EMPLOYMENT TRIBUNALS

Claimant: **Mr I Ibbotson**

Respondents: **(1) G4S Forensic & Medical Services (UK) Limited**

(2) G4S Health Services (UK) Ltd

Heard at: Manchester **On:** 20-22 December 2021

Before: Employment Judge Ord

Representation:

Claimant: Ms E Youshani (Counsel)
Respondent: Mr A Leonhardt (Counsel)

JUDGMENT

1. Upon withdrawal of the claim against the first respondent, the claim against the first respondent is dismissed.

2. The claimant's complaint of unfair dismissal against the second respondent is well founded.

3. The claimant's complaint of wrongful dismissal against the second respondent is well founded.

Reasons

Claim

1. The claimant brought complaints of unfair dismissal and wrongful dismissal.

Issues

2. The issues are:

   (A) *Unfair Dismissal*

   - What was the reason for the claimant's dismissal?

   - If the reason was conduct, did the respondent act reasonably in all the circumstances in treating that conduct as a sufficient reason to dismiss the claimant? In particular:
     - Did the respondent genuinely believe that the claimant had committed the misconduct?
     - If so, was this based on reasonable grounds?
     - At the time the belief was formed, had the respondent carried out a reasonable investigation?
     - Was the procedure within the band of reasonable responses?
     - Did the respondent act reasonably in treating the misconduct as sufficient to dismiss the claimant?
     - Was dismissal within the band of reasonable responses?

   - If the reason was Some Other Substantial Reason capable of justifying dismissal, in this case a breakdown in trust and confidence, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

   (B) *Wrongful Dismissal*

   - Did the claimant fundamentally breach the contract of employment so as to justify the respondent treating the contract as at an end?

Evidence

3. The tribunal had before it a 198 page bundle and witness statements from the claimant, Jennifer Forster, Donna Cardell, Jonathan Allen, Valerie Mawson and Dr Leanne Tee.

4. It heard oral evidence on oath from Jennifer Forster, Donna Cardell, Jonathan Allen, Dr Leanne Tee and the claimant.

Findings of Fact

5. The claimant commenced employment with the respondent in January 2016 as a paramedic/Health Care Professional (HCP) at Carlisle Police Station. He had practiced as an HCP for about 25 years. The respondent is a provider of health and medical services.

6. The respondent carried out audits on a quarterly basis of paperwork completed by HCPs, which provided an opportunity to discuss any failings and any actions in response. The claimant had a clean disciplinary record and had been given the "Employer of the Month" award previously. Nonetheless, there were some notes on his file relating to previous matters raised informally, albeit they had never been investigated and the claimant had not been given an opportunity to properly address them.

7. It was the respondent's practice to check expiry dates of drugs on a weekly basis to ensure out of date drugs were not administered.

8. On 22 January 2020 the claimant arrived at work for his night shift at about 18.30 and went through a handover from his colleague Marie Ware, who was also his supervisor, and who had been on the day shift. He was told there was a detained person (DP) in custody, who had been there for some time. The Detention Officer, Stuart McGregor, had said that the DP "still" had a headache.

9. HCPs do not usually examine DPs unless there is a medical problem and this particular DP had not been examined. The DP was Iranian and could not speak English. However, he had managed some limited communication earlier on with non-verbal gestures. He had let it be known that he wanted a shower and some alternative food, which was brought for him and which he ate.

10. The claimant went to see the DP who gestured to him that he had a headache. The claimant did not undertake a full medical examination of him. The previous HCP had not undertaken a medical examination either. The claimant offered the DP two paracetamols and he took them. There is paperwork to complete upon administering medication, but the claimant only partially completed it.

11. On 30 January the claimant received a phone call from` the clinical lead, Jennifer Forster, followed by a letter of the same date (bundle p79) to say that he was suspended from work pending investigation into allegations of:

> potential misconduct in relation to poor documentation/gaps in documentation and assessment of the DP on 22.1.20; and not using an interpreter in his assessment of the DP who did not speak English.

12. This was followed by a letter of 31 January inviting him to an investigation meeting on 5 February. The claimant was told he could be accompanied to the meeting and chose a companion, Melissa Pugh. However, about an hour or so before the meeting he was told she could not accompany him because of breaches of confidentiality. This unnerved the claimant just before going into the hearing alone and impacted on his performance at the investigatory interview.

Investigation 5.2.2020

13. Jennifer Forster (Clinical Lead Cumbria and the claimant's line manager) was the investigation officer. The minutes of the investigation record the following:

14. The claimant was given a laptop to read through the DP's Medical Assessment Form (MAF), which was not fully completed and no case reference was logged on it. The claimant explained that he had wanted to see the DP to give him analgesia but no consent for this was noted down. The claimant admitted he should have done that but said he had expected to see the DP again later to complete the note of consent. He added that other people give paracetamol without MAFs. He had not noted any concerns with respect to the DP and so he did not see the need for an interpreter. He said

he took pride in his paperwork but could not explain why he did not put the batch number or expiry date of the paracetamol on the MAF.

Disciplinary Documents

15. By letter of 10 February 2020, the claimant was invited to a disciplinary hearing, which was to take place on 17 February. He was to answer seven allegations including:

> not following policy and procedures for getting informed consent, meds management, and recording cases; failing to carry out an examination; failing to obtain an interpreter; failing to document his assessment on Police Works; failing to refer the DP to support services; not justifying decisions made in relation to the assessment; breaches of G4S policy and Health Care Professions' Council (HCPC) guidelines.

16. Donna Cardell (Forensic Nurse Examiner) was assigned as the Disciplinary Manager. It is not clear exactly what documents were considered by Ms Cardell, or provided to the claimant for the disciplinary.

17. What is clear is that Ms Cardell considered a timeline produced by Marie Ware and historical audits, amongst other things. However, the claimant said he was not sent these specific documents and he did not address them in his Disciplinary Statement ((bundle p93) prepared for the disciplinary hearing.

18. As he had been thorough in covering points in some considerable detail in his Disciplinary Statement, I accept that, at this stage, he was unaware that historical information was being considered. Consequently, he was given no opportunity at disciplinary stage to address these historical matters.

19. The claimant's Disciplinary Statement said he had read the notes of the investigatory meeting and realised he had not given a good enough account of himself. This statement was his attempt to address that problem and give some contextual background.

20. The contents of the Disciplinary Statement (16/2/2020) included the following:

21. The DP had already been in custody for several hours when the claimant came on shift. No concerns had been documented and the claimant was not informed of any medical problems apart from the Detention Officer mentioning the DP still had a headache. The word "still" suggested people on the earlier shift knew about this, although the DP had not been medically assessed prior to the claimant coming on shift. The DP had requested alternative food and a shower, which indicated some ability to communicate.

22. The claimant reviewed the risk assessment, which had been done with an interpreter that day and noted that no risks were recorded, nor any allergies or mental or physical health issues. The claimant observed the DP, who appeared alert, orientated and pleasant and gestured that he had a headache. The claimant had no concerns and did not deem it necessary to carry out a thorough examination of him. He thought he was probably dehydrated and gave him two paracetamol.

23. The claimant started to fill in the MAF with a view to getting the DP's consent and case number if and when there was a need to reassess him. He admitted he should have got informed consent with an interpreter, but took the DP's gestures as implied consent.

24. The claimant entered the medication on the MAF but admitted he omitted to record the batch number of the paracetamol and the expiry date. He also failed to complete a health assessment document on the Police Works system. He said he realised this was non compliant and it would never happen again. He observed the DP later on and he was sleeping comfortably.

25. The claimant did not refer the DP to Liaison and Diversion because he had no concerns to warrant a referral and there was nothing that Liaison and Diversion could offer him. Also there had been no referral during the previous shift.

26. The claimant went on to set out mitigating factors, saying that he was conscientious and the omissions were not his usual standard. He referred to personal and family issues that had distracted him and affected his confidence. He said that he had attended his GP that week. He asked that the matter be treated as an isolated incident.

Disciplinary meeting 17.2.2020

27. Donna Cardell conducted the meeting and the minutes record the following:

28. The claimant did not have a companion with him; he was not in the Trade Union.

29. On the consent issue, the claimant said he was not the only one who did not get consent. He did not think it necessary in this case as he just wanted to make the DP comfortable with analgesia. No concerns had been raised about the DP by the person on the previous shift. He said the DP had gestured and he inferred consent from this. He did not think an interpreter was necessary and previous clinicians did not have concerns. He did not know why he had not got a signature for consent.

30. Ms Cardell went through the claimant's Disciplinary Statement with him.

31. The claimant made clear there were no concerns about the DP. He was a good colour when he saw him.

32. The claimant also revealed that he had suffered a heart attack 18 months ago and that he had seen the Community Mental Health Team the previous weekend. He started to get upset and Ms Cardell adjourned the meeting. He was subsequently signed off with stress.

Character References

33. In March 2020 the claimant obtained a number of character references from colleagues both in the Police and other Health Care Professionals, including Doctor Tee. These references spoke of the claimant's dedication, efficiency, reliability, and integrity amongst other things. It was said that he was able to work calmly under pressure and was caring, putting others before himself.

34. In Melissa Pugh's reference (Registered General Nurse), she said that verbal consent rather than written consent was given in this practice area on many occasions. Also, she said that putting batch numbers and expiry dates for medications on the MAFs was not done in practice for the majority of her 10 years working in custody. Whilst it had been encouraged in recent years, she often did not complete them. She also referred to the claimant's myocardial infarction (heart attack) in April 2018, when she noticed that, on his return, he was not his usual self and she reported her worries to Jennifer Forster.

Occupational Health (OH) Assessment

35. On 6 April 2020 the claimant received a phone call from someone from OH wanting to do a telephone consultation. He refused as he said he had not been told about any consultation. The claimant then received two letters on 16 April, which were dated 30 March and 7 April, notifying him of the appointment. At that stage he confirmed with the respondent that he was willing to undertake an OH assessment, although in the event, no OH consultation took place.

36. Donna Cardell said that she had obtained verbal consent previously from the claimant. However, no note was made of this and, given its importance, I would have expected some record to have been made. Furthermore, as the claimant was willing to give consent, there would have been no reason for him not to proceed with the OH telephone consultation, if he had known what it was. For these reasons, I prefer the evidence of the claimant and find that no consent had been sought prior to the telephone call.

37. On 22 April the claimant received another letter saying the disciplinary hearing had been adjourned and OH advice was sought to ascertain whether he was fit to continue with the disciplinary process. Jennifer Forster, in her witness statement, said she obtained verbal consent from the claimant during a remote video meeting on 4 May when he was at home. OH contacted him to say his OH appointment would be on 27 May.

Reconvened Disciplinary Hearing

38. On 11 May, the claimant received a letter from Donna Cardell dated 6 May (bundle p123), reconvening the disciplinary hearing for 12 May. The claimant emailed Ms Cardell objecting to the hearing the following day at such short notice (bundle pp124-127), and enclosing a supplemental statement from his solicitor for consideration at the hearing.

Supplementary statement drafted by solicitor

39. This statement set out again the reasons for the claimant's actions on 22 January. It said that he had acted in the best interests of the DP and that no harm had come to the DP. The claimant would ensure his failings would not happen again. He was skilled, knowledgeable and conscientious and, apart from this incident, he had a clean disciplinary record. Any sanction should be proportionate to the nature of the misconduct. His actions did not fall within the definition of gross misconduct in his contract.

Telephone call with Donna Cardell

40. The claimant received no response to his email and so he telephoned Ms Cardell on 12 May to ask for a postponement of the hearing. What was said on the telephone is in dispute.

41. The claimant's evidence is that Ms Cardell said she would speak to HR about a postponement and call him back. She called him back shortly afterwards only to tell him he was dismissed for gross misconduct.

42. Ms Cardell says that the claimant called to say he wanted the meeting over and done with and she called HR to let them know and would ring back. There is a note drafted by Ms Cardell purporting to record the telephone conversation taking place at 9.37 (bundle p128). It records that the claimant said he wanted the meeting to go ahead to get it over with and the meeting went ahead.

43. The note continues by recording that Ms Cardell explained she had taken into account his answers at the meeting on 17 February and the Health Care Professions' Code of Conduct. She would give him the outcome on 12 May at 10am. She said he agreed with this. She rang back at 10.08. She said she had considered his statement of 16 February, which he made prior to their initial meeting, and she came to the decision that it was gross misconduct and he was to be dismissed.

44. There are no other minutes or notes of this purported reconvened meeting.

45. I do not accept Ms Cardell's evidence. It is clear that the claimant wanted more time, as set out in his email. It is not plausible that he would call the day of the hearing and agree to it going ahead without his involvement, given the history of what had happened before. Moreover, it seems strange that Ms Cardell would need to call HR to say the meeting was going ahead if it was already scheduled for that day. Also, if it were a meeting, there would be proper minutes, as there were with the other meetings. In giving evidence, Ms Cardell described her note as simply an "aide memoire".

46. I prefer the claimant's evidence. He was consistent throughout that he wanted the meeting postponed and did not agree to it going ahead that day. He was not expecting an outcome to the disciplinary when Ms Cardell called back.

47. Therefore, I find that the reconvened meeting took place without the claimant being present and without him realising it was happening.

Dismissal Letter dated 13 May 2020

48. The dismissal letter from Donna Cardell stated the disciplinary hearing was reconvened on 12 May 2020 and resulted in her decision to dismiss for gross misconduct with immediate effect. It set out 11 reasons for the dismissal. It also took account of historical matters, such as audits, training, issues with administering medication and the claimant's failure to disclose his own ongoing health issues.

49. It cited failure to follow G4S policy relating to poor documentation when assessing a detainee, saying this was a breach of the Health Care

Professionals' Code of Conduct. However, it did not specify the parts of the policy or Code that had been breached.

Appeal Documents

50. The claimant appealed and on 22 May sent the respondent an appeal statement prepared by his solicitor (bundle p137B). It set out the claimant's position on Procedural Unfairness (with respect to the investigation and disciplinary, and the disciplinary letter) and also his position on substantive unfairness. The substantive unfairness section addressed each bullet point in Donna Cardell's dismissal letter.

51. Jonathan Allen, head of Police Custody for G4S Health Services, conducted the appeal by way of review. In his invitation letter of 3 June 2020 (bundle p140) he said the hearing would be limited to the grounds prepared by the claimant's solicitor.

52. Mr Allen's email of 10 June (bundle p142) sets out the documents he was to consider. This is the first time in the process it had been made clear what documents were being considered. It does not include the claimant's Disciplinary Statement and Supplementary Submission Statement (bundle p93 & p125). When asked at the Tribunal hearing whether he had read these statements, Mr Allen could not be sure and admitted that they might not have formed part of the appeal documentation. Under these circumstances I find that they were omitted from the appeal process and not considered.

53. The list of documents considered did however contain historical documents, including MAF audits, a note of an informal discussion with Marie Ware, and Clinical Incident Positive Intervention (CIPI) reviews.

Appeal Hearing 24 June 2020 via Google Meet

54. The claimant did not have the disciplinary meeting notes of 17 February and they had to be sent to him during the remote appeal hearing. The historical matters were considered by Mr Allen, and discussed at the meeting. Mr Allen said in evidence to the Tribunal that he only considered this historical information to ascertain whether the 22 January incident was a one off event. However, he discussed these matters in some detail, despite them never previously being the subject of any disciplinary action. When giving evidence to the Tribunal, Mr Allen referred to historical charts and statistics, which he said had worried him.

Appeal Outcome

55. The claimant was sent the appeal outcome letter dated 1 July 2020, which did not uphold the appeal. Jonathan Allen recorded that the initial meeting notes with Jennifer Forster and the disciplinary meeting notes with Donna Cardell had been reviewed, and he felt that the claimant had not offered any new evidence to support his case.

56. He said he had spoken to Marie Ware about the claimant's audit results in August 2019, for which he scored 38% for gaining consent, and commented that they had been put in the claimant's in-tray and were still there. He also

considered the timeline of concerns supplied Marie Ware. As a result, these lead him to believe that the 22 January incident was not isolated.

57. Mr Allen said he was also referring the matter to the HCPC. In evidence to the Tribunal, he did say however that the issue of referral to Liaison and Diversion was irrelevant and not misconduct.

Policies

58. Of relevance is the "G4S Disciplinary and Capability Policy" (bundle p156). Section 7.0 sets out the disciplinary action and dismissal process, which is a four stage process (bundle p159). The fourth stage includes dismissal for gross misconduct.

59. "Gross misconduct" and "misconduct" are defined in section 9.0 (bundle p160), although the lists of examples are not exhaustive. Under "gross misconduct" it lists "action in breach of any legal act/procedure/guidance". The remainder of the examples are of a greater magnitude of seriousness. "Misconduct" includes "minor breaches of Company policy" and "being careless when carrying out your duties".

60. Also of note is the "G4S Health Service (UK) Ltd Consent to Examination & Treatment" (bundle p161C). This sets down guidance on when and how to obtain consent. It shows that burdens of consent are high in a custody environment. The claimant had breached this policy.

Evidence of Dr Tee – Sanction

61. Dr Tee, who was the Lead Forensic Medical Examiner for G4S, gave evidence to the Tribunal and in her witness statement. She referred to cases that she had investigated where there had been failings by HCPs of much more serious a magnitude than those of the claimant, yet they had not resulted in dismissals. Whilst she accepted that some of the claimant's actions were not ideal, she expressed surprise that he had been dismissed in the circumstances of his case.

62. Her Dr Tee's evidence was that the risk should be proportional to the severity of the situation. Here the DP had communicated through gestures, which was possibly adequate for a one off dose of paracetamol, which was low risk. She also said it was reasonable for the claimant to rely on Police Works information and its record of the DP's lack of allergies. She saw no need to put expiry dates and batch numbers on MAFs as this was repetitive and meds were checked each week. Small numbers on the meds boxes were prone to errors when transcribing on to MAFs.

Law

63. **Section 98 of Employment Rights Act 1996** provides, so far as is relevant:

> (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) …..

b) Relates to the conduct of the employee

98(4) whether the dismissal is fair or unfair

(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.

64. The **ACAS Code of Practice 1** on Disciplinary and Grievance Procedures 2015 applies to the procedure followed.

65. Also of relevance is the **ACAS Guide**: **Discipline and Grievance at Work (2019)**, which says *"…the nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against it."*

66. The main **caselaw** that the tribunal took account of is set out below.

67. It was held in ***Abernethy v Mott, Hay & Anderson*** [1974] ICR 323 that: "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee."

68. ***British Home Stores Ltd. Burchell [1980] ICR 303*** held that "First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in in all the circumstances of the case."

69. When determining reasonableness, the tribunal should not focus on whether it would have dismissed in the circumstances and substitute its view for that of the employer – ***Iceland Frozen Foods Ltd v Jones*** [1983] ICR 17, EAT.

70. The test to be applied in determining reasonableness is whether the employer's decision to dismiss fell within the range of reasonable responses available to it – **(1)** ***Post Office v Foley*** **(2)** ***HSBC Bank plc v Madden*** [2000] ICR 1283, CA.

71. In ***J Sainsbury plc v. Hitt*** [2003] ICR 111, the Court of Appeal said that, in applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere.

72. The extent of the investigation required will depend on the circumstances. The gravity of the consequences and the impact on an employee's career will be relevant, such as where the allegation of misconduct could mean disqualification from a profession, such as with teachers. See for example ***Salford Royal NHS Foundation Trust v Roldan*** [2010] ICR 1457, Court of Appeal; and ***Turner v East Midlands Trains Ltd*** [2013] ICR 525, Court of Appeal.

73. Where the consequences of an internal disciplinary procedure could lead to external statutory procedures, the standards of procedural fairness may be higher than in general ***Kulkarni v Milton Keynes Hospital NHS Trust*** [2010] ICR.

74. Whether or not a procedural defect is sufficient to undermine the fairness of the dismissal as a whole, is a question for the tribunal. Not every error will do so. It is crucial to assess the gravity of any procedural defect and consider its impact on the fairness of the decision as a whole – ***Pillar v NHS*** 24 UKEAT/0005/16/JW [2017] All ER (D) 173 (Apr).

75. A failure to follow the ACAS Code of Practice or internal procedures is not determinative of the fairness of a dismissal. The tribunal must address whether the procedure followed overall was reasonable – ***UPS Ltd v Harrison*** (UKEAT/0038/11/RN)(16 January 2012 unreported).

76. The tribunal must have regard to the appeal process when considering the unfair dismissal claim. It should examine the fairness of the disciplinary process as a whole and each case will depend on its own facts – ***Taylor v OCS Group Ltd*** [2006] ICR 1602, [2006] IRLR 613.

77. In ***Brito-Babapulle v Ealing Hospital NHS Trust*** [2013] IRLR 854 it was held that where dismissal is for gross misconduct, the tribunal has to be satisfied that the employer acted reasonably both in characterising the conduct as gross misconduct, and then in deciding that dismissal was the appropriate punishment.

Conclusions

Unfair Dismissal

What was the reason or principal reason for dismissal?

78. There is no dispute that the reason for dismissal was conduct and I conclude that this was the reason.

Did the respondent genuinely believe that the claimant had committed misconduct? Was this belief based on reasonable grounds, following a reasonable investigation? Was this within the band of reasonable responses?

79. The main allegations were: lack of consent; lack of a medical examination; incomplete paperwork. However, the basic issue boils down to whether it was gross misconduct for the claimant to give the DP two paracetamol in the circumstances of this case.

80. It is important to understand the context of what happened on 22 January 2020. The evidence of Marie Ware, who had been on duty that day, would have been crucial. She had conducted the handover and would have been able to give background information on the DP. She would have known his demeanour and his apparent health. She would have been able to explain why she did not give the DP analgesics when he was presenting with a headache, and why she did not undertake a medical examination herself. She was also the claimant's supervisor and she had created the timeline and was involved with the audits. She appeared to be a key figure in the background and it was not reasonable to omit taking detailed evidence from her.

81. Furthermore, the evidence of Stuart McGregor, the detention officer at the time, would have been of importance. He had said that the DP "still" had a headache. What did he know about the DP? Again this would have given an insight into the situation and put in context the claimant's actions. It was not reasonable to omit taking evidence from him.

82. Also, the information on the Police Works system was very relevant, and it was not reasonable to omit a full consideration of what was recorded.

83. Consequently, by not presenting this evidence, the claimant was denied the opportunity of responding to all this information and that was not reasonable.

84. When such a serious matter as potential dismissal of a professional is a possibility, the most thorough of investigations is mandatory. This investigation failed to reach that standard.

85. I turn next to the level of seriousness of the claimant's conduct. The claimant set out his case in three statements, two of which were before the disciplinary hearing and the 3rd of which was additionally available to the appeal hearing. From these statements, the following was apparent to the decision makers.

86. The DP "still" had a headache on handover to the claimant, and so he must have been in pain for sometime before then. The claimant was concerned about his pain and wanted to make him comfortable. He noted that no earlier meds had been given and the DP appeared healthy. The claimant observed his skin colour and gait, which were fine. There was nothing on Police Works to indicate any problems. Whilst the DP was anxious, this was understandable for a foreign national in police custody.

87. No problems had been communicated on handover. The claimant had 25 years of experience of these matters and was confident that there was no problem in giving analgesics. Therefore, there was no apparent reason not to give paracetamol. There was no reason to give him a full medical examination before doing so. Whilst this was not strictly in accordance with

policy, the risk was low. No harm came to the DP and the claimant observed him sleeping comfortably afterwards. These actions cannot be classed as gross misconduct.

88. With respect to consent, it was clear that the DP had some means of communication. He had let others know that he wanted a shower and alternative food, which was brought for him and which he ate. The claimant was able to understand that he had a headache when he pointed to his head. He willingly took paracetamol when offered and he was likely to have known what paracetamol were, given their universal use.

89. Whilst the DP's signature was not obtained, which went against policy, it is questionable whether this would have made much difference if the DP was unable to read English. There was no real need for an interpreter to take this step. Although an interpreter could have been called, this would have taken time, and prolonged the DP's suffering. The claimant put the DP's welfare first. Regardless of the higher duties of consent in custody, this matter in itself cannot amount to gross misconduct.

90. In terms of the incomplete paperwork, this seems to be something that others also failed to do, albeit they were not disciplined. With respect to expiry dates and batch numbers, because meds were checked each week, the risk of out of date or problematic meds being given was slight. This matters in itself was not gross misconduct.

91. Considering the definitions of gross misconduct, even taking the breaches cumulatively, what the claimant did could not come within the seriousness of the examples given. The breaches of policy were not serious in the circumstances, and at their highest could only reasonably be classed as "misconduct".

Did the respondent act reasonably in treating the misconduct as sufficient to dismiss the claimant?

92. The sanction of dismissal was disproportionate to the conduct and not within the band of reasonable responses. This is particularly so, given the claimant's clean disciplinary record and good service over many years. There were other more appropriate options open to the respondent as per their Disciplinary and Capability Policy.

Substantive conclusion

93. Therefore, with respect to the substantive matters alone, the Tribunal concludes that the respondent did not base its belief of gross misconduct on reasonable grounds and a reasonable investigation. Dismissal was not within the band of reasonable responses and therefore, was unfair. Consequently, the claimant's complaint of unfair dismissal is well founded.

Was the procedure within the band of reasonable responses?

94. I will go on to consider procedural matters as these are at least relevant to any uplift for breaching the ACAS code of practice. There are several breaches, the most stark of which is the handling of the disciplinary stage of proceedings by Donna Cardell and in particular the reconvened meeting. This

went ahead without the claimant's knowledge after he was misled into thinking Donna Cardell was discussing a postponement with HR, thereby depriving him of the opportunity to discuss his response verbally. Given the lack of any minutes recorded, and the short time taken for the so-called hearing, it is also unclear what Ms Cardell took into account and whether she properly considered the claimant's statements. This was wholly inadequate and unreasonable.

95. The problem was not rectified on appeal, which proceeded only by way of a review. In Jonathan Allen's letter, enclosing the documents, he did not include the claimant's Disciplinary Statement or Supplementary Submission Statement and did not consider them. This was vital information, which was missed.

96. Consequently, it appears that vital evidence was not taken into account in the disciplinary process.

97. Furthermore, Marie Ware's timeline and audits, amongst other historical information was included for consideration. Donna Cardell took it into account at the disciplinary stage, as evidenced by the dismissal letter (bundle p130) where she explicitly says so. These were informal historical matters, which the claimant had never been given the opportunity to address, either at the time they were created, or during this disciplinary process. To take them into consideration when reaching the decision to dismiss, was unreasonable.

98. These shortcomings were not rectified at the Appeal Hearing. Jonathan Allen also took account of historical information, including charts and statistics, which had not be presented to the claimant for comment previously. Regardless of whether this was just to establish whether the 22 January occurrence was a one off incident, the claimant had been given no opportunity to respond to the matters at the time. Had they been deemed significant when they occurred, they should have been properly dealt with at that stage. As they were not, it was unreasonable to have considered them in this disciplinary process.

99. Mr Allen also took evidence from Marie Ware, although no note was made of it, just a comment in the appeal outcome letter. Therefore, the claimant was given no opportunity to respond to anything Marie Ware said or produced. Again this was not reasonable.

100. There were other matters of procedural concern relating to the respondent's shoddy handling of the disciplinary process, which aggravated its failings.

101. Offering the claimant a companion at the investigatory meeting and then withdrawing the offer an hour and a half before the meeting on grounds of breach of confidentiality, upset the claimant and impacted on his performance at the meeting.

102. Then there is the matter of the OH consent, whereby the respondent failed to obtain the claimant's prior consent, demonstrating a disregard for the process. After eventually giving consent, the claimant was led to believe that an OH consultation would take place before the reconvened disciplinary

hearing, yet it went ahead without one, despite the claimant having been given a date for OH to meet with him.

103. Documents were not always provided to the claimant in a timely manner. This caused unnecessary stress to the claimant in responding to matters.

Procedural Conclusion

104. All of these additional matters only serve to add to the conclusion that the process was not within the band of reasonable responses.

Overall Conclusion on Fairness

105. For the reasons given above, the Tribunal finds that the respondent did not act fairly in dismissing the claimant. Accordingly, in accordance with equity and the substantial merits of the case, the claimant's complaint of unfair dismissal is well-founded and succeeds.

Polkey

106. There is no reason to think that the claimant would have been dismissed in any event if a fair procedure had been undertaken. This is particularly in the light of the examples given by Dr Tee. Therefore, I make no deduction for Polkey.

Contributory Conduct

107. There were some failings by the claimant, to which he conceded. However, he was apologetic and gave assurances that such things would not happen again. Also, he had suffered in his own personal life, which likely affected his conduct. Consequently, whilst some deduction should be made, it should be modest. I therefore find that a 10% deduction on both the basic and compensatory award should be made.

ACAS code

108. There were serious procedural failures as outlined in my conclusion. Therefore, I find that a 20% uplift should be applied.

Wrongful Dismissal

Did the claimant fundamentally breach the contract of employment so as to justify the respondent treating the contract as at an end?

109. This was not gross misconduct on the part of the claimant and did not amount to a repudiatory breach of contract that entitled the respondent to summarily dismiss him. Therefore, the claimant's complaint of wrongful dismissal is well founded and succeeds.

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Employment Judge Liz Ord

Date 9 March 2022

JUDGMENT SENT TO THE PARTIES ON
Date 31 March 2022

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FOR THE TRIBUNAL OFFICE

Notes

1. Neither party objected to the hearing taking place on a remote video platform.