EMPLOYMENT TRIBUNALS

Claimant: Mrs H Zaitoun

Respondent: The Newcastle-upon-Tyne NHS Hospitals Foundation Trust

Heard at: Newcastle-upon-Tyne Hearing Centre **On:** 10-14 June 2021

Before: Employment Judge G Johnson
Mrs P Wright
Mr S Hunter

REPRESENTATION:

Claimant: Mr A Crammond of Counsel
Respondent: Mr R Gibson, Solicitor

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:-

1. The claimant's complaint of unlawful age discrimination is not well-founded and is dismissed.

2. The claimant's complaint of unfair dismissal is well-founded and succeeds.

REASONS

Introduction

1. The claimant in these proceedings was represented by Mr Crammond of counsel, who called the claimant to give evidence. The respondent was represented by Mr Gibson, who called to give evidence Ms Angela Dragone (Finance Director) and Mr Jonathan Jowett (non-Executive Director). The claimant and the two witnesses for the respondent had each prepared typed and signed witness statements which were taken “as read” by the Employment Tribunal, subject to supplemental questions, questions in cross examination and questions from the Tribunal. There was an agreed bundle of documents marked R1 comprising 3 x A4 ring-binders containing a total of 1,640 pages of documents.

Claims and Issues

2. By a claim form presented on 17 August 2019, the claimant brought complaints of unlawful age discrimination and unfair dismissal. The respondent defended the claims. In essence they arise out of the claimant's dismissal on or about 24 May 2019, for reasons which the respondent says related to her conduct. The claimant's case is that the conduct which formed the subject matter of the allegations against her did not amount to gross misconduct justifying dismissal, and that the real reason why she was dismissed was because of her age. The respondent's position is that the conduct which formed the subject matter of the allegations against the claimant was to a large extent admitted by her and was of such a serious nature as to justify dismissal. The respondent denied that the claimant's age played any part in the decision to dismiss her.

3. The issues to be decided by the Tribunal are summarised as follows:-

(1) What was the reason, or if more than one the principal reason, for the claimant's dismissal?

(2) If misconduct, did the respondent hold a genuine belief that the claimant had committed those acts of misconduct?

(3) Were there reasonable grounds for that belief?

(4) Did the respondent follow a fair procedure in dismissing the claimant for that reason and in particular did it carry out an investigation which was reasonable in all the circumstances of the case?

(5) Was the respondent's decision to dismiss the claimant for that misconduct one which fell within the range of reasonable responses open to a reasonable employer in all the circumstances?

(6) Was any part of the investigation, disciplinary process or dismissal influenced in any way by the claimant's age?

Findings of Fact

4. The claimant was employed by the respondent as a consultant healthcare scientist from 1 January 1982 until her dismissal on 24 May 2019. She had 37 years' service with the respondent. At the time of the incidents which led to her dismissal, the claimant was aged 67; at the date of her dismissal she was aged 69, and at the date of this hearing she was aged 71.

5. From approximately 2000 the claimant's work had been carried out on Ward 51 at the Royal Victoria Infirmary in Newcastle-upon-Tyne. The claimant enjoyed a large degree of autonomy in the role she performed as a consultant healthcare scientist. She was involved in the design of the purpose-built clinical investigation room/laboratory where she examined patients and undertook investigations to assist in the diagnosis of various medical conditions. It is accepted that the claimant had a clean disciplinary record and had never been the subject of any disciplinary action, nor had there been any concerns previously expressed about her performance.

6. The claimant had never been required to share her room with any other medical or non-medical staff. The claimant used specialist, expensive equipment which was stored within her room. The claimant had a desk with drawers which could be locked, storage cupboards and a filing cabinet which could also be locked.

7. In early 2016 the claimant had applied for a re-grading of her role. The claimant asked that provision be made for her in respect of the extra work and long hours which she had undertaken.

8. In March 2016, the claimant's Clinical Director asked her to attend a job planning meeting, which the claimant understood to relate to the assessment of the hours she had been working. Upon attending the meeting, the claimant was surprised that it was conducted by her new directorate manager, Ms Dawn Youssef. This was the first time the claimant had met Ms Youssef. The claimant presented her timetable and evidence of the long hours she had been working and the research work she had been undertaking. The claimant felt that her submissions were dismissed in a peremptory fashion and she was told by Ms Youssef, “By the way, your application for regrading is rejected”.

9. In July 2016 the claimant was asked by Ms Youssef’s secretary to attend a meeting to discuss her proposal for annual leave. The meeting took place on 5 August 2016. However, at that meeting, the claimant was told by Ms Youssef that the new office to which the claimant hoped to be transferred would not be made available to her, and further that she was no longer to have exclusive use of the room which she had occupied for a number of years. The claimant was told that she may be required to “hot desk” in an adjacent building. The claimant heard nothing formally from Ms Youssef until 5 August 2016, when the claimant was told by a Ward Sister that a proposal had been made that the claimant's equipment to be moved the Immunology Department and that the claimant would have to see her patients there. The claimant tried to arrange a meeting with Ms Youssef or her secretary, but was unable to do so. However, late on the afternoon of Friday 23 September 2016, Ms Youssef contacted the claimant by telephone and instructed her to move her belongings and equipment, by the following Wednesday morning, to the Immunology Department. Those instructions were confirmed by Ms Youssef in a letter of the same date, a copy of which appears at page 1295 in the bundle. The claimant was distressed upon receiving this letter, as she felt that there had been inadequate consultation with her about the reason and purpose for the move and the suitability of the alternative accommodation which had been offered to her. The letter sets out Ms Youssef’s reasons for the move and concludes with the following paragraph:-

> “Taking the above into account I am writing to instruct you to make arrangements to remove your personal belongings from that room w/c 26 September 2016. Should you require any support with this please let me know. Should you fail to do so I may have no alternative but to consider formal action against you in accordance with the Trust’s disciplinary procedure.”

10. That letter had in fact been drafted by Ms Marie Lynn of the respondent’s HR department, with whom Ms Youssef had clearly discussed the threat of disciplinary action.

11. The claimant considered that Ms Youssef was being unreasonable in requiring her to vacate her room and also in the manner she was adopting. The claimant wrote to her Clinical Director of Medicine, Dr Chris Dipper, on 26 September 2016 (page 1167). The claimant stated as follows:-

> "Chris, I am sorry to say that since she started as Directorate Manager, Dawn has not shown me the understanding, support and respect I deserve as a senior longstanding Trust employee. She appears in a very dictatorial fashion rather than by mutual consent which is in the best interests of the service and all my needs have been ignored. I would be most grateful therefore if you could arrange for me to be managed by yourself or Ewan Dick."

12. Dr Dipper discussed that letter with Ms Youssef at their weekly meeting the following Monday. Ms Youssef noticed that the claimant's email to Dr Dipper had been sent from the claimant's personal Hotmail account and not from the respondent's secure internal email system. On 26 September, Ms Youssef asked via Marie Lynn of HR that the respondent's IT section gain access to the claimant's email activity. Access for the previous six months activity was requested. Nothing of any significance was discovered. A further request was made in the following terms:

> "Are we able to restore Hannah's deleted items please as we are concerned about the lack of email activity. We know she regularly emails Lesley Tate, her secretary, and there are no emails in that information you sent us relating to them. Could we also request access to Lesley Tate's emails, please, as we would like to investigate the flow of messages between Hannah and Lesley."

13. On 26 September, the claimant had visited a patient on ward 19 with whom she was personally acquainted, but in respect of whom she had no clinical involvement. During that visit, the claimant expressed her personal concern at the patient's capacity to provide instructions to the Ward staff. Those concerns were expressed by the claimant in a manner which upset the Ward staff. The matter was formally reported and came to the attention of Ms Youssef. Ms Youssef enquired of the respondent's IT department as to whether the claimant had attempted to access the electronic records of the patient, who had sadly died the following day. When it was shown that the claimant had not accessed that patient's records, Ms Youssef again asked IT to provide the names of all persons who had accessed that patient's records throughout his seven-week hospital admission.

14. On 28 September an email was sent by Marie Lynn to Ms Youssef, a copy of which appears at page 1240 in the bundle. The letter states as follows:-

> "I have had some further thoughts about what we might want to consider going forward. With regards to any ongoing investigations I don't think you should lead them, but we'll need somebody robust:-
>
> (1) Complaints regarding HM's (the claimant) attitude from both families/nursing staff/consultant:
>
> Do we need to investigate this formally in accordance with the disciplinary procedure under the allegations of serious unacceptable

behaviour? This would involve formally meeting witnesses first and then HM.

It looks like we can't prove that she's looked at the person's record unless you've been able to identify anybody off the list Richard gave that is linked to HM and who shouldn't rightly have access to his records.

(2) Concern that HM has accessed Trust buildings with Dr Record

Again, do we need to investigate this formally under allegations of serious unacceptable behaviour, first meeting with witnesses? Although we don't have CCTV of them both accessing PIU I believe there were two witnesses? Also, as we do have footage of them entering/exiting Laing O'Rourke would it be reasonable probability to believe they were in PIU too? We could present the question something like, 'we've seen you both on CCTV in Laing O'Rourke, why were you both in PIU?' She won't know at that point that we don't have CCTV for PIU.

(3) As she's failed to continue to use the hand scanner, do we investigate this as a breach of the ERA policy? My views are that she should have raised any difficulty she was having rather than just stop hand scanning without permission.

(4) Do we investigate her working hours i.e. what does she do after 2.00pm on a Friday after swiping out etc? Can we look in more detail at what she actually does when she's not with patients? There isn't any email trail. Would her work be put on Mermaid (sorry, as I'm not experienced in what the med secs do etc so not what the process would be)? There would hopefully be some information we could audit through to check how much output there is.

(5) Concerned that she may be using an insecure email address. We'd probably need to understand from her secretary how she communicates and what type of information she puts on email i.e. is it patient identifiable?

(6) With regards to her subsequent emails to Clinical Director after you have clearly given her an instruction, could this be deemed as insubordination and another breach of the disciplinary rules?

There's a lot to be going on with. We'll need to let the Medical Director know that Dr Record has been witnessed on site so maybe should commence the above asap. Another problem is that Hanan's appraisal is overdue! How are we going to overcome that?"

15. Neither Ms Youssef nor Marie Lynn were called to give evidence to the Tribunal. From its examination of these documents, the tribunal found it likely that Ms Youssef and Marie Lynn had embarked upon a process designed to obtain information which was to be used in disciplinary proceedings against the claimant.

16. At pages 1214 and 1215 in the bundle are copies of emails between Marie Lynn and Ms Youssef, which refer to the examination of the claimant's email activity. Marie Lynn at page 1214 on 12 October states as follows:-

> "Iran came down to see me earlier. He's had a brief look through the emails and like me has found it difficult to unpick what may or may not be NHS work. He's contacted Private Patients who have given a different impression to Tracy in that according to them he's able to put private patients through The Lodge. We need to try and clarify that if we can. In the meantime he suggested that I put a list together of all the patients named on HM's emails and ask for somebody to cross reference them with e-record in order to identify whether they have been an NHS patient around the same date as the email. We can then seemingly get a better picture whether these are NHS or private patients. I don't have access to e-record. Would somebody be able to do it at your end?"

17. On Monday 24 September 2016, the claimant returned to work following annual leave during which she had visited Jordan. The claimant had in fact been born and brought up in Damascus, Syria. The claimant received a telephone call late that morning asking her to attend the Freeman Hospital to meet with Dawn Youssef and Marie Lynn at the end of her clinic. The claimant was not told of the reason for the meeting. Upon arriving at the meeting, the claimant was told:-

> "We've asked to meet with you Hanan as we have some very serious concerns that we need to discuss with you. The concerns we have are around information governance. This is a fact-finding meeting. I need to ask you some questions."

18. The claimant asked whether she was entitled to be accompanied at the meeting. She was told that ordinarily she would have been, but that "due to the serious nature of the concerns we've had no alternative but to meet with you as soon as possible".

19. The claimant was questioned about her email activity and in particular her use of the Hotmail account. The claimant confirmed that she did use her Hotmail account when working at night. When asked if she ever used that account for identifiable information, the claimant said, "I'm not aware, unless I pushed a button. I've never done that in my life".

20. Following a series of questions, Ms Youssef and Marie Lynn left the office to consider matters, and on their return informed the claimant that she was being suspended on full pay with immediate effect, pending further investigations into alleged misuse of the respondent's email system for the transmission of confidential information both internally and to an external recipient.

21. The following exchange then took place, as is set out on page 194 in the bundle:

> "HM - What about my personal things?
>
> ML - We're aware that you started your clinic at the Freeman this morning so assume you have your handbag with you?
>
> HM - Yes, I have my passport locked in the filing cabinet.
>
> DY - We can arrange with you Hanan to go through it and get your passport. We need to be with you though as we need to ensure

you're not taking anything that belongs to the Trust or that has patient identifiable information on it.

HM - It's the whole filing cabinet. I have a lot of stuff there. If it could just be arranged for Angela to be there or somebody. I'll go over this afternoon. Please don't break it. Only I have the key.

DY - We can arrange something although it's not likely to be this afternoon as we're at the Freeman now and we'll need to get over there.

ML - It's probably better to call Hanan this afternoon with a convenient time to meet up tomorrow?

DY - Yes, we'll do that.

ML - Hanan, all of this will be put in writing to you.

DY - We need to take your badge.

HM - But if you see, what I'm…it's my jewellery. I have my jewellery there.

DY - Your jewellery?

HM - Yes, I've been keeping my jewellery in my cabinet.

DY - You're telling us you've been keeping your jewellery on Trust premises?

HM - Yes, but it's locked.

DY - Why would you do that?

HM - I've been burgled three times in the last year. I haven't been staying in my house so I wanted to keep it safe.

DY - But Hanan, do you understand that you're putting the Trust at risk by doing this? It's totally unacceptable.

HM - I didn't think I was doing anything wrong. I love my work and my research. I love my patients. I would never do anything malicious. Please believe me.

ML - As we've said, Hanan, you will have the opportunity to discuss this in a lot more detail when the investigation is underway. We are not disputing that you love your work.

DY - Hanan, we cannot discuss this now. You will be asked to come back in and we'll be in touch with you to arrange to meet up to go through your cabinet. Remember you are not allowed to come back onto Trust premises though until you hear from us."

22. Having assured the claimant that she would be invited back to the premises to remove her personal belongings from her filing cabinet, Ms Youssef decided that she would go to the claimant's room to conduct a search of the room and to open the claimant's locked filing cabinet. Ms Youssef was accompanied by Marie Lynn and Angela Clasper. Because the filing cabinet was locked, assistance was requested from two "Estate Officers" who forced open the drawers in the filing cabinet. The first two drawers contained paperwork, but the third and fourth drawers contained a substantial amount of cash and jewellery. The cash was in various denominations including Sterling, US Dollars, Euros, and Middle Eastern currency. There was a mixture of used and unused notes in sealed and unsealed envelopes. It transpired that there was approximately £144,000 worth of currency. There was also jewellery wrapped in cloth, which Ms Youssef estimated to have a value of approximately £250,000.

23. Ms Youssef contacted the respondent's Fraud Specialist Manager, Mr Ivan Bradshaw. Between them they decided that the police should be called, due to the large amount of cash and jewellery. The police attended and recovered the cash and jewellery. Following an investigation which lasted until April 2017, the police accepted that the cash and jewellery were the claimant's property and all was returned to her on 5 April 2017. No criminal charges were brought against the claimant.

24. During the search of the claimant's office and following the opening of her filing cabinet, Mr Bradshaw contacted Ms Angela Dragone, the respondent's Finance Director, who was Mr Bradshaw's line manager. Ms Dragone advised Mr Bradshaw to notify HMRC, stating that "Finance at the Trust are responsible for ensuring all monies paid to staff are properly subjected to PAYE. There was such a large volume of cash stored, I believed it needed to be reported. Reporting it is in no sense an indication of guilt".

25. Mr Bradshaw's recollection as given to the subsequent internal investigation, was that he had made the decision to call the police. Mr Bradshaw also confirmed that HMRC had not been informed immediately. On 5 April 2017 the police concluded their enquiries. On 25 April 2017, NHS Protect confirmed that they had found no evidence that the NHS had been the victim of any fraud or other criminal activity. The agreed chronology shows that in April/May 2017, Angela Dragone had authorised Mr Bradshaw to report the claimant to HMRC.

26. The claimant remained suspended throughout the investigation by the police and HMRC. By a letter dated 27 October 2016, the claimant had been informed that the respondent was to conduct a formal investigation into the claimant's conduct. By a letter dated 15 January 2017, the claimant's trade union representative asked that the investigation be suspended pending the outcome of the police investigation. On 3 October 2017 the respondent wrote to the claimant's trade union representative proposing an investigatory meeting. On 7 October 2017 the claimant raised a formal grievance in a letter which runs to over 3 pages and appears in the bundle at pages 1484-1487. At page 1486 the claimant states:

> "The purpose of this grievance is to ask you to investigate the circumstances surrounding the decision to abuse my privacy by breaking into my filing cabinet and subsequently calling the police. I require answers to the questions set out above in an attempt to help me understand the reasons for

> my treatment by the Trust, who I have worked for since 1982. In the circumstances and in accordance with the grievance policy, I believe the current investigation should be suspended until this grievance is resolved. I genuinely believe that the treatment outlined about is a product of either a personal vendetta or unlawful discrimination that must be investigated before the allegations against me can be taken forward. It is not possible to overstate the impact that the treatment I have received from the Trust has had upon me. My career has been wrecked. My health has been very severely affected. I was near suicidal and my personality and character have completely changed as a result of the trauma I have suffered. I have been humiliated in front of my friends and colleagues who are aware of what has happened to me, and I believe my reputation will never be restored. My social life has been destroyed and I have effectively been isolated and imprisoned at home for the past 11 months."

27. The respondent's investigation into the claimant's email account showed that between October 2010 and October 2016 a total of 90 emails containing patient identifiable information were sent from the claimant's NUTH account. Of those, 70 were sent to the claimant's personal Hotmail account and 20 were sent to an iCloud account of Dr Christopher Record. Dr Record was a former employee of the respondent, who had retired some time ago and who was not entitled to receive any of that patient information. Throughout the disciplinary process, the claimant accepted and admitted that each of those emails had been sent from her NUTH account to either her personal Hotmail account, or Dr Record's iCloud account. The claimant accepted and admitted that those emails all contained patient identifiable information. In simple terms, the claimant's explanation throughout has been that the emails were sent to her personal hotline account to enable her to undertake work from home, and that those sent to Dr Record's iCloud account were sent so that she could undertake work from Dr Record's computer during a period of time when she was living in Dr Record's house whilst her own house was being renovated. The claimant has always accepted that the sending of these emails was a technical breach of the respondent's IT policies and also a breach of what are known as the "Caldecott Guidelines", which collectively require that all patient related information is processed using only secure NHS email accounts. The claimant's explanation about her breaches of the Caldecott Guidelines and the respondent's clear IT policies was that it was an inadvertent breach, primarily due to a lack of training and understanding of the email policy, and that the patient information had gone no further than her own personal account and that of Dr Record.

28. By a letter dated 19 October 2017, the claimant was invited to attend an investigatory meeting on 31 October 2017, the purpose of which was said to be:

- To determine whether there has been a breach of confidential information in relation to information governance standards and responsibilities with regard to data protection, confidentiality and information security in the transmission of confidential patient details to non NHS email accounts.

- To establish whether there has been misuse of the Trust's IT systems, including emails and e-communications.

- To consider the misuse of Trust premises and facilities, including the use of NHS equipment for personal use and the use of NHS facilities without permission to store excessive cash and goods.

- To understand whether there has been a failure to properly disclose private patient activity and determine whether or not that activity was undertaken during NHS time and using NHS resources.

- To determine whether NHS premises and/or facilities and equipment has been used for personal use without permission.

29. The letter goes on to state:

"The allegations are very serious. Such action or conduct can constitute a breach of the following disciplinary rules on the grounds of:-

2.1A Theft – Any theft or attempted theft on or from NHS premises, patients or patients' homes. This may include the use of NHS property or facilities for private purposes. Borrowing NHS property without permission may constitute theft.

2.1B Fraud – Any deliberate attempt to defraud the Trust.

2.1D Serious unacceptable behaviour.

2.1J Severe breach of confidential information. Especially any breach of information relating to patients.

2.1N Gross or serious misuse of the Trust's IT systems as outlined in the email and electronic communications policy.

2.1O A serious breach of trust and confidence.

2.1P A serious breach of the rules, regulations, policies and procedures of the Trust.

2.1R Bringing the Trust into serious disrepute

and therefore could result in your being dismissed."

30. The claimant throughout this period was certified as unfit for work by both her GP and the respondent's Occupational Health department. Occupational Health had confirmed on 12 September that the claimant would be fit to return to work once there had been a satisfactory resolution of the outstanding employment issues, which included her grievance and the disciplinary process.

31. Due to the claimant`s ill-health, it was eventually agreed that the investigatory meeting would proceed by way of written questions and answers to and from both sides. The respondent's HR department then instructed its solicitors to appoint someone to act as the investigating officer in the disciplinary proceedings, with a different solicitor acting as investigating officer in respect of the claimant's grievances.

32. The final report into the claimant's grievances contains conclusions which appear at pages 855 and 856 in the bundle. The claimant's complaint about delay in the disciplinary process was upheld. The police investigation concluded on 25 May 2017. There was little further activity until October 2017 and none from 16 December 2017 until 13 July 2018. The investigating officer stated that, with the benefit of hindsight, it would have been better practice for the Trust to have accessed her office when the claimant was present. However, the investigating officer concluded that Mr Bradshaw and the police would still have been called and accordingly, the Trust could not be criticised for not having the claimant present. The investigating officer concluded that Ms Youssef's actions leading to the claimant's suspension were not by reason of vendetta or discrimination.

33. The investigating officer's report into the disciplinary allegations appears at pages 114-159 in the bundle. The report considers the 5 allegations referred to in the letter of 19 October 2017. The investigating officer concluded that there was a case to answer in connection with;

i) Allegation 1 (breach of confidential information in relation to information governance standards);

ii) Allegation 2 (misuse of the Trust's IT systems, including emails and communications);

iii) Allegation 3 (misuse of Trust premises and facilities, including the use of NHS equipment for personal use and the use of NHS facilities without permission to store excessive cash and goods);

iv) Allegation 4 Failure to disclose private patient activity;

v) Allegation 5 (NHS premises and/or facilities and equipment being used for personal use without permission).

34. The investigating officer concluded that there was no case to answer in relation to the allegation that the claimant had failed to properly disclose private patient activity or undertook private patient activity during NHS time and using NHS resources.

35. By a letter dated 8 April 2019, the claimant was invited to a disciplinary hearing on Wednesday 1 May. The allegations were those set out in the report of the investigation. The claimant was told that the hearing would be chaired by Ms Angela Dragone, Executive Finance Director, who would be accompanied by Mr Paul Turner, Head of HR Services. The letter states:

> "She will be accompanied by Mr Paul Turner, Head of HR Services, who will take notes and provide support and advice on the disciplinary process and procedure."

35. Ms Dragone gave evidence to the Tribunal. Neither of the investigating officers for the claimant's grievance and the disciplinary process gave evidence to the Tribunal. Dawn Youssef did not give evidence to the Tribunal, nor did Marie Lynn. The two solicitors who carried out the investigations into the claimant's grievance and the disciplinary allegations were described by the respondent as "independent of the Trust". It is accepted that the firm of solicitors engaged by the

respondent is one which frequently advises and assists the respondent in defending Employment Tribunal proceedings. Mr Gibson was one of those investigation officers, represented the respondent throughout these proceedings and appeared as their advocate at this hearing. The Tribunal found that neither solicitor could fairly or reasonably be described as "independent".

36. The Tribunal found Ms Dragone to be a poor witness. Ms Dragone's witness statement comprises only 16 paragraphs over 3½ pages. Ms Dragone accepts that she was aware of the allegations against the claimant from the day when the filing cabinet was opened, as Mr Bradshaw contacted her to report what had been found and to ask her advice. In the "timeline" document which appears at page 1423 and which forms part of the grievance investigating officer's report, it shows at page 1424 that on 5 July 2017 Ms Dragone attended a meeting "To discuss whether or not to proceed with all allegations or to pursue only allegations in relation to information governance – agreed to pursue all". Bearing in mind the size of the respondent's organisation and the resources available to it, the Tribunal found that it was inappropriate for Ms Dragone to have been involved in the disciplinary hearing. It is a basic principle of natural justice that the person conducting the proceedings should not have a direct interest in the outcome of those proceedings and should not give any appearance of bias or partiality. The Tribunal found that a fair-minded and informed observer, having considered the facts, would consider that there was a real possibility that Ms Dragone had already formed an opinion which was adverse to the claimant.

37. The disciplinary hearing took place over 3 days from 8-10 May 2019. The claimant was unable to attend that hearing, but was subsequently sent a copy of the minutes, which showed that the respondent had called witnesses to give evidence, without the claimant having been informed prior to the hearing that these witnesses were to be called. A list of questions was sent to the claimant by a letter dated 13 May, to which the claimant replied on 20 and 21 May. Ms Dragone's evidence to the Tribunal about the disciplinary hearing was as follows:-

> "In advance of the hearing I received the management's statement of case with attachments dated 18 March 2019 and the claimant's statement of case dated 1 May 2019. The hearing went ahead over a 3 day period from 8 May – 10 May 2019. The claimant was asked some questions by the panel on 13 May 2019. I understood she then received handwritten notes of the hearing on 17 May 2019. She then responded and raised questions of her own. The response and questions were on 20 and 21 May 2019. A letter of dismissal was then issued on 24 May 2019 for the reasons set out in it. I went through the response to the panel's questions received from the claimant. I also went through the questions raised by the claimant for the witnesses. I have to say I found her questions irrelevant to the matters we were considering, or they had already been covered to our satisfaction. I saw no point in submitting them to witnesses and elected not to do so. As a Chair of the panel I have the right to control questions of witnesses. A lot of what the claimant was alleging was that there was a vendetta against her by Dawn Youssef. Dawn Youssef had attended before the panel and had already been questioned by us. She had flatly denied any vendetta. Furthermore, the evidence which she had collated backed up what she was saying. In my view Dawn Youssef was a truthful witness."

38. Ms Dragone does not set out or describe in any meaningful terms what was the claimant's position concerning the alleged vendetta. The claimant had worked for many, many years for the respondent without any difficulty, until Ms Youssef became her line manager. Within a matter of months, the claimant had raised a formal complaint about her treatment at the hands of Ms Youssef. Within a matter of hours of that complaint being raised, Ms Youssef had authorised an investigation into the claimant's use of her email account and had increased the extent of that investigation when the first one did not disclose any wrongdoing. No consideration was given to the reason why Ms Youssef had instigated that investigation. No consideration appears to have been given as to why Ms Youssef assured the claimant that the respondent would contact the claimant to arrange for her to attend to empty her locker/filing cabinet, when Ms Youssef had already decided that it would be opened in the claimant's absence. The Tribunal found that Ms Dragone had failed to give any fair or reasonable consideration to the claimant's complaint that Ms Youssef had embarked upon a vendetta against her.

39. Ms Dragone credibility was further undermined by the document which appears at page 1169A and 1169 in the bundle. This is an email dated 26 October 2016 sent from Dawn Youssef to Ivan Bradshaw and Ms Dragone. The document disclosed to the claimant's representative appears at page 1169, upon which Ms Dragone's name is redacted. The letter states as follows:-

> "Angela/Ivan – A few photos I took of the money on Monday. I was unable to take photos of jewellery but presumably the policy will be doing that and getting it valued. I understand from Hanan and others that she has had her house broken into a number of times and also been mugged/car broken into and jewellery stolen? Could this be the jewellery?"

40. When the redacted version was put to Ms Dragone in cross-examination, she denied any knowledge of it. When the Tribunal ordered production of an unredacted copy for the second day of the hearing, Ms Dragone accepted that it must have been sent to her, but denied any recollection of it. Ms Dragone denied any knowledge of who had redacted the document or why it had been redacted. She could not explain why the original document had not been produced as part of the disclosure process in these proceedings. It was put to Ms Dragone that the only plausible explanation for the removal of her name from the disclosed copy was to avoid any suggestion that Ms Dragone was much closer to Ms Youssef than she was now prepared to admit. It was put to Ms Dragone by the Employment Judge that Ms Dragone had already said that the discovery of the money and jewellery in the filing cabinet was an extremely serious matter and yet she now maintained that she was unable to recall having received the email with the photographs. The Tribunal did not accept Ms Dragone's evidence in this regard. It was put to Ms Dragone by Mr Crammond that the letter suggested that the claimant had lied to the police about jewellery having been stolen, when in fact the jewellery had been stored in the claimant's filing cabinet. Ms Dragone accepted that this was a fair interpretation of that document, but that she had never mentioned it during the disciplinary process or in her evidence to the Tribunal.

41. Ms Dragone was questioned at length by Mr Crammond about the allegation that the claimant had committed an act of "theft" when she stored the money and jewellery in the locked filing cabinet in her room. Ms Dragone referred to the respondent's disciplinary policy and in particular the part which appears at page

1019S in the bundle, which is part of the respondent's "Disciplinary Rules". Under section 2.1 "Gross Misconduct", it states as follows:-

> "The list which follows is not exhaustive, but the offences and circumstances mentioned represent gross misconduct and as such normally warrant summary dismissal. The action may be taken irrespective of whether a previous warning has been given.
>
> (a) **Theft:** Any theft, or attempted theft. This includes the use of Trust/NHS property, facilities or resources for personal/private purposes and borrowing Trust/NHS property without permission."

42. Ms Dragone was asked to explain why the claimant storing her own personal possessions, in a locked filing cabinet to which she was authorised to have the key, could possibly amount to "theft." Ms Dragone accepted that the respondent had no specific policy prohibiting the placing or storage of personal items in personal lockers or filing cabinets. Accordingly, the claimant was not in breach of any specific policy. Ms Dragone confirmed that the police had accepted that the cash and jewellery belonged to the claimant, and she went on to confirm that she accepted the claimant's explanation that the cash formed part of her dowry. Ms Dragone was unable to gainsay the claimant's explanation that the cash and jewellery had been stored in the cabinet because the claimant was concerned about a spate of burglaries in the vicinity of her home and that she herself had been subjected to a mugging and to having her car broken into. Ms Dragone accepted that the claimant was not in breach of any of the respondent's policies and therefore had not committed any act of misconduct and therefore had not committed any act of gross misconduct. Nevertheless, Ms Dragone insisted that the claimant's storage of the cash and jewellery in the filing cabinet was "unreasonable" and "just wasn't right". Ms Dragone went on to say that she considered this to be "such a serious situation that this policy (referred to above) is what I had to rely on".

43. Ms Dragone was asked by the Employment Judge as to whether the claimant storing the cash and jewellery in her cabinet could be regarded as "dishonest". Ms Dragone's answer was that the claimant's use of the cabinet for her own private purposes satisfied the definition of "theft" in the policy and was therefore dishonest. Ms Dragone was then asked whether it was ever put to the claimant that her use of the cabinet in those circumstances was in some way dishonest. Ms Dragone accepted that the allegation of dishonesty had never been put to the claimant. Ms Dragone was asked by the Employment Judge as to whether any reasonable person would categorise the claimant's use of the filing cabinet for those purposes as either "dishonest" or "theft". Ms Dragone's reply was, "To me it was not reasonable to store that amount and value of money in her cabinet".

44. Ms Dragone was referred to paragraph 11 of her witness statement, which states as follows:-

> "Separately, huge amounts of money and jewellery and personal papers and patient papers were found in drawers in a Trust room. They should not have been there. In 25 years I have never seen anything like that. Yes, employees would leave handbags in drawers from time to time and the occasional item of personal possession. But this was jewellery valued at many thousands of pounds and cash in excess of £140,000. Banks have been robbed for less. It

> exposed the Trust to extreme risk in my view. If the money had been lost, I was concerned as to who would have been held responsible, as it was clearly held on Trust premises and the claimant was our employee. I could see no valid basis why such a vast amount of cash, jewellery and personal papers had ever been brought to the Trust premises. I was aware the Trust insurance was limited to £3,000. No permission had ever been sought to store these items. I took the view that the Trust premises are there for NHS services. Using them to store vast amounts of cash and jewellery was a serious breach of trust and confidence."

45. Ms Dragone accepted in cross examination that some employees have access to lockers in which they can place their personal possessions whilst they are at work. It was put to Ms Dragone that someone may leave an expensive watch in their locker, or the keys to an expensive car. Ms Dragone was asked whether there was any limit on the value of the watch or the value of the motor car. Ms Dragone was unable to answer that. Ms Dragone was asked for an explanation of her comment, "Banks have been robbed for less". Ms Dragone simply said that the phrase "typified how overwhelmed we were – it was astounding to me – it left us exposed".

46. Ms Dragone was asked about Ms Youssef's reason for requiring a search of the claimant's emails and email account. It was put to Ms Dragone that it was far too much of a coincidence for that search to have been ordered within a matter of hours of the claimant raising a formal complaint about Ms Youssef. Ms Dragone explained that Ms Youssef understood that the claimant had been using her Hotmail account prior to the email containing the complaint about Ms Youssef. Ms Dragone insisted that this was the reason why Ms Youssef began the investigation, to establish whether the Hotmail account had been used for purposes which fell outside the respondent's IT and email policy. Ms Dragone pointed out that more than 90 emails were discovered which contained confidential patient information and which had either been sent to the claimant's personal Hotmail account or to that of her colleague Dr Record, who had retired from the respondent Trust in 2012. However, the respondent had only relied upon 12 of those emails, namely those which had been sent after the date of the claimant's most recent training course about the use of the respondent's IT systems. Ms Dragone was asked whether she accepted the claimant's explanation that emails had been sent to the personal account for the claimant's work purposes. Ms Dragone said she did not believe the claimant about this and that she considered the claimant to be "dishonest" in her explanation. Ms Dragone did however accept under cross examination that the issue of honesty had never been put to the claimant in this regard.

47. It was put to Ms Dragone by Mr Crammond that the claimant had worked for the respondent for many, many years and that her work had commenced before emails were invented or in common use. Ms Dragone accepted that. Ms Dragone was asked whether the claimant had ever received any specific training in the use of emails and, more importantly, in the respondent's IT policies with regard to emails. Ms Dragone insisted that the claimant had attended on-line courses for training in the IT systems and had confirmed that she had attended and understood that training. It was specifically put to Ms Dragone that the claimant's explanation was that she had not fully understood the training or indeed the policy, and that her sending these emails to her personal email account had been no more than inadvertent. Ms Dragone was specifically asked whether she accepted the

claimant's explanation in this regard. Ms Dragone confirmed that she had accepted the claimant's explanation, but nevertheless, Ms Dragone was of the opinion that this was a particularly serious breach of the respondent's policy, which involved the transmission of confidential patient information and which had to be reported to the IOC, which itself could have had serious consequences for the respondent. It was put to Ms Dragone that if she accepted that the claimant's actions had been inadvertent, then how could they amount to misconduct or, particularly, gross misconduct. Ms Dragone insisted that, regardless of the level of training, the claimant was an experienced and long-serving employee, who should and must have been aware that sending emails of this nature to her personal email account or to that of a colleague, was plainly wrong. Ms Dragone stated that she did not believe the claimant when she said that it had not been intentional or deliberate. Ms Dragone considered it to be so serious as to amount to gross misconduct justifying dismissal.

48. Mr Crammond then questioned Ms Dragone about the procedure which had been followed throughout the disciplinary process. It was put to Ms Dragone that the initial investigation into the claimant's email account was motivated by malice on the part of Ms Youssef, because the claimant had asked to be managed by someone other than Ms Youssef, about whom the claimant had been less than complimentary in that letter. Ms Dragone insisted that the investigation was not part of any vendetta on the part of Ms Youssef, but was a proportionate response to the obvious fact that the claimant's message about NHS business had been sent from her personal Hotmail account. Ms Dragone insisted that it was the source of the email and not its content which prompted the investigation.

49. Mr Crammond put to Ms Dragone the claimant's explanation that her actions were inadvertent rather than a deliberate breach of the IT policy. Ms Dragone did not accept the claimant's explanation in that regard. Ms Dragone's position was that the claimant must have been aware of the various policies and must have been aware when she sent the various emails that doing so was a breach of those policies. Mr Crammond put to Ms Dragone that the claimant had been undertaking the same work in the same role from the same premises for some 30 years, which work would have commenced before emails were in common use, that the claimant had not been properly trained in the use of emails and in particular in the application of the respondent's policy. Ms Dragone insisted that, having received that explanation from the claimant, the respondent checked the claimant's training records and only relied upon those emails sent after the claimant's last training session as a breach of the policy. Whilst Ms Dragone was prepared to acknowledge that there may have been a lack of training in the early days, she insisted that the claimant was an experienced and senior employee and would have been aware that her activities amounted to a serious breach of those policies. It was put to Ms Dragone that the alleged breaches of the IT policy were no more than a convenient excuse to be rid of the claimant, when the real reason was either her age or the vendetta on the part of Ms Youssef. Ms Dragone refused to accept that.

50. Ms Dragone was asked about the respondent's refusal or failure to disclose the email traffic between Marie Lynn of HR and Ms Youssef, relating to the instigation of the original investigation. Ms Dragone was unable to provide any meaningful explanation as to why those documents were not disclosed during the disciplinary process. When asked why she had not looked at them as part of the disciplinary hearing, Ms Dragone`s answer was that only the investigation report

was disclosed as part of the management case. Ms Dragone presumed that either Christine Mann or Marie Lynn from HR had decided not to disclose them. Ms Dragone accepted that there was an obligation on the respondent to investigate fairly those matters which may exculpate the employee as well as those matters which may prove the allegations against the employee. It was put to Ms Dragone that Ms Youssef and Marie Lynn were "clearly searching for things to find against the claimant". Ms Dragone accepted that this was probably correct. Ms Dragone accepted that from the outset Ms Youssef was looking to put an "adverse spin" on the claimant's behaviour. Ms Dragone's explanation for this was that the claimant had become a "management challenge" as evidenced by her reluctance to move premises, to properly account for her working time and desire to maintain her autonomy in her working practices. Ms Dragone accepted that Christine Mann, Marie Lynn and Dawn Youssef were actively engaged in putting together a case to be used against the claimant. As an example, Mr Crammond referred to the email of 25 October 2016 from Marie Lynn to Ms Youssef which states, "She must think we haven't found anything as would you honestly bother to seek representation knowing what she's had stashed in her cabinet?!", to which Ms Youssef replied immediately thereafter, "I know – deluded I think". Ms Dragone insisted that she personally had not been part of any such vendetta or conspiracy and maintained that her decision to dismiss the claimant was based upon the factual evidence about the emails and cash and jewellery, all of which had been admitted by the claimant.

51. Mr Crammond then turned to what he described as "clear and specific breaches of the respondent's own disciplinary policy". That policy appears at page 109A in the bundle. Clause 6.10.8 requires the Finance Director (i.e. Ms Dragone) to be informed within 24 hours of an employee being suspended. Ms Dragone confirmed that she had been so informed, but that the email in question was not in the hearing bundle. Ms Dragone insisted that she was not told the reason for the suspension, simply the name of the employee and the fact of the suspension.

52. Ms Dragone was asked how she came to be appointed as the disciplinary officer. Ms Dragone replied stating that she had been "appointed" by D Fawcett of HR and the respondent's Executive Team. Ms Dragone could not recall receiving any particular brief about the disciplinary proceedings and could not remember whether she was asked to do it by email or verbally. Ms Dragone accepted that it was unusual to appoint Trust solicitors to carry out the investigation, and accepted that both solicitors had in effect been acting as employees of the Trust whilst carrying out the investigation. Ms Dragone was asked about the wording of the dismissal letter, which appears at pages 64-71 in the bundle. Ms Dragone's evidence was that she and Paul Turner agreed the content of the letter following the disciplinary hearing. Ms Dragone insisted that the letter reflects her own decision and that Mr Turner played no part whatsoever in the decision itself. That evidence was challenged by Mr Crammond, who pointed out what was subsequently said by Mr Turner at the claimant's appeal hearing on 10 October 2019 (pages 1151 and 1152 in the bundle). Questions to Ms Dragone by Mr Jowett (the appeal chair) were answered by Mr Turner in the following terms:-

> "It is clear to staff which methods of communication are safe/unsafe. Also the way HM tried to defect blame e.g. why staff weren't asked to sign to confirm they understood the IT email. She was a senior member of the Trust who had taken appropriate training. There was no willingness to accept fault of wrongdoing. She acknowledged, not admitted or agreed. She doesn't see

> how important this is. Protecting patient information as patients would expect. HM showed no insight. She was continuing to do what she had been told not to do, 2012. Storing personal items – she was told not to and continued to. It's a key point that when she sent it out, she lost control of it. HM thought she was above the law. Dr Record used to work here. His background is irrelevant. He was a member of the public at that time. It appeared she had no respect for policy/regulation. The Trust has to protect patient data. AD and I were able to identify a person (patient) each from the information received in the hearing. It's not appropriate."

53. When Ms Dragone was asked about separating the grievance from the disciplinary hearing, Mr Turner replied, "We felt they should run concurrently. They were independent of each other".

54. When asked about the alleged vendetta by Dawn Youssef, Mr Turner replied:-

> "We found her open and honest, unswerving, and she said she had no vendetta. As you are here today with the evidence uncovered, we have it proved she was right to look into this in her role of Directorate Manager. No evidence has been produced of any vendetta. We asked Dawn Youssef the question directly. She was unswerving in her response that there was no vendetta."

55. At page 1154 on the point of the claimant's alleged breach of the IT policy, Mr Turner says:-

> "She says she may have unknowingly breached IT policy. There is evidence she did. She had training, there are procedures, not unknowingly done. I refute that."

56. The Tribunal found that Mr Turner played an influential role in the decision - making process at the disciplinary hearing which led to the conclusion that the claimant should be dismissed for gross misconduct. His role was not limited to advising on matters of procedure, but extended to issues of the claimant`s credibility and level of culpability. The Tribunal did not accept Ms Dragone's evidence that this was her decision alone.

57. Ms Dragone did concede that there were other breaches of the respondent's disciplinary policy, namely:-

(1) The claimant had not been told in advance that witnesses were to be called to give evidence at the disciplinary hearing;

(2) The claimant`s questions for those witnesses were not put to them;

(3) The claimant was not provided with an opportunity to sum up her case at the conclusion of the evidence.

58. Ms Dragone was asked why the claimant was reported to HMRC as soon as the police had notified the respondent that their enquiries were completed and that no criminal charges were to be brought against the claimant and that her money and jewellery were to be returned to her. Ms Dragone's evidence was that the money stored by the claimant in her filing cabinet may have been the proceeds of private

patient work, which ought to be declared to HMRC. Ms Dragone insisted that this was her decision and that it was appropriate to do so once the police investigation was concluded. Ms Dragone insisted that reporting the claimant to HMRC at that stage was not her response to the police's unexpected decision to take no action against the claimant.

59. The Tribunal found Ms Dragone's explanation to be unsatisfactory. The Tribunal found it likely that the claimant was reported to HMRC because the police concluded that the claimant had done nothing wrong.

60. Finally, Ms Dragone was challenged by Mr Crammond about paragraph 7 of her witness statement in which she states that she considered the claimant's questions to be put to the respondent's witnesses to be "irrelevant to the matters we were considering, or they had already been covered to our satisfaction. I saw no point in submitting them to witnesses and elected not to do so". It was put to Ms Dragone that this was clear evidence that she had closed her mind to any explanation which may have been proffered by the claimant in respect of the serious allegations made against her. Ms Dragone's response was that:-

> "Our time was spent on the 90 emails, of which 12 contained significant patient details which had been sent after the claimant's last training session. The facts could not be explained. No explanation could have been given. It was a black and white case on breach of policy."

61. Ms Dragone accepted that the claimant's questions were not put to the witnesses, were not answered in writing and that the claimant was not told why they had not been put to the witnesses. When pressed by Mr Crammond, Ms Dragone conceded that herself and Paul Turner "decided before the disciplinary hearing which questions were relevant and which would be answered". Ms Dragone accepted that the respondent had the last word before she retired to deliberate, before making her decision and that the claimant had not been given any such opportunity. It was put to Ms Dragone that she was not interested in what the claimant had to say, to which Ms Dragone replied, "No. We had enough evidence".

62. Mr Crammond then took Ms Dragone through the dismissal letter itself, which appears at pages 64-71 in the bundle. Towards the end of the section headed "Decision", Ms Dragone states as follows:-

> "In concluding matters, I felt there has been an irretrievable breakdown in working relationships and there is no longer the required level of trust and confidence in you. Your employment with the Trust is no longer tenable and I must inform you of my decision to dismiss you without notice or pay with immediate effect."

63. Ms Dragone was unable to explain to the Tribunal with whom the claimant's working relationships had broken down, other than to say that it was with "everyone". It was put to Ms Dragone that this alleged breakdown was simply another description of the claimant becoming a "management challenge", which Ms Dragone had already accepted. It was put to Ms Dragone that Ms Youssef simply did not like the claimant and took exception to the claimant's complaint about her. It was put to Ms Dragone that this must have been a factor in her decision to dismiss the claimant. Ms Dragone would not accept that. She did however accept that the alleged

breakdown in the working relationship was never put to the claimant at any stage during the investigation or disciplinary process.

64. Following her dismissal, the claimant exercised her right to appeal against that decision. The appeal letter appears at page 106 and sets out the grounds for appeal as follows:-

(1) The decision was taken before the claimant's related grievance appeal had been heard and the outcome determined;

(2) There were procedural irregularities in the decision to dismiss, in that the claimant's questions to the witnesses were not asked, nor the answers communicated to her, and neither was she given an opportunity to sum up her case before a decision was made;

(3) In determining the sanction to be applied, insufficient account was taken of the claimant's long and unblemished service;

(4) The sanction of dismissal without notice is too harsh in all the circumstances.

65. The appeal was heard by Mr Jonathan David Jowett, a non-executive director and former solicitor. Mr Jowett's statement runs to just over 4 pages and contained 17 paragraphs. The Tribunal found Mr Jowett to be a poor witness. Mr Jowett was ill-prepared for this hearing and had an incomplete and generally poor recollection of the appeal process and the appeal hearing. Mr Jowett conceded that this was the first appeal hearing in which he had participated. Mr Jowett was challenged by Mr Crammond on a number of material points, to which his replies included:-

(1) When asked whether the claimant's case had been discussed at Board level prior to the appeal hearing, Mr Jowett stated that he could not remember.

(2) When whether he had the full investigation pack which had been given to Ms Dragone, before him at the appeal hearing, Mr Jowett could not remember.

(3) When asked by whom he had been appointed to chair the appeal hearing, Mr Jowett could not remember.

(4) When asked whether he had challenged Ms Dragone about the allegation that she was not impartial, Mr Jowett could not remember whether he asked Ms Dragone that question.

(5) When asked whether he was aware of the content of the claimant's grievance and whether that grievance was in the appeal bundle, Mr Jowett was unable to remember exactly what was in the bundle.

(6) When asked whether he was aware of the level of input into the investigations into the claimant's conduct by Ms Youssef and Marie Lynn, Mr Jowett could not remember all that was being investigated and could not remember whether reference was made to that in the appeal bundle.

(7) When his attention was drawn to the dismissal letter which refers to the alleged irretrievable breakdown in working relationships, Mr Jowett could not recall whether he gave any thought to that.

(8) When it was pointed out to Mr Jowett that the claimant had never been charged with an irretrievable breakdown, he was asked whether he had addressed his mind to that point to which he replied, “We must have done”.

(9) When asked whether he believed the claimant when she said that she was not fully aware of the respondent’s IT policy and had not been properly trained, Mr Jowett maintained that he did not believe the claimant in that regard, even though Ms Dragone had said in evidence that she did believe the claimant.

(10) Mr Jowett accepted that if the claimant did not know of the respondent’s IT policy then she could not “wilfully breach it”, but did not accept that her lack of wilful conduct meant that she could not have committed gross misconduct.

(11) Mr Jowett was asked whether the claimant was correct when she maintained that the respondent had no policy regarding keeping valuable items on work premises, to which he replied, “I cannot say”. When asked by the Tribunal Judge whether he had looked into that point, Mr Jowett said he could not remember. Somewhat reluctantly, Mr Jowett went on to accept that, in the absence of any specific policy, then there could be no misconduct for any breach of such a policy. Mr Jowett was unable to explain why he did not uphold that part of the claimant's appeal.

(12) When asked whether he believed the claimant had committed an offence of “theft” by storing her belongings in the locked filing cabinet, Mr Jowett maintained that he had read the respondent’s policy and was satisfied that the claimant's actions in storing that amount of cash and jewellery in the locker amounted to “dishonesty” and therefore was “theft.” Mr Jowett considered that “dishonesty” meant the claimant “not asking for permission and for storing that amount of cash and jewellery”. When pressed by Mr Crammond, Mr Jowett finally stated, “I do not believe we considered theft as such”.

(13) It was put to Mr Jowett that, if the appeal panel had undertaken their duties properly, then they would have concluded that there was no misconduct in this case and certainly no gross misconduct. Mr Jowett replied, “I believe we did it properly. With hindsight I agree we should have done it differently. At the time we looked at the wood, not the trees”. Nevertheless, Mr Jowett maintained that the claimant's activities constituted misconduct and effectively, gross misconduct.

(14) When asked whether the panel had considered alternatives to dismissal, Mr Jowett replied, “I do not remember specific alternatives being considered. I had not thought about it”.

(15) Mr Jowett would not accept that Mr Turner`s behaviour at the appeal hearing had any influence on his decision.

66. Although Mr Jowett refused to accept the proposition when put to him by Mr Crammond, the Tribunal found that the appeal process was effectively a "rubber-stamping" exercise, which affirmed the decision originally taken by Ms Dragone. The process followed by the appeal panel was not a true review of that original decision. Insufficient regard was paid to the grounds of appeal raised by the claimant and no reasonably adequate investigation was carried out into the grounds of appeal submitted by the claimant. The Tribunal found that there was an unreasonable willingness on the part of the appeal panel to accept what was said by Ms Dragone and by or on behalf of Ms Youssef and the respondent's HR department.

67. As with the original disciplinary hearing, the Tribunal found that there was an unreasonable and inappropriate involvement in the appeal process by the respondent's HR department, particularly Mr Turner. It is clear from the minutes of the meetings that Mr Turner did far more than provide HR advice to Ms Dragone and Mr Jowett. The opinions given by Mr Turner on a number of points were likely to have had a material influence on the outcome of both the disciplinary hearing and the appeal hearing.

68. Both Ms Dragone and Mr Jowett vehemently denied that any part of their decision making process was in any sense whatsoever influenced by the claimant's age. The claimant did not produce any evidence to support her allegation that her treatment at the hands of the respondent was in any sense whatsoever influenced by her age. The claimant states in her claim form at paragraph 4(d) on page 13 of the bundle:-

> "I believe the respondent decided to support this vendetta despite much evidence of Daw Youssef's dishonesty in the evidence she presented to the investigating officer. I believe the reason for this is that I was 65 years old and I had no plans to retire, the respondent saw this as a way of getting rid of me instead of waiting for me to retire. This is age discrimination."
>
> The only evidence put forward by the claimant about her age, was that some months prior to her suspension, a colleague had noticed that she looked stressed and had asked whether it was time for her to retire.

69. Ms Dragone's evidence to the Tribunal, which was not challenged, was that the Trust has a retirement policy which supports the retention of knowledge, skills and experience for the benefit of the Trust and its patients, and to support the health and wellbeing of all staff as they approach retirement. The claimant's position was simply that because she could not understand why she had been treated so harshly by the respondent, and because she did not accept that she may have committed an act of gross misconduct justifying dismissal, then the only reason why the respondent wanted to be rid of her was because of her age. Furthermore, the main thrust of the claimant's challenge to the evidence of the respondent's witnesses was that the real reason for her dismissal was the vendetta being pursued by Dawn Youssef as a result of the claimant becoming a "management challenge" because she had requested a change from Ms Youssef as her manager.

70. The Tribunal found that there were no facts proved by the claimant from which the Tribunal could infer that the treatment was in any sense whatsoever influenced by her age.

THE LAW

Unlawful Age Discrimination

71. The statutory provisions engaged by the claimant's complaint of unlawful age discrimination are contained in the Equality Act 2010.

72. Section 4 of the Equality Act 2010 states:

> "**4. The protected characteristics**
>
> The following protected characteristics are protected characteristics –
>
> age;
>
> disability;
>
> gender reassignment;
>
> marriage and civil partnership;
>
> pregnancy and maternity;
>
> race;
>
> religion or belief;
>
> sex;
>
> sexual orientation."

73. Section 5 of the Equality Act 2010 states:

> **"5. Age**
>
> (1) In relation to the protected characteristic of age –
>
> (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;
>
> (b) a reference to persons who share a protected characteristic is a reference to persons of the same age group.
>
> (2) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages."

74. Section 13 of the Equality Act 2010 states:

"**13. Direct discrimination**

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex –

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7)."

75. Section 26 of the Equality Act 2010 states:

"26. Harassment

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating

or offensive environment for B.

(2) A also harasses B if –

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if –

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are –

age;

disability;

gender reassignment;

race;

religion or belief;

sex;

sexual orientation."

76. Section 136 of the Equality Act 2010 states:

"**136. Burden of proof**

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

77. The claimant's complaint is one of direct age discrimination contrary to section 13 of the Equality Act 2010. She says in her claim form:-

> "I believe that the reason for my dismissal was not misconduct, but a vendetta against me by my manager, saw Youssef, who, without justification, initiated two sets of IT investigations against me on the same day as she heard about a complaint I had raised against her. I believe the respondent decided to support this vendetta despite much evidence of Dawn Youssef's dishonesty in the evidence she presented to the investigating officer. I believe the reason for this is that I was 65 years old and as I had no plans to retire the respondent saw this as a way of getting rid of me instead of waiting for me to retire."

78. Section 13 of the Equality Act 2010 prohibits less favourable treatment "because of a protected characteristic" (in the claimant's case, age).

79. Cases of direct discrimination tend to fall into two categories. In the first category, the treatment in issue is discriminatory on its face. For example, where an employer has an express policy of not appointing women to certain roles. In a case where the less favourable treatment is clear and objectively discriminatory, there is no need to investigate the subjective motives of the discriminator. As the Court of Appeal said in **Khan v Royal Mail Group (2014 EWCA Civ 1082)**. "It does not matter why he discriminated on the grounds of race, if in fact he did".

80. In the second category, the treatment with which the court is concerned is not objectively discriminatory and thus it is necessary to know something about the respondent's reasons for their actions, so as to establish whether the less favourable treatment is "because of" the protected characteristic. In **Chief Constable of West Yorkshire Police v Khan (2001 UK HL 48)**, the House of Lords clarified that the real question is, "What, consciously or unconsciously, was the alleged discriminator's reason for the less favourable treatment". Thus, discrimination would be treated as being because of the protected characteristic if the substantial or effective, although not necessarily the sole or intended, reason for the discriminatory treatment, was the protected characteristic.

81. In **Barton v Investec (2003 IRLR 332)** the Employment Appeal Tribunal held that a protected characteristic should not be "any part of the reason for the treatment in question". That interpretation was specifically approved by the Court of Appeal in **Igen v Wong (2005 ICR 931)**.

Unfair Dismissal

82. The statutory provisions engaged by the claimant's complaint of unfair dismissal are contained in the Employment Rights Act 1996.

83. Section 94 states:

> "**94. The Right**

(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239)."

84. Section 98 states:

"**98. General**

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

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

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

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

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a) –

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

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

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the

employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

85. It is trite law that the respondent must discharge the burden of satisfying the employment Tribunal as to what was its reason, or if more than one its principal reason, for dismissing the employee. That reason must be one of the potentially fair reasons in section 98(2). Where the reason relied upon relates to the employee's conduct, what the Tribunal has to decide is whether the employer entertained a reasonable suspicion amounting to the belief in the guilt of the employee of that misconduct at that time. That involves three elements:-

(1) There must be established by the employer the fact of that belief – that the employer did believe it;

(2) That the employer had in its mind reasonable grounds upon which to sustain that belief;

(3) At the stage at which the employer formed that belief on those grounds, or at any rate at the final stage at which he formed that belief on those grounds, the employer had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

(British Home Stores v Burchell – 1980 ICR 303)

86. However, employers suspecting an employee of misconduct justifying dismissal cannot justify their dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds, and they must act reasonably in all the circumstances, having regard to equity and the substantial merits of the case. They do not have regard to equity in particular if they do not give the employee a fair opportunity of explaining before dismissing him. They do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had gathered further evidence or carried out as much investigation into the matter as was reasonable in all the circumstances of the case **(Weddel v Tepper – 1980 ICR 286)**.

87. Once the reason has been established, the Tribunal must go on to consider whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted **(Iceland Frozen Foods v Jones – 1983 ICR 17)**.

88. The position was summarised by the Court of Appeal in **Orr v Milton Keynes Council (2011 EWCA Civ 62)**. In misconduct cases, a Tribunal must consider three aspects of the employer's conduct:-

(1) Did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case?

(2) Did the employer believe that the employee was guilty of that misconduct?

(3) Did the employer have reasonable grounds for that belief?

89. If the answer to each of those question is "yes", then the Tribunal must then decide on the reasonableness of the response of the employer. In doing that exercise, the Tribunal must consider by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within the band or range of reasonable responses to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss would be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The Employment Tribunal must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt, for that of the employer. The Tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. The Tribunal may not substitute its own evaluation of a witness for that of the employer at the time of its investigation and dismissal, save in exceptional circumstances. The Tribunal must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or in the appeal process) and not on whether in fact the employee has suffered an injustice.

90. Difficulties may arise in cases where a witness lies to the investigating officer, or the investigating officer misleads the disciplinary officer, or where the real reason for the dismissal is something other than that given to the employee by the dismissing officer. In **Morgan v Electrolux Limited (1991 ICR 369)** the Court of Appeal endorsed the view that if a witness lied to an employer on a subject relevant to the dismissal, but that it was reasonable at the time for the employer to accept what the witness actually said (because he was not a bare-faced liar and must have given that impression to the employer at the relevant time), then the Employment Tribunal cannot for the purposes of deciding whether the dismissal of the employee was fair or not, substitute its own finding on the truth or not of the evidence of the witness. This is so even if the witness confessed to the Employment Tribunal that he had lied to the employer at the relevant time.

91. In **Royal Mail Group Limited v Jhuti (2019 UKSC 55)** the Supreme Court asked the following question:-

> "In a claim for unfair dismissal, can the reason for the dismissal be other than that given to the employee by the decision maker?"

92. The Supreme Court answered that question by stating:-

> "Yes. If a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason, but hides it behind an invented reason which the decision maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason."

93. In **Associated Society of Locomotive Engineers and Firemen v Brady (2006 IRLR 576)** a trade union activist was dismissed after a fracas at a workplace barbecue. The union employer argued that the dismissal was for misconduct. However, the Employment Appeal Tribunal held that the Tribunal was entitled to find on the facts that the real reason for the dismissal was the employer's political

antipathy towards the employee, irrespective of the fact that his misconduct might well have justified dismissal. In so doing, the Employment Appeal Tribunal addressed the question of whether, if an employer seizes on a genuine potentially fair reason for dismissal as an opportunity to dismiss an employee for hidden reasons, the potentially fair reason can be said to have been established for the purposes of section 98. The Employment Appeal Tribunal accepted that the fact that an employer acts opportunistically in dismissing does not preclude the potentially fair reason from being the true reason for the dismissal – an employer may have a potentially fair reason for dismissing, such as misconduct, and at the same time welcome the opportunity to dismiss for that reason, because it is keen to get rid of the employee. Just because there is misconduct which could justify dismissal does not mean that the Tribunal is bound to find that this is indeed the operative reason. For example, if the employer makes the misconduct an excuse to dismiss the employee in circumstances where it would not have treated others in a similar way, the reason for the dismissal will not be the misconduct at all. Such a difference in treatment would mean that, even if dismissal for misconduct would in fact be reasonable, a Tribunal would be fully entitled to conclude that the misconduct was not the true reason for the dismissal.

Submissions

94. Mr Crammond's submissions on behalf of the claimant may be summarised as follows:

(1) The respondent has failed to discharge the burden of showing that its real reason for dismissing the claimant was one of the potentially fair reasons in section 98(2) of the Employment Rights Act 1996.

(2) The storage by the claimant of her own cash and jewellery in a locked filing cabinet in her own room was not a breach of any of the respondent's policies, and could not therefore be reasonably described as misconduct and could certainly not be categorised as gross misconduct.

(3) Ms Dragone having accepted that the claimant may not have been not fully aware of the respondent's IT policies, or properly trained in those policies and thus may not have fully understand them, then her misuse of the IT system could not have been either deliberate or intentional and therefore could not reasonably be categorised as gross misconduct.

(4) That the real reason for the claimant's dismissal was either because of her age, or alternatively because of a vendetta against her by Dawn Youssef because the claimant had become "a management challenge" as evidenced by her refusal/reluctance to move rooms, and her written request that she be line managed by someone other than Ms Youssef.

(5) The entire procedure followed by the respondent which culminated in the claimant's dismissal was tainted by bias and pre-judgment.

(6) There had been inappropriate interference by Dawn Youssef and the respondent's HR department, which adversely influenced the procedure and the outcome.

(7) The investigation into the allegations against the claimant had not been reasonable in the circumstances. Emails between Dawn Youssef and the respondent's HR department were not disclosed. The claimant's questions to the respondent's witnesses were not put to those witnesses. The claimant was not told the names of those witnesses and was not given the chance to sum up her case. All of those were contrary to the respondent's specific policies.

(8) The claimant's grievances were relevant to the disciplinary process but were not properly dealt with and the content of those grievances was not considered during the disciplinary process.

(9) Ms Dragone was not impartial at the time she conducted the disciplinary hearing, in that she had been consulted about the allegations against the claimant since she was first made aware of them on the day the cash and jewellery were found and had played a part in the framing of the allegations.

(10) The appeal process was no more than a "rubber-stamping" exercise, which did not properly consider the claimant's grounds of appeal.

(11) The Tribunal was entitled to draw an adverse inference from the respondent's failure to call Dawn Youssef to give evidence to the Tribunal. In the absence of an explanation from Dawn Youssef about the above matters, then the Tribunal was entitled to infer that the claimant's version of events was more likely to be correct, as shown by the documents to which the Tribunal was referred during the hearing. Of particular significance is the respondent's failure to disclose to the claimant the emails between Dawn Youssef and the HR department and the respondent's inability to explain the redacted email from Dawn Youssef to Angela Dragone dated 26 October 2016.

(12) By applying the principles established in **ASLEF v Brady** and **Post Office v Jhuti**, the Tribunal should find that the respondent had embarked upon a process designed to rid themselves of the claimant by whatever means.

(13) There should be no deduction from any compensation awarded under the "Polkey" principles, if the Tribunal accepted that the reason proffered by the respondent was not the real reason for dismissal and that the respondent was determined to dismiss the claimant by whatever means.

(14) If the real reason for dismissal was not the misconduct alleged by the respondent, then there should be no deduction from any compensation for any contributory conduct on the part of the claimant.

95. Mr Gibson's submissions on behalf of the respondent may be summarised as follows:

(1) The claimant has failed to prove any facts from which the Tribunal could infer that her dismissal was in any way influenced by her age. A single, innocuous comment by a consultant wholly unconnected with the subsequent investigation and disciplinary process could not found the

basis of a claim for unlawful age discrimination. The respondent's evidence about its policies regarding age and retirement were not challenged by the claimant. The mere fact that the claimant did not like the way she was treated and considers herself to be older than most of her colleagues, does not mean that she was treated less favourably because of her age. The respondent has shown that other employees had been dismissed in the recent past for offences similar to those committed by the claimant. The age discrimination claim is doomed to failure.

(2) No adverse inference should be drawn against the respondent because it had not called Dawn Youssef to give evidence. Dawn Youssef was not the decision maker at either the disciplinary hearing or the appeal hearing. It had always been open to the claimant to request the Tribunal to issue a witness order to secure the attendance of Ms Youssef.

(3) This was not a case to be approached in accordance with the principles of **ASLEF v Brady** or **Post Office v Jhuti.** There was no evidence that the dismissing officer or appeal officer had been duped or misled as a result of inaccurate information provided by other persons in a position of influence.

(4) The investigation into the claimant's email account was triggered by her own emails to her manager which were to do with internal NHS business, but which were not sent on the secure NHS email account. The fact of the use of that email account was what triggered the investigation, not any vendetta by Dawn Youssef against the claimant.

(5) Having undertaken a reasonable search, the respondent discovered numerous serious breaches of its IT system and policies which involved the disclosure of confidential patient information to the claimant's non-secure personal account and to that of someone wholly unconnected with the respondent.

(6) Having discovered those emails, it was reasonable for the respondent to undertake a search of the claimant's room to ascertain whether any other confidential information was being improperly stored and/or used.

(7) The amount and jewellery found in the filing cabinet in the claimant's room was highly unusual and justified being reported to the police for further investigation.

(8) Further confidential patient information was found in the claimant's room which was neither stored or filed in accordance with the respondent's policies or with the Caldecott principles.

(9) The emails, patient information in the room and contents of the locked filing cabinet justified the immediate suspension of the claimant on full pay pending further investigation.

(10) The emails between Ms Youssef and HR could fairly be categorised as "distasteful, arrogant and inappropriate". However, they should not be

regarded by the Tribunal as evidence of a “Gotcha” mentality and should not be regarded as prejudgment of any allegations against the claimant.

(11) The respondent was entitled to separate the claimant's grievance about the opening of her filing cabinet from the respondent’s allegations of misconduct.

(12) Whilst the respondent conceded that there were technical deficiencies in its failure to follow its own disciplinary policy (witnesses not identified; the claimant's questions not put to those witnesses; the claimant being denied the opportunity to sum up), the Tribunal should examine the entire disciplinary process as a whole and consider whether in all the circumstances it was fair and reasonable.

(13) Mr Gibson submitted that the claimant was aware throughout of the precise nature of the allegations against her, she was provided with a full statement of case and able to make a response, she was provided with adequate notice of the hearing and provided with notes of the hearing. Whilst the process may not have bene perfect, Mr Gibson submitted that it was fair and reasonable in all the circumstances.

(14) Whilst there may have been inappropriate comments by members of the HR team, there was no evidence to support an allegation that the conduct of the process and particularly the outcome of the process was inappropriately influenced by members of the HR team. Ms Dragone remained independent throughout the process, as was Mr Jowett, who heard the appeal.

(15) The respondent genuinely believed on reasonable grounds, after a reasonable investigation, that the claimant had committed the acts of misconduct for which she was dismissed.

(16) The investigation produced a detailed report which was disclosed to the claimant prior to the disciplinary hearing. The question of a vendetta was put to Ms Youssef as part of that investigation, and the investigating officer accepted Ms Youssef’s denial of any vendetta. Ms Dragone also accepted that denial.

(17) The storage of the cash and jewellery in the filing cabinet in the claimant's room was highly unusual to the extent of being “shocking” and was something which justified both investigation and disciplinary action.

(18) It was not unreasonable of the respondent to categorise the claimant’s use of the filing cabinet as “theft” as set out in the respondent’s policy.

(19) Following a fair procedure, the respondent’s decision to dismiss the claimant for misconduct was one which fell within the range of reasonable responses open to a reasonable employer in all the circumstances of the case.

(20) If there was any defect in the procedure followed by the respondent, then the Tribunal must consider the likelihood that the claimant would have been dismissed in any event, had a fair procedure been followed.

(21) Furthermore, the claimant's conduct (particularly with regard to the use of the personal email account) was conduct which contributed towards her dismissal to such an extent that there should be a total, if not substantial, reduction in any compensation which may be awarded to her.

Discussion and Conclusions

Age Discrimination

96. The Tribunal found that the claimant has failed to prove any facts from which the Tribunal could infer that any treatment administered to the claimant, including her dismissal, amounted to less favourable treatment because of her age. The single comment referred to the claimant in her evidence was found by the Tribunal to be no more than an innocuous comment in circumstances wholly unconnected to any of the matters which form the subject matter of these claims. There was no evidence that the person making the comment had any influence whatsoever over the claimant's employment. There was no evidence that the person involved played any part in the decision to suspend, investigate and dismiss the claimant or indeed any part in the grievance process followed by the claimant.

97. The claimant's unlawful age discrimination was simply that she did not accept that she had committed any act or acts of misconduct justifying suspension, investigation or dismissal, and therefore the only reason why she had been treated that way was because of her age. The Tribunal found that not to be the case and the allegation of unlawful age discrimination is dismissed.

Unfair Dismissal

98. The investigation into the claimant's conduct was instigated by Dawn Youssef, following her receipt of the claimant's email dated 23 September 2016 and the claimant's email to Dr Dipper dated 26 September 2016. Both emails related to NHS business, but both were sent from the claimant's personal Hotmail account rather than the internal NHS email account. In the absence of any direct evidence from Ms Youssef on the point, the Tribunal found it likely that Ms Youssef had taken exception to the content of those emails, which showed that the claimant had indeed become a "management challenge". In her evidence to the investigating officer, Ms Youssef specifically denied any vendetta against the claimant and maintained throughout that her request for an investigation into the claimant's email account was simply due to the fact that the claimant was using a personal, unsecure account for internal NHS business. Initial enquiries of the claimant's personal secretary confirmed that the claimant frequently used her personal Hotmail account for NHS matters, including the sending of emails which contained confidential patient information.

99. On the evidence before it, the Tribunal was satisfied that it was reasonable for the respondent through Ms Youssef to conduct an investigation into the claimant's use of her personal email account for NHS purposes. Based upon what had been said by the claimant's personal secretary, the Tribunal also found it reasonable for the respondent to have extended its search and investigation, once the initial search did not reveal any material of concern. What was revealed by the extended investigation revealed a course of conduct over a period of time by the claimant

which indicated that there may be a serious breach of the respondent's IT policies and the claimant's obligation to observe the Caldecott Guidelines.

100. The Tribunal then considered whether it was reasonable for the respondent to suspend the claimant to enable further investigations to be carried out into the matters which had been revealed by the investigation into the claimant's email account. Bearing in mind the potentially serious nature of those allegations and what had already been discovered, the Tribunal found that it was reasonable in all the circumstances for the respondent to suspend the claimant whilst further investigations were carried out.

101. The Tribunal then considered whether it was reasonable for the respondent to undertake a search of the claimant's room and in particular, the locked filing cabinet within that room. The Tribunal accepted that the respondent had a suspicion, based upon what had been said by the claimant's secretary, that the manner in which confidential patient information was being emailed and/or stored by the claimant may amount to a further breach of her obligations about the use and storage of confidential patient information. The Tribunal found that it was reasonable for the respondent to undertake a search of the claimant's room, in all the circumstances of which they were aware at that time.

102. The Tribunal then had to consider whether it was reasonable for the respondent to force entry into the locked filing cabinet to which only the claimant had the key. There is no doubt that the filing cabinet was the respondent's property. Ms Youssef's evidence to the investigating officer was that she became suspicious about the contents of the cabinet when the claimant insisted that she be allowed to visit her room and collect personal belongings including her passport, before she left the respondent's premises. That suspicion was increased when the claimant made clear that she also had items of jewellery stored in the filing cabinet.

103. The Tribunal found that it was reasonable in all the circumstances for the respondent to open the locked filing cabinet, so as to undertake a search of its contents. Whilst it may have been poor HR practice not to have the claimant present whilst the search was undertaken and the cabinet opened, Ms Youssef did ensure that other persons of sufficient seniority were present to witness the opening of the cabinet and the exposure of its contents. The Tribunal was satisfied that the decision to search the room and open the cabinet in the claimant's absence was not something which tainted the investigation process itself. At no stage has the claimant denied or challenged what was found in the cabinet, the amount of cash or the value of the jewellery.

104. The Tribunal found that it was not unreasonable for Ms Youssef and those present to be astounded by the amount of cash and value of the jewellery stored in the cabinet. It was not unreasonable for Ms Youssef and Mr Bradshaw to be genuinely suspicious about how and why the cash and jewellery were being kept in a locked filing cabinet in the claimant's room. It was not unreasonable for the matter to be immediately reported to the police for them to investigate the possibility of criminal activity.

105. The Tribunal found that Ms Dragone had been made aware of the contents of the filing cabinet almost immediately thereafter. In Dawn Youssef's interview with the investigating officer she confirms:-

> "The police arrived relatively quickly and security left at approximately 4.30pm. I then stayed with the two police officers. Security arranged for us to have some crates. I was in regular contact with Andy Welch and Angela Dragone."

106. The Tribunal found that Ms Dragone had received the email dated 26 October 2016, to which was attached photographs of what had been found. The Tribunal did not accept Ms Dragone's evidence when she said she could not recall receiving that email. No satisfactory explanation was ever given to the Tribunal about why that email had been redacted to remove Ms Dragone's name from it. The Tribunal found that this had been done in an attempt to conceal from the claimant the extent of Ms Dragone's involvement.

107. The emails between Ms Youssef and the respondent's HR department in the immediate aftermath to the search of the claimant's room show that both Ms Youssef and the HR department had already formed the view that the claimant would be unable to provide any kind of meaningful explanation for what had been found. The Tribunal found that this prejudgment of the claimant's conduct permeated the investigation and disciplinary process through to the dismissal and dismissal of the appeal.

108. The Tribunal found the respondent's categorisation of the claimant's use of her room and filing cabinet as "theft" to be wholly unreasonable. The Tribunal found that no reasonable person armed with all the information in this case could come to the conclusion that the claimant had been dishonest in storing her own properly in the filing cabinet, regardless of its value. For the respondent's witnesses to suggest that the claimant's failure to ask for permission amounted to "dishonesty" because she wished to conceal the presence of the cash and jewellery, was disingenuous.

109. The respondent accepted the outcome of the police enquiry, namely that the cash and jewellery were indeed the claimant's property. The respondent accepted the outcome of the investigation by NHS Protect, to the effect that the claimant was not in breach of any policy regarding income or earnings from private patients. The respondent eventually accepted the outcome of HMRC investigation which was that the claimant was not in breach of any tax regulations.

110. The Tribunal found that it was unreasonable for the respondent to categorise the claimant's use of her locker as either "theft" or "dishonesty." No reasonable employer would have done so. The decision to proceed with those allegations was found by the Tribunal to have been as a result of a desire by Ms Youssef and HR and with the support of Ms Dragone, to frame charges against the claimant in such a way as to ensure that she would be removed from her post. The Tribunal found this point to be reinforced by the respondent's subsequent failure/refusal to disclose these emails until ordered to do so by the Tribunal, including that which was redacted.

111. Whilst expressing their astonishment at the material found in the claimant's locked filing cabinet, Ms Dragone and Mr Jowett accepted that the claimant would not have been dismissed for misconduct, had that been the only allegation brought against her. Ms Dragone indicated that she would probably have issued a formal written warning or final written warning, had that been the only offence.

112. As is set out above, the Tribunal found that it was reasonable for the respondent to carry out an investigation into the claimant's use of the respondent's IT and email system. The Tribunal found that it was reasonable for the respondent to suspend the claimant whilst that investigation was carried out. The Tribunal found that the investigation itself was reasonable in all the circumstances. The claimant was made fully aware of the number of emails which formed the subject matter of the allegations and also the content of those emails. The claimant was given a full, fair and reasonable opportunity to explain her use of her personal Hotmail account and why confidential information had been sent to Dr Record's personal account. The Tribunal found that it was reasonable for the investigating officer to conclude that there was a case to answer and that the allegations relating to the use of the IT system and email accounts should be referred for the formal disciplinary hearing.

113. The Tribunal found that the manner in which the respondent conducted the disciplinary hearing was unreasonable and unfair in all the circumstances. The respondent failed to follow its own procedure by not informing the claimant as to which witnesses would give evidence on behalf of the Trust, did not put the claimant's questions to those witnesses and did not provide the claimant with an opportunity to summarise her case before the decision was taken.

114. The Tribunal found that Ms Dragone was an inappropriate choice to conduct the disciplinary hearing. The Tribunal found that Ms Dragone had been involved in the claimant's case from the day when a filing cabinet had been opened and its contents revealed. Ms Dragone had made a material role in the decision as to which charges should be brought against the claimant. Bearing in mind the size and administrative resources of the respondent's undertaking, the Tribunal found that there must have been numerous other people who could have conducted the disciplinary hearing. The Tribunal found that Ms Dragone was predisposed and prejudiced against the claimant's case, for reasons unconnected with the merits of the allegations against her. A fair-minded and informed observer would conclude that there was a real possibility that Ms Dragone was biased against the claimant. That suspicion of bias was reinforced in the finding of the Tribunal, that Ms Dragone unreasonably refused to put the claimant's questions to those other respondent's witnesses who gave evidence at the disciplinary hearing. Mr Turner`s involvement in the disciplinary hearing amounted to an unreasonable influence upon the decision - making process.

115. The Tribunal found that Mr Jowett's conduct of the claimant's appeal was also conducted in a peremptory and unreasonable manner. Mr Jowett was unable to give any meaning evidence to the Tribunal about exactly what he was supposed to be doing as the appeal officer or the basis upon which he was considering the claimant's appeal. Whilst there was no obvious possibility that Mr Jowett was biased, the Tribunal found that his conduct of the appeal hearing displayed an element of prejudgment which made the entire hearing unfair. The Tribunal found that Mr Jowett had adopted the view from the outset that the claimant could not possibly have any meaningful or reasonable explanation for storing that amount of cash and jewellery in her locker or for her inappropriate use of the respondent's IT systems and email account. Mr Turner`s involvement in the appeal hearing again amounted to an unreasonable influence on the decision-making process.

116. In her evidence to the Tribunal, Ms Dragone stated that she accepted that the claimant may not have properly understood the respondent's policies about use of

the internal email system and that this may have been as a result of a lack of training. Ms Dragone's position throughout, however, was that the claimant as an intelligent, educated and experienced employee of some considerable seniority, should, and indeed must, have been aware that she was prohibited from sending confidential patient information by any other means than the respondent's secure internal system. Ms Dragone insisted that the claimant should and must have been fully aware of the Caldecott Guidelines, which specifically state that confidential patient information must be handled in a secure manner. Mr Jowett's evidence to the Tribunal was that he took exactly the same view about the claimant's state of knowledge. Neither Ms Dragone nor Mr Jowett accepted that the claimant had "made a mistake" by "pushing a button" to send this confidential information to herself or Dr Record.

117. The Tribunal found that the claimant's use of her personal email account to send confidential patient information to herself or Dr Record was a breach of both the respondent's IT and email policies and the Caldecott Guidelines. The Tribunal found it likely that the claimant had received adequate training about those matters. The Tribunal found it likely that the claimant was sufficiently aware of her duties and responsibilities surrounding the transmission of confidential patient information. The Tribunal found that it would have been reasonable for a dismissing officer and/or appeal officer to reject the claimant's explanation that she had sent this information by mistake or by simply pushing a button. The Tribunal found that explanation by the claimant to be unlikely. The Tribunal found that the investigation into the claimant`s conduct was triggered by the use of her personal Hotmail account. Whilst Ms Youssef may have taken exception to the claimant being a "management challenge", it was reasonable for Ms Youssef to authorise that investigation. The tribunal was satisfied that the respondent`s principal reason for dismissing the claimant was her abuse of their IT policy and her breach of the Caldecott Guidelines and neither a vendetta due to her being a management challenge, or age discrimination

118. The Tribunal found the allegations against the claimant in respect of the contents of the filing cabinet to be unsubstantiated. It was never put to the claimant that her conduct was in any way dishonest or amounted to any kind of theft. The claimant was not in breach of any particular policy then in place. Whilst the respondent may have genuinely believed that the claimant's behaviour was unreasonable, the Tribunal found that no reasonable employer would have categorised that as misconduct, and certainly not as gross misconduct. The respondent's decision to dismiss the claimant for her use of the locked filing cabinet, was one which fell outside the range of reasonable responses open to a reasonable employer in all the circumstances.

119. The allegations relating to the breach of the IT policy were reasonably investigated. The claimant admitted sending those emails by insecure means. It was reasonable for the investigating officer to require a disciplinary hearing to take place. However, the Tribunal found that the process which led to the claimant's dismissal for both the contents of the cabinet and the use of the email account, was unreasonable and unfair. Ms Dragone should never have been appointed as the dismissing officer. The conduct of the disciplinary process and disciplinary hearing was a breach of the respondent's own written disciplinary policy. The appeal hearing was unreasonable and unfair. As a result, the claimant's complaint of unfair dismissal is well-founded and succeeds.

120. The Tribunal was asked to consider whether the claimant could have been fairly dismissed in any event, had a fair procedure been followed. The Tribunal found that there was no procedure which could have been followed which could have led to the fair dismissal of the claimant for allegations of misconduct relating to the contents of the filing cabinet. However, the Tribunal was satisfied that, had a fair procedure been followed, there was a reasonable prospect that the claimant would have been dismissed in any event for her misconduct relating to her use of the IT and email system. The respondent would have to establish that it held a genuine belief, on reasonable grounds after a reasonable investigation, that the alleged acts of misconduct had been committed by the claimant. The Tribunal found that the respondent's investigation into the claimant's use of the email account was reasonable in all the circumstances. It was reasonable to conduct the investigation, reasonable to suspend the claimant pending the investigation and reasonable for the investigating officer to conclude that the claimant had a case to answer at a disciplinary hearing. What made the entire process unfair was Ms Dragone's appointment as the disciplinary officer, bearing in mind her previous involvement in the investigation and framing of the charges against the claimant.

121. The Tribunal also found that Ms Dragone and Mr Jowett allowed themselves to be improperly influenced by the views expressed by the respondent's HR department. Ms Dragone's own conduct of the disciplinary hearing itself was unreasonable. The appeal hearing was no more than a rubber-stamping exercise of the original decision. The process was unreasonable and the dismissal was therefore unfair. However, the tribunal found that, had an appropriate person been appointed to deal with the disciplinary hearing, and had they proceeded to conduct the hearing in a fair and reasonable manner, then there was a realistic prospect of the claimant being dismissed for her inappropriate use of the respondent's IT and email system. Had there been a full and reasonable appeal hearing, the appeal may have been reasonably dismissed. This goes to the issue of "just and equitable" compensation under **S. 123 of the Employment Rights Act 1996.** In accordance with the decision of the House of Lords in **Polkey v AE Dayton Services.** Taking into account the claimant's admissions about sending the emails and her explanation surrounding the circumstances in which they were sent, the Tribunal found that, following a fair hearing, there was a reasonable prospect that the claimant would have been fairly dismissed for that misconduct. Those were serious breaches of the IT policy relating to confidential patient information, for which other employees had been disciplined and dismissed. The claimant`s explanations may have been accepted by the disciplinary officer, as they were by Ms Dragone, although not by Mr Jowett. In accordance with the decision of the EAT in **Software 2000 Ltd v Andrews,** the tribunal was satisfied that it could make an assessment of the likelihood of a fair procedure resulting in a fair dismissal. The tribunal found that there was a 50% chance of dismissal had a fair procedure been followed.

122. The Tribunal was asked to consider the extent to which, if any, the claimant had contributed towards her dismissal by her own conduct, in accordance with S. 123(6) of the ERA 1996. Again, the Tribunal took into account the claimant's admissions about the number of emails and the content of the emails and her explanation about how and why they came to be sent. The Tribunal was not persuaded by the claimant's explanation that she had pushed a button by mistake, or that she was improperly trained in the use of the IT systems and lacked knowledge about the respondent`s IT policies and Caldecott Guidelines. The Tribunal found that the claimant in her capacity as a long-serving employee at the level at which the

claimant worked, could and should have been aware that what she was doing was plainly wrong. The claimant`s conduct was of sufficient gravity that the tribunal was satisfied that a further reduction should be made. The Tribunal found that the claimant had contributed to her own dismissal because of her conduct to the extent that any compensation awarded to her should be reduced by 50% to reflect that contribution.

Authorised by Employment Judge G Johnson

Date 6 August 2021