apply a lower sanction.

163. In respect of victimisation it is accepted that the grievances were founded on race discrimination, albeit there was quite limited documentary evidence relating to these matters. However, there was nothing to link the claimant's dismissal back to protected acts from 2014/2015. In fact, even if we accept that the claimant's race allegations were not dealt with properly in some cases they were, in some cases they were not on the evidence we had, the claimant would still have to show causation in that those making the decisions were motivated by the fact he had complained of race discrimination. DG had asked about the complaints and the complaints he said were satisfactorily resolved, therefore there was no evidence to suggest this had anything to do with why DG formed his view, particularly given the weight of evidence.

164. In respect of the appeal panel the appeal panel could see no connection between these complaints and the matters they had to look at and therefore did not consider them any further. The claimant did not suggest any connection between the complaints made in 2014/15 and the dismissal/appeal.

Conclusions

Victimisation

Protected Acts

165. We have concluded the claimant did raise complaints regarding the three matters which he relies on as protected acts as referred to in the List of Issues. Obviously, the crucial question is whether there was any causal link

between the decision to dismiss the claimant and the making of those complaints.

Causal link to dismissal

166. There is no direct evidence at all of a causal link between the protected acts and the claimant's dismissal. We accept the factual scenario is that SM's decision to instigate an investigation was motivated by firstly Mr Howarth raising concerns with her, then her interests being engaged by an outside funding enquiry which caused her to look at the claimant's recordkeeping and raise its deficiencies with him on 14 March, and finally the meeting of 25 April and her subsequent phone call with the CCG where the information she was given suggested that the claimant had not replied to the panel's questioning truthfully on 25 April. There is a clear "audit trail" here so that without strong factual matters which do not accord with that more relevant matters from which inferences could be drawn, we accept that that is what happened factually.

167. Following that a thorough investigation was undertaken by JN which literally left no stone unturned and the matter was referred to a disciplinary hearing. Again, there was no specific connection between the protected acts and JN's conduct of the investigation.

168. (In respect of the disciplinary hearing, the claimant did raise some matters in the disciplinary hearing briefly, although he agreed that none of them concerns colleagues, they only concerned service users. One of these related to one of the protected acts he relied on for his victimisation claim. He accepted in the disciplinary hearing that these complaints had been dealt with by management and did not refer to these issues again.

169. In respect of drawing any sort of causal link between how the investigation was conducted and the disciplinary hearing and the protected acts, we have scrutinised whether anybody involved in the original complaints gave evidence which did sway the conduct of the investigation, its conclusions and similarly the disciplinary hearing. The only people involved (DT and JC's evidence), although they are recorded, they were not matters which were relied on in coming to the conclusions in the investigation report not in the disciplinary hearing. JC's evidence in any event was remarkably supportive of the claimant and she time and time again did take the view that he had a heavy caseload, neither had she failed to follow up his complaint regarding his colleague (PB). Although she did take the view ultimately it was one person's word against another which is not good practice, it was in the context of this being an informal stage and she did clearly advise him that if he wished to take the matter further he needed to make a formal complaint. She was the closest link between one of the protected acts and the disciplinary process but there was nothing in her interview that had an impact on the decision makers.

170. We have also considered that the claimant alleges (and there was no dissenting evidence regarding this) that Martcha Thomas had said that she was supposed to give him a grilling about why he brought a complaint about

PB rather than sorting it out "between ourselves". Even if we accept this was said, as there was no opposing evidence, this was not sufficient to establish any sort of causal connection. This matter arose in 2014 and none of the players in the investigation or the disciplinary hearing or the appeal had any connection with Martcha Thomas or mentioned anything which would suggest that the claimant's complaints had soured their view of him. KH, whose evidence was perhaps the most damning, was not involved at all in any of the complainants/ protected acts.

171. We have considered if we can draw any inference from any of the matters involving JC (which included matters which were not part of the claimant's case but he did raise in the appeal regarding JC commenting on him carrying two many bags or on his aftershave), was relevant to any of the conclusions in this case: but as her evidence was mainly positive we have not done so.

172. Whilst DT did not have a brilliant view of the claimant her evidence was not taken into account at any stage of these proceedings. Accordingly, if she was concerned about the two incidents with the claimant it had no effect on the process. It is noted that these incidents were not one of the three protected acts but in respect of an inference we considered whether the respondent should have borne in mind that she may have had a grudge against him but it no-one involved in the disciplinary process knew of the DT events other than JC.

173. The evidence which JN had gathered was more than sufficient to take the matter to a disciplinary hearing. Whether or not she should have stated that she found matters proven rather than simply stating there was sufficient evidence to go to a disciplinary hearing matters not as there was nothing in relation to Jackie Nuttall that connected her to any of the protected acts or any suggestion that she was concerned about the complaints the claimant relies on. The documentation she gathered regarding his visit to Treelands, the lack of detailed notes, what was in his Outlook calendar, what mileage claims he made, when notes were actually made compared to the dates of the visits, were all documented and tables drawn up to show where the information overlapped and where it did not. None of that is linked to the claimant's protected act: it is all completely stand alone objective information.

174. Further, in respect of the disciplinary hearing the claimant raised some issues but the minutes record he did not challenge that these had been dealt with. The claimant suddenly said in cross examination the minutes were not accurate but the claimant had never raised this before; it was not in his witness statement and it reflected poorly on his credibility.

175. In respect of the dismissal, DG made a reasoned decision. He did so in the light of the claimant agreeing that the race discrimination complaints had been dealt with, that none of these concerned his colleagues and the claimant did not raise any causal connection with the decision to institute disciplinary proceedings against him to give DG any information to connect matters. At the highest these were matters which the respondent should have suggested the claimant brought a grievance in relation to, but the claimant at the hearing did not dissent they had been dealt with and therefore this was not an obvious matter to suggest.

176. DG's outcome letter shows that he considered all the information presented by JN, independently and objectively. He found one allegation unproven, and some matters the claimant had in any event admitted. The most negative opinion in the investigation pack was that of KH, but DG's conclusions show he did not rely on KH's overall information, although it is true that he relied on KH's rag assessment as to how heavy in reality the claimant's caseload was. This was not challenged to any great extent at the disciplinary hearing and therefore it was reasonable for DG to take a view on mitigation, taking the rag assessment into account and any other evidence the claimant presented. DG took the view that the mitigation of workload was insufficient to exculpate the claimant from a gross misconduct finding. There was ample evidence for him to take that view and there was nothing to show that he took that view because of the protected acts. If he took that view based on DG's assessment, and there was some bias in that assessment, there was nothing to link KH to the protected acts at all.

177. Finally, in relation to the appeal we were concerned that although it was correct that the allegation of race discrimination did not appear relevant to the panels remit on appeal, that the appeal panel did not at least ask the claimant if he wished these matters to be investigated under the grievance procedure irrespective of the fact that he had been dismissed and subject in any event to their decision which they had not made, as to whether they would overturn that dismissal. Nevertheless, although the claimant provided a lot of detail in his extended appeal grounds it was reasonable of the panel to conclude that nothing had any bearing on the actual decision to dismiss, bearing in mind this is a victimisation case rather than a claim of race discrimination. The claimant was not claiming that his dismissal was discriminatory, in which case this information may have been more relevant.

178. Of course, in a victimisation claim the tribunal considers subconscious bias/motivation: in this case could it be said that the panel was subconsciously biased against the claimant by not considering his race discrimination claims? We cannot find this as the panel did diligently look into the claimant's appeal and did instruct the HR adviser to make further enquiries of SM, they did explore the question of whether the claimant must have been treated more harshly than colleagues, and they received information which satisfied them reasonably that he was not being so treated.

179. In any event, the question in a victimisation claim is not whether the panel was influenced by the claimant's claims of race discrimination but whether they were influenced by the fact he had made protected acts. There was no overt evidence of this and therefore we did consider whether there was anything from which we could draw an inference. We put to the parties the matters that we might consider drawing an inference from, which we recount below with our final observations on them:

    (1) That Peter Tomlin's instructions to the claimant to make the CHC screening were not followed up by management, hence it could not be such an important matter. However, we do not accept this. JC did follow it up in supervision in January 2018 and she was entitled to assume the claimant had completed the screening following this and that she did not

need to raise it with him again. Accordingly, we can see nothing unusual in that.

(2) That SM did not escalate the matter when she noticed the claimant's notes were not up-to-date and did not question him further at the meeting on 25 April regarding the CHC screening. It is clear, however, that she did remind him that he was not meeting HCPC standards and he had a responsibility to do so, and she did immediately move to make further enquiries of the CCG after the meeting on 25 April. Again, there is nothing unusual in any of those actions and nothing to suggest that the matters were not taken seriously and therefore there must have been some other motivation for the claimant's treatment.

(3) In relation to the KH email, whilst the claimant suggested it was suspicious because the heading was not correct, and that it possibly had been fabricated, we did not see (and we put this to the claimant's representative) how this helped the claimant. The claimant actually wished to rely on the content of that email. The claimant had been suspended by the time the email was sent, if it was sent, so he would not have seen it in any event. KH did refer to it in his interview, which is unlikely he would do if it did not exist. In any event, if it was fabricated the motivation could only have been for Mr Howarth to establish he had responded to the claimant's email regarding the allocation of cases following a stint on duty rota. We do not see that this takes the claimant's case any further. We have not accepted that that email was about workload per se, nor that it was a grievance. Reading KH's response, it seems a perfectly reasonably response but had he not responded nothing would have turned on that in the few days between the claimant sending his email and being suspended.

(4) Evidence regarding JN and SM regarding DL being interviewed – There was a distance between JN's evidence and SM's email towards the end of the proceedings as to why DL was not interviewed. JN's evidence was stronger: that she had been told not to interview DL, or had been 'guided' not to. SM had no recollection of being approached about this matter, whether by JN or anyone else. We accept that this is simply a divergence of recollections and not anything more sinister. The claimant placed a lot of weight on the possibility that DL's evidence would have assisted him, particularly in respect of workload, however the respondent had evidence from JC and KH regarding his workload and were in a position to consider the mitigation in the light of this. There was nothing to stop the claimant, who was represented by an experienced union representative, seeking to approach DL himself for a statement at least, and he failed to do this. To draw an inference we would have to be convinced that the DL's potential evidence had been suppressed in order to weaken the claimant's claim on mitigation, and on the balance of probabilities this seems unlikely particularly in light of SM's evidence to the appeal panel. In fact, her view was of anyone he may have harboured a grudge against the claimant who had previously complained about him.

180. Accordingly, the claimant's claim of victimisation fails as we can find no basis for a casual connection between the claimant's protected acts and the decision to dismiss.

181. However we do have some concerns and would suggest that the respondent's consider the following :

(1) Confidential assistance for employees who believe they are suffering discrimination

(2) Better recording of any such complaints

(3) Consideration of escalating complaints even where an employee does not make a formal grievance

(4) A policy (if there currently is none) as to what action will be taken where service users racially abuse staff and where third parties such as care providers behave in an unacceptable way.

(5) Follow up grievances even where the individual has left the respondent's employment whether amicably or not.

(6) Regular training on discrimination for staff, online training would be potentially accessible and effective

Unfair Dismissal

182. We find the claimant's dismissal was a fair dismissal for the following reasons:

The Investigation

(1) The investigation was thorough and meets the **Sainsbury's v Hitt** test. It was extremely forensic and detailed and there was consideration of a large amount of documented evidence regarding the claimant's visits to Treelands, the claimant's Outlook diary, the claimant's mileage, the claimant's notes on Mosaic, the timing of when the claimant had put his notes on and the content of those notes. JN produced a table showing where those records overlapped and where they did not. Whilst in our view JN went too far in making conclusions on that evidence, and it would have been preferable for her simply to say there was sufficient evidence for the matter to be considered at a disciplinary hearing or to support the allegations, this did not make any difference to the process as David Garner made an objective decision considering all the evidence. He consciously considered the claimant's point that she was biased and stated he had made his own decision based on objective evidence.

(2) Regarding the suggestion that the failure to interview DL was a fatal flaw in the investigation, this was really a matter going to mitigation and was a matter for the disciplinary hearing rather than for the investigation.

(3) Regarding the interviews JN conducted, even if we accepted the claimant's case at its highest that there was some fishing for negative

comments, this proved irrelevant as the interviews were certainly not relied on in deciding whether the allegations were proven. The relevant evidence was objective data which JN had collected.

Disciplinary Hearing

(4) We are satisfied that there was ample evidence on which to uphold the allegations against the claimant in respect of the majority of the claims. We are satisfied DG considered that evidence diligently and came to a genuine, reasoned and reasonable conclusion that the claimant was guilty of the matters he was charged with. He set this out in full in a lengthy outcome letter and relied heavily on the documented evidence rather than on any matters raised in the interviews.

(5) In relation to the rag assessment, which was conducted by KH who did have a somewhat negative view of the claimant, we rely on the fact that at the disciplinary hearing this rag assessment was not challenged in any great detail and the claimant had been provided with it. If the claimant felt he had not enough time to challenge it then he could have asked for a postponement of the hearing.

Appeal Panel

(6) We do not think that the dismissal was made unfair by the panel's decision not to consider the race discrimination allegations raised by the claimant as there was no obvious connection with the claimant's dismissal. Whilst we feel they should have offered the claimant the opportunity to raise a grievance, that does not affect the fairness of the panel's decision. Again, the panel were diligent. They instructed the HR adviser to make further enquiries of SM which provided highly relevant and useful information which they then relied on properly to come to a conclusion that the claimant had not been treated differently from his colleagues. The panel were also fully aware of the **Roldan** case and that they should take extreme care in a situation where a decision may be career ending, although this case was not as critical as Mrs Roldan case where her immigration status also depended on her retaining her job.

(7) There was nothing therefore in the panel hearing which was unfair, substantively or procedurally. Some difficult questions were asked by the panel which evidenced that they were and did engage with all the claimant's issues, apart from the race discrimination matters he raised.

General

(8) The only point we would have queried was an omission to consciously consider that the claimant had simply forgotten the ins and outs of MB's CHC screening process at the meeting on 25 April 2018. However, on the balance of probabilities given that he had submitted 3 applications and one very close to the panel hearing we find that had this been

consciously examined the respondent would have concluded he had not simply 'misremembered' as given the history that was inherently unlikely.

(9) In addition if it was an omission to consider whether other members of the claimant's team had acted in a similar way this was 'cured' by the appeal where this information was elicited from SM.

Was it reasonable to dismiss?

183. We remind ourselves that it is not our role to substitute our own opinion in respect of whether we would have found all the allegations to be upheld or whether we would have decided to dismiss the claimant rather than giving him a warning or instituting performance procedures. In fact, that would not have been appropriate where findings were made that the claimant had fabricated visits and fabricated notes. Where such findings are made, as the claimant agreed, it would have been a matter for dismissal.

184. As the respondent had enough evidence to conclude that the claimant had knowingly provided incorrect information to the panel on 25 April, and that he had fabricated visits, not just failed to record them in a timely fashion (although he had done that as well) then it was not outside the range of reasonable responses to dismiss as it was clear any employer would lose trust and confidence in an employee on the basis of either one of those matters. They had their attention drawn to the Roldan point and took it into consideration.

185. In respect of whether the employer at the disciplinary and the appeal stage took mitigation properly into account, we find that at both stages the claimant's mitigation was clearly considered, and it was within the range of reasonable responses for the respondent to decide that the mitigation was not sufficient to outweigh the matters that were found proven. An avoidance of substituting the panel's view is particularly acute in a profession with its own standards and practice rules internal and regulatory.

186. Accordingly, the claimant's claim of unfair dismissal fails and is dismissed.

Employment Judge Feeney

Date 12 April 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

12 April 2021

FOR THE TRIBUNAL OFFICE

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