



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4101980/2020**

5 **Held via Cloud Video Platform (CVP) on 19 to 21 April and 25 to 28 April 2022**  
**Members' Meeting on 10 June 2022**

10 **Employment Judge S MacLean**  
**Tribunal Member I Ashraf**  
**Tribunal Member M McAllister**

**Mr Paul Chateau**

**Claimant**  
**In Person**

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**Dumfries & Galloway Health Board**

**Respondent**  
**Represented by:**  
**Ms H Craik -**  
**Solicitor**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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

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### **REASONS**

#### **Introduction**

1. The claimant sent a claim form to the Tribunal on 28 March 2020, complaining of constructive unfair dismissal following the termination of his employment with the respondent on 31 December 2019. The claimant maintains that he resigned in response to a course of conduct by the respondent which taken together amounts to a breach of the implied duty of trust and confidence. The claimant asserts that the breach was sufficiently serious to constitute a repudiatory breach and by his resignation, he accepted the breach. The claimant says that the termination of his employment amounted to a dismissal within the meaning of section 95(1)(c) of the Employment Rights Act 1996 (the ERA).

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2. In the response form the respondent denies that the claimant was constructively unfairly dismissed. The respondent says that its treatment of the claimant including its handling of the grievances and appeal did not amount to a breach of any express or implied terms of the claimant's contract of employment. If there was such a breach, the respondent contends that it was not sufficiently serious as to constitute a repudiatory breach giving rise to entitlement to treat the contract as terminated. If there was an unfair dismissal, the respondent asserts that the claimant would have been dismissed because of the breakdown in his relationship with the respondent or alternatively because of his conduct.
3. The final hearing was to be conducted remotely by CVP. There were a number of difficulties throughout. The Tribunal did not have printed copies of the productions although these arrived later on the first day. The claimant's connection with the hearing froze and despite various attempts to improve the connection, it was agreed that the claimant would attend the Glasgow Tribunal Centre and connect to the CVP from a hearing room. The Tribunal, the respondent's solicitor and the respondent's witnesses connected with the hearing by CVP. Notwithstanding the difficulties, the Tribunal was satisfied that with the willing compliance of the claimant, the respondent's representative and the witnesses, the Tribunal was able to hear the arguments advanced by the parties and the interests of justice were duly served.
4. The claimant gave evidence on his own account. For the respondent, the Tribunal heard evidence from Pamela Jamieson, Deputy Workforce Director, Nicola Hamlet, Deputy Chief Operating Officer, Caroline Cooksey (nee Sharp), Workforce Director and Justin Murray, Deputy General Manager for Mental Health Services.
5. Ms Cooksey has held the position of Workforce Director since August 2005. The respondent's other witnesses have changed roles since their involvement in this case. At the time of their involvement, Ms Jamieson was Head of HR and in that role supported Ms Hamlet who was General Manager for Acute

Services. Mr Murray held the post of Service Manager for the Specialist Drug and Alcohol Service and Prison Healthcare.

6. The Tribunal was also referred to a joint set of productions. From around 2020 all health boards have been following "Once for Scotland" policies. In this case the Tribunal was considering events between 2012 and 2019 when the respondent had its own local management of capability policy and conduct policy which aligned to the model national policy provided by NHS Scotland Partnership Information Network (PIN). The respondent also had its own grievance policy.
7. The witnesses prepared witness statements which were taken as their evidence in chief although supplementary oral questions were asked. Cross examination and re-examination took place in the usual way.
8. The Tribunal has set out facts as found that are essential to the Tribunal's reasons or to an understanding of important parts of the evidence. The Tribunal carefully considered the submissions during its deliberations and has dealt with the points made in submissions whilst setting out the facts, law and the application of the law to those facts. It should not be taken that a point was overlooked, or facts ignored, because the facts or submission is not part of the reasons in the way it was presented to the Tribunal by a party.

## 20 **The issues**

9. This is a case in which it is alleged that the respondent breached the implied term of trust and confidence. During its deliberations, the Tribunal's approach was to consider the following issues.
- a. Do the incidents, so far as proven to have occurred, amount to conduct that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the claimant and the respondent?
- b. If so, was there reasonable and proper cause for that conduct?

- c. If not, and there was therefore a fundamental breach of contract, did that conduct cause the claimant's resignation? Was it so serious that the claimant was entitled to treat the contract as being at an end?
- d. Did the claimant resign in response to the breach?
- 5 e. Did the claimant affirm the contract before resigning?

### The relevant law

- 10. Section 95(1)(c) of the ERA provides that there shall be a dismissal if the employee terminates the contract under which he is employed (with or without notice) in circumstances where he is entitled to terminate it without notice by  
10 reason of the employer's conduct.
- 11. For an employee to claim constructive unfair dismissal, there must be:
  - a. A breach of contract by the employer: either an actual breach or an anticipatory breach.
  - b. That breach must be sufficiently important to justify the employee  
15 resigning or else it must be the last in a series of incidents which justify him leaving.
  - c. The employee must leave in response to the breach and for not some other unconnected reason.
  - d. The employee must not delay too long in terminating the contract in  
20 response to the employer's breach otherwise he may be deemed to have waived the breach and agreed to vary the contract.
- 12. The leading case is *Western Excavating (ECC) Limited v Sharpe* [1978] ICR 221: the question of whether there had been a constructive dismissal should be answered according to the rules of the law of contract.
- 25 13. Normally there are implied into a contract of employment mutual rights and obligations of trust and confidence. A breach of this implied term may justify the employee in leaving and claiming that he has been constructively dismissed. A breach of the implied obligation of trust and confidence may

consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In such a case, the last action of an employer which leads to the employee leaving need not in itself be a breach of contract; the question is does the cumulative series of acts taken together amount to a breach of the implied test. (see *Woods v WM Car Services (Peterborough) Limited* [1981] ICR 666.) This is the “last straw” situation.

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14. The scope of the implied term was considered in *Malik & Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606 which imposed an obligation that the employer shall not: “...without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee.”
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15. The test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Not every action by an employer which can probably give rise to a complaint by an employee amounts to a breach of trust and confidence. Simply acting in an unreasonable manner is not sufficient. *Malik* (above) recognises that the conduct must be likely to destroy or seriously damage the relationship of trust and confidence.
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16. The test of what is repudiatory in contract has been expressed in different words at different times. In *Woods* (above), it was “conduct with which an employee could not be expected to put up”. In *Tullett Prebon plc v BGC Brokers LP & others* 2011 IRLR 420 it was expressed as the employer must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. The Tribunal cannot go too far and apply a duty on the employer to behave reasonably towards his employees.
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17. The repudiatory breach or breaches may not be the cause of the employee leaving provided they are the effective cause. There is often a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify the employee
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taking that action but when viewed against the background of such incidents, it may be considered sufficient by the courts to warrant their treating the resignation as constructive dismissal. The question is does the cumulative series of acts taken together amount to a breach of the implied term.

- 5 18. The EAT in *Williams v Governing Body of Alderman Davies Church in Wales Primary School* UKEAT/0108/19 distinguished the case of *Omilaju v Waltham Forest London Council* 2005 IRLR 35.: “if any given case the last conduct, in point of time, relied upon as having contributed together with earlier conduct to a breach of the *Malik* term, is properly found by the Tribunal to have been  
10 innocuous, then that would be fatal to the claim of constructive dismissal if either (a) earlier conduct relied upon crossed the *Malik* threshold but was followed by the employee affirming the contract, or (b) the earlier conduct was not by itself sufficient to cross the *Malik* threshold. However, if in the given case, the earlier conduct was (a) sufficient to cross the *Malik* threshold, (b)  
15 was not followed by affirmation and (c) also at least materially contributed to the decision to resign, then constructive dismissal will be made out. This will not be affected by the fact that the most recent conduct, in time, which also contributed to the decision to resign added nothing to the breach.”
19. In *Western* (above) it was held that an employee who had been subjected to  
20 a repudiatory breach must make up his mind soon after the conduct of which he complains. If he continues for any length of time he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.
20. In *Buckland v Bournemouth University Higher Education Cooperation* [2010]  
25 EWCA Civ 212 suggested that Tribunal should take a reasonably robust approach to affirmation and that a wronged employee who failed to make their position clear at the outset could not expect to continue with the contract for very long without losing the option of termination, at least where the employer has offered to make suitable amends. The Tribunal should consider the facts  
30 carefully before deciding that the employee affirmed the contract. It is not simply the passage of time that is important but the conduct of the employee

during the intervening period (see *Chindove v Morrison Supermarkets Plc* UKEAT/0076/17/JOJ).

## Findings in fact

### *Background*

- 5 21. The respondent is a health board within NHS Scotland.
22. The claimant qualified as a Registered Mental Health Nurse in 1991. The respondent employed the claimant from 19 May 2008 in the position of Band 6 Community Alcohol Nurse for the Wigtownshire Team. The claimant was employed in within the Mental Health Directorate. In April 2009, the claimant was promoted to Band 7 Team Leader level which involved the building and managing of Addiction Services within the Wigtownshire (West) area. A Band 7 nurse is a senior and very experienced clinical practitioner. The claimant developed a team of six managing them across two bases, Newton Stewart and Stranraer. Having been employed on temporary contracts on 1 April 10 was promoted to Band 7 Team Leader level which involved the building and managing of Addiction Services within the Wigtownshire (West) area. A Band 7 nurse is a senior and very experienced clinical practitioner. The claimant developed a team of six managing them across two bases, Newton Stewart and Stranraer. Having been employed on temporary contracts on 1 April 15 2013, the claimant was appointed on a permanent basis as Community Team Leader at Band 7. He was based at Newton Stewart Health Centre. He was issued with written terms and conditions on 15 May 2013.
23. The claimant's line manager was Moira Cossar, Service Manager for Healthcare within the Specialist Drug and Alcohol Service and within Prisons within the Mental Health Directorate. Ms Cossar had line managed the 20 claimant since around June 2008.
24. Denise Moffat was initially Lead Professional Nurse/Deputy General Manager. They reported to Ian Hancock General Manager, Mental Health Directorate.

### 25 *PIN model policy – conduct 2012*

25. Since 2020, all health boards have been following "Once for Scotland" policies. However in 2012 the respondent had its own local Management of Conduct policy which aligned to the model National policy provided by the

NHS Scotland Partnership Information Network (PIN) (the Disciplinary Policy).

26. Employees are expected to adhere to acceptable standards of conduct in the course of their employment. The aim is to deal with conduct issues in a fair and consistent manner. The Disciplinary Policy requires HR to advise managers on the correct implementation of the policy and support employees by providing advice on the policy.
27. The Disciplinary Policy recognises that it may not be clear at the outset whether a matter is one of conduct or capability. Therefore, it may be that the approach requires to be changed in the course of managing such matters.
28. Under the formal procedure employees have the right to be accompanied by a trade union/professional organisation representative or work colleague at any investigatory meeting or disciplinary (or appeal) panel.
29. Suspension forms a part of the Disciplinary Policy. Careful consideration needs to be given to appropriate circumstances for its use in situations where the allegation imposes a risk to clinical, financial or staff governance and in all cases, consideration should be given to alternatives to suspension. Suspension related to disciplinary investigations will be on full pay for a short a time as possible. Where a suspended individual reports sick, the employee will receive occupational sick pay according to their entitlement during the sick absence period.
30. Before any disciplinary process a full and thorough investigation must take place. The investigation officer (usually the manager unless they are implicated or involved in any aspect of the allegation) may be supported by an HR representative. It will involve interviewing the individual who is the subject matter of the investigation; any potential witnesses and gathering relevant material. After the investigation, the investigation officer will make a recommendation as to whether the matter requires to be progress. Sometimes it might be determined that the matter does not require to progress to a formal disciplinary hearing but if sufficient concerns remain informal action may be undertaken.



31. The disciplinary hearing is conducted by a panel. Panel members and the Chair must have had no prior involvement. All employees have a right of appeal against any decision taken which cannot increase the penalty.

5 32. Where an employee raises a grievance or dignity at work complaint during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance/complaint. However, it may be equally appropriate to deal with both issues concurrently.

*PIN model policy - capability 2012*

10 33. In 2012 the respondent also had its own local Management of Employee Capability policy which aligned to the model National policy provided by the NHS Scotland Partnership Information Network (PIN) (the Capability Policy).

15 34. The policy was developed in partnership with trade union and professional organisations. It applied where an employee is lacking in some area of knowledge, skill or ability resulting in a failure to be able to carry out the required duties of the post to an acceptable standard. It does not apply in cases of issues of conduct. It is recognised that it may not be clear at the outset whether a matter is one of conduct or capability and therefore it may be that the approach followed requires to be changed.

20 35. The policy requires a supported improvement plan to be completed and updated at each stage of the procedure. If a formal approach is required there are three stages. There is a right of appeal at all stages of the formal procedure.

25 36. Where an employee raises a grievance/dignity at work complaint during implementation of the formal process the capability proceed may be temporarily suspended in order to deal with the grievance/complaint. If they are related it may equally be appropriate to deal with both issues concurrently.

*2012 disciplinary investigation*

37. On 17 October 2012, Ms Cossar wrote to the claimant advising that he was the subject of a formal investigation under the disciplinary policy. The allegations related to the supply of naloxone to a patient in September 2012.
- 5 38. The investigation started on 2 November 2012. Sharon Young, Learning Disabilities Manager acting as Investigating Officer invited the claimant to an investigation interview on 21 November 2012. The claimant was advised of right to be accompanied. He was also advised that Anne-Marie Kerr, HR representative would be present. The investigation did not result in a  
10 disciplinary hearing.
39. At that time it was not the respondent's normal practice to provide investigation reports to the person investigated in situations where the investigation did not result in a disciplinary hearing. The claimant did not receive a copy of the investigations report.
- 15 40. On 13 June 2013, Ms Cossar sent an email to the claimant confirming their earlier telephone conversation about the outcome of the disciplinary investigation and the next steps in the process. The email was copied to Fiona Patterson, Workforce Business Manager and attached "Appendix 1 PIN Guidance".
- 20 41. Ms Cossar advised that the evidence from the investigation had highlighted concerns about the claimant's understanding of procedures for storage and administration of prescription only medicines including the use of Patient Group Directions. As there was no indication that the claimant's behaviours were part of a wilful decision not to follow recognised practice, the outcome  
25 of the investigation was not to proceed to a disciplinary hearing but to move to the formal stage of the capability process.
42. Ms Cossar advised that on her return from leave, they would meet to set out the details of the performance improvement plan. She anticipated that this would include an expectation that the claimant would work from the Dumfries  
30 base for a period of up to six months. As the Capability Policy was under

review, it had been agreed with the staff side that the respondent would use the PIN guidance for capability in the meantime. The claimant was invited to discuss matters with Lee Rankine (HR Officer) or Ms Patterson of HR. Ms Cossar also referred the claimant to occupational health so that any health related issues could be taken into account.

### *2013 capability process*

43. On 12 July 2013, Ms Cossar sent an email to the claimant confirming their conversation the previous day about the next steps and key areas of focus. This was copied to Ms Patterson. The claimant was to be provided with a structured performance plan to give him opportunity to show that he had the required knowledge and skills to fulfil his role as team leader. Ms Cossar indicated that she wanted the same services to be in place across Dumfries and Galloway. The claimant would have an opportunity to carry some clinical cases and shadow other members of the team. The next step was to meet on 23 July 2013 to initiate the formal process and agree the elements of the improvement plan. The claimant was advised of his right to be accompanied. The claimant had not attended an occupational health appointment on 5 July 2013. The appointment was rescheduled for 24 July 2013.
44. Ms Cossar wrote to the claimant on 15 July 2013. The procedure to be followed was the formal stage 2 process set out in the PIN guidance for capability forwarded to you on 13 June 2013. The claimant did not receive this letter.
45. On 23 July 2013 the claimant met with Ms Cossar and Ms Patterson. The claimant was advised that he would be removed from his substantive post to join the community-based team in Dumfries from 29 July 2013 covering Castle Douglas, Gatehouse of Fleet, Kirkcudbright and Dalbeattie.
46. On 21 October 2013, the claimant returned from two weeks' annual leave and was informed that Ms Cossar had applied an audit of his work in the claimant's absence.

47. The audit review was discussed at a progress review meeting on 5 November 2013. Ms Cossar noted in the performance plan that the audit had identified several concerns about the standard of record keeping and the decision to move to the formal stage 2 of capability.
- 5 48. Ms Cossar wrote to the claimant on 11 November 2013 confirming the key points that had been discussed. The claimant was informed of the decision to extend his placement in Dumfries until 31 March 2014 and to promote someone within Team West to the position of Temporary Team Leader until that date. The letter also referred to the aim of creating a constructive learning  
10 opportunity, an amnesty was agreed regarding the claimant's level of knowledge and skills.
49. A further capability review meeting took place on 6 December 2013 at which Ms Cossar noted a satisfactory improvement in the claimant's record keeping. The claimant expressed concerns about the wrong forms being used at a  
15 review meeting, but no action was taken to correct this.
50. On 17 December 2013, Ms Cossar signed the claimant as being competent in the supply of naloxone. As the capability process had been initiated to deal with concerns regarding the claimant's practice with naloxone, the claimant thought that the capability process would come to an end.
- 20 51. The capability process continued. There was a supervision meeting on 30 January 2014. On 18 March 2014, the claimant was advised that there was a significant improvement in his record keeping. The next step was to undertake work that would allow the claimant to demonstrate leadership skills and qualities. This was to be reviewed with Ms Patterson in three months. The  
25 claimant was to remain outside his substantive role for a further six months until 30 September 2014. This was confirmed in a letter date 14 April 2014.
52. The claimant was concerned about the extension to the capability process. He joined Unison in April 2014. The claimant was offered local support.

53. The claimant found a letter on Ms Cossar's "Shared Drive" which referred to a "new manager" of Wigtownshire services. The claimant felt his trust in Ms Cossar was being eroded.
54. On 18 July 2014, Ms Cossar sent the claimant an invite to a progress review meeting the purpose of which was to review the claimant's progress "in line with the formal Stage 2 process as set out in the PIN guidance for capability" which Ms Cossar forwarded to the claimant on 13 June 2013.
55. On 7 August 2014 the claimant contacted occupational health and asked for an emergency appointment. He was sent home and it was suggested that he consult his general practitioner. The claimant obtained a sick line. The claimant attended an occupational health appointment on 27 August 2014. He returned to work on 1 September 2014.
56. The rescheduled progress review meeting took place on 9 September 2014. The claimant was accompanied by Jim Beattie, TU representative. The claimant asked Ms Cossar to provide him with her rationale for moving his case to stage 2 of the capability process and when this decision was taken. The claimant did not consider that her answer was satisfactory and made a written request for this information in an email sent to Ms Cossar on 25 September 2014. The claimant indicated that he felt that there had been a breach of policy as he had not been treated fairly. He said that he felt aggrieved.
57. When replying to the claimant's email, Ms Cossar provided the claimant with a copy of the four findings from the disciplinary investigation in 2012.
58. The claimant wrote to Ms Cossar on 14 October 2014 requesting to raise a formal grievance because the investigation findings had never been provided to him/feedback given at the end of the investigation (and he felt that he was being misrepresented) and that written notification of the decision to move to stage 2 of the capability process had never been furnished to him. Ms Cossar acknowledge the letter on 17 October 2014 and confirmed that the request was being managed by Linda Davidson, Deputy Director of HR and Workforce Development. This was copied to Ms Patterson.

*The 16 October incident*

59. On 16 October 2014, Ms Cossar raised with the claimant a conversation that Ms Cossar had had the previous day about to the claimant's opinion at an initial child protection case conference on 15 October 2014. The claimant considered that Ms Cossar's view was predetermined. He was aggrieved about the manner in which Ms Cossar had raised the issue with him. The claimant considered that her behaviour had ramifications for his dignity at work (the 16 October Incident).

*The 2014 grievance policy*

10 60. In 2014 the respondent's grievance policy aimed to offer a constructive mechanism for all parties to air their differences and seek mutual agreement. To support early resolution of a grievance mediation by an independent third party can be sought at any stage of the procedure by agreement of both parties. Wherever possible no person who has previously been involved in any way formally or informally should sit on the grievance appeal panel.

15 61. The first formal stage normally involves the employee laying out their grievance in writing using the Grievance Notification Form which is sent to the Workforce Directorate Department who will arrange for the grievance hearing with the appropriate manager. Where appropriate investigation is carried out in line with the disciplinary policy. A written reply detailing the manager's decision, the reasons and action if any the employer intends to take will be given within 10 working days of the hearing. There is a right of appeal.

20 62. The second and final formal stage involves sharing the grounds of appeal with the manager conducting the first stage to allow then to respondent. A hearing will be arranged as soon as possible and within a reasonable timescale of the notification of the appeal to the next appropriate level of management. A written reply detailing the manager's decision, the reasons and action if any the employer intends to take will be given within 10 working days of the hearing.

63. Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended to deal with the grievance. If they are related it may be appropriate to deal with both issues concurrently.

*October grievances and dignity at work complaint*

- 5 64. On 16 October 2014 on the recommendation of his TU representative the claimant wrote to Ms Davidson raising a formal grievance about the application of the capability process enclosing 14-page document cutting and pasting excerpts from capability policy with comments about how the policy was applied to him. The claimant said he would like clarification about the  
10 application of the policy as he perceived it.
65. On 20 October 2014, the claimant wrote again to Ms Davidson with reference a dignity at work issue; the 16 October Incident which he considered to be continued mistreatment under the capability process.
- 15 66. The claimant sent a further reminder to Ms Davidson on 21 October 2014. Ms Davidson replied to the claimant by email later that day. She had been out of the office at meetings. She was not clear against whom the claimant was raising his grievance as the claimant has mentioned Ms Cossar and HR. She asked the claimant to complete the grievance form attached to the policy and send this to her to arrange for HR support. This would provide the details  
20 which would allow the process to begin.
67. The claimant was disappointed with Ms Davidson's response. He considered that he had complied with the grievance policy; the letter was adequate and acceptable within the process.
- 25 68. Nonetheless the claimant completed four grievance notification forms on 24 October 2014, 27 October and two on 28 October 2014. These grievances related to:
- a. The claimant's concerns about Ms Cossar's file audit in June 2014.
  - b. The delay in the progress review meeting in July 2014 and the conduct of that meeting.

- c. The claimant's concerns regarding escalation of the capability process.
- d. Further concerns regarding not being advised in writing that the capability process was moving to stage 2 and never being advised in review meetings of the possible outcomes of the meeting or indeed the next review date.

*Sick absence from 29 October 2014 to 22 December 2014*

69. The claimant presented at occupational health on 29 October 2012 following a discussion with Ms Cossar about a client prescription. The claimant was advised to go home and remained on sick leave. The diagnosis was stress at work.

70. The claimant was certified as may be fit to return to work between 22 December 2014 and 19 January 2015. The occupation health advice was that the claimant "could be at work doing non case load based activity". It was likely that this would require consideration from an operational perspective. The claimant sent the fit note to the respondent but received no acknowledgement.

*Suspension*

71. On 7 January 2015, Denise Moffat, Deputy General Manager, Mental Health Directorate wrote to the claimant advising that he was being formally suspended from work from 12 January 2015 on full pay (the Suspension Letter). The Suspension Letter confirmed that Adjo Forsen, Workforce Business Partner was the claimant's contact; while the suspension was a neutral act, the potential outcome following a disciplinary hearing may be termination of his employment; and the allegations against the claimant were:

- a. The claimant did not fulfil his role and the expectations of a registered practitioner during the child protection initial case conference held on 15 October 2014.
- b. The claimant did not follow the agreed service policy for the initiation of Disulfiram prescribing on 29 October 2014.



c. The claimant dictated a letter to Dr Clyde, Charlotte Medical Practice on 9 October 2014 indicating that he had recently reviewed a patient and would continue to see fortnightly whom the claimant had not seen since 30 July 2014. The review was based on a telephone conversation instead of a planned home visit agreed with the patient.

d. The claimant's record keeping did not meet the standards required by the Nursing and Midwifery Council (NMC).

72. Ms Moffat also stated in the Suspension Letter that she had hoped to be able to discuss matters with the claimant but as he did not have a personal mobile telephone or email account, she had been unable to contact him via his work mobile or his NHS email account.

73. The disciplinary allegations were raised by Ms Cossar. As the claimant had already raised grievances against her in October 2014 the respondent decided that it was appropriate to resolve the grievances before proceeding to deal with the conduct issues against the claimant.

#### *February 2015 grievance*

74. On 21 January 2015 the claimant wrote to Ms Davidson referring to his availability for work since 22 December 2014 and the recommendation from occupation health that he was able to attend meetings about his grievances that he sent in October 2014. The claimant understood from his trade union representative and occupational health that an investigator had been identified and sought clarification of this.

75. On 2 February 2015, the claimant raised a grievance about Ms Cossar's delay in sending him on 17 December 2014 the minutes of the review meeting which took place on 9 September 2014.

#### *Sick absence from 6 February 2015 to 22 June 2015*

76. On 19 January 2015 the claimant provided a fit note up to 16 February 2015 that he may be fit for work. The diagnosis was stress at work.

77. On 6 February 2015 the claimant provided a fit note stating that he was not fit to work. He remained absent until 22 June 2015 when he provided a fit note that he may be fit for work.

*Review of suspension*

5 78. Ms Moffat wrote to the claimant on 30 June 2015 saying that while the claimant's GP considered that the claimant had sufficiently recovered from ill health to return to amended duties, the claimant remained suspended from work. The claimant was advised that the suspension would be reviewed should circumstances change.

10 *Investigation of grievances*

79. For administration purposes the respondent allocates numbers to grievances that are raised. The grievances raised by the claimant were allocated the number G129.

15 80. The claimant was interviewed at length by Keith Paul, Investigation Officer accompanied by Ingrid Wilson, Senior Workforce Manager as part of an investigation into his grievance G129 on 22 July 2015 and on 29 July 2015.

81. Mr Paul and Ms Wilson also had an investigatory interview with Ms Cossar on 9 September 2015. Ms Cossar confirmed that the notes of interview were accurate on 21 October 2015.

20 *Sick absence from 7 October 2015*

82. The claimant was absent from work due to reactive depression from 7 October 2015. During this time, he was in receipt of his entitlement to sick pay in terms of his employment contract. At times when he was fit for work in 2015, he was on full pay in line with his entitlements relating to suspension.

25 *First formal stage - grievance G129*

83. On 4 May 2016 Ian Hancock General Manager Mental Health Directorate wrote to the claimant inviting him to a first formal stage grievance hearing. Also enclosed with the letter was the investigation report prepared by Mr

Keith, who had retired. The claimant was advised that Lee Rankine, Workforce Business Partner would present the investigation report. Mr Hancock would conduct the hearing supported by Ms Moffat and Laura Nisbet (Workforce Directorate). Ms Cossar would be present as a witness to answer questions. The claimant was advised of his right to be accompanied.

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84. The letter was sent to the claimant at an address that he had informed the respondent three/four week previous had changed. It was redirected by Royal Mail on 11 May 2016. A second package was sent to the claimant at his new address, but it was incomplete as the even numbers were missing. Ms Nisbet apologised for this at the first formal stage grievance hearing.

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85. This was the first opportunity the claimant had to see the investigation report. It was incomplete and missing various documents including the transcript of the interview with Ms Cossar on 21 October 2015.

86. At the first formal stage grievance G129 hearing the claimant was accompanied by Alf Hannay, his TU representative. The claimant raised with Mr Hancock his concern about the discrepancies and poor quality of the application of the grievance policy. The claimant did not consider that the investigation report reflected his grievances and misrepresented him and omitted materials pertinent to his case. The claimant had not received as he was advised that he would typewritten transcripts of all people interviewed. It was agreed that given the delay in the interest of having the process begin the claimant would bring attention to the investigation report initially and the “missing” material and supporting documentation would be considered.

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87. It was noted that the claimant’s grievance about the 16 October Incident was not addressed in the investigation report. It needed further investigation and therefore was not addressed at the first formal stage grievance G129 hearing.

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88. Ms Cossar who was asked by Ms Rankine to be a witness joined at the appropriate point to answer questions.

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*Grievances arising from the grievance G129 process*

89. The claimant wrote to Ms Davidson on 29 May 2016 enclosing two further grievances about:
- a. The delay in being provided with the investigation report.
  - 5 b. Not being given a copy of the transcript of the interviews carried out during the investigation.
  - c. The content of the investigation report which he did not consider reflected his grievance, misrepresented him and was whimsical and shoddy.
  - 10 d. The attendance of Ms Cossar at the grievance hearing to answer questions to the report and the claimant's written submissions.
  - e. Mr Hancock's lack of awareness of the claimant's written grievance and approach to the findings.
  - f. The investigation report being sent to an old address.
  - 15 g. The requirement to use the "annex A grievance format" rather than the entire breakdown of grievances in the 14-page letter sent on 16 October 2014.

*First formal stage grievance G129 outcome*

90. Mr Hancock issued his outcome by letter dated 30 May 2016. Mr Hancock  
20 agreed that there were procedural omissions in the management of the capability process. He considered that the correspondence sent to the claimant lacked detail as to the next steps of the procedure and that the claimant was not asked to sign copies of notes of meetings which added to the ambiguity regarding formality of meetings. Mr Hancock accepted that the  
25 complexity of the cases was not borne out by the figures in the investigation report but considered that the claimant had a reasonable workload. Mr Hancock was critical of the lack of clarity about the intention of the meeting on 9 September 2014 and apologised for the delay in the claimant receiving

a copy of the note of that meeting. Also, the claimant was not informed formally that he was on stage 2 of the Capability Policy until a letter dated 15 July 2013 (a letter which the claimant did not receive) and therefore the claimant was unaware for some time that he was on stage 2 of the Capability Policy. The claimant was able to demonstrate that he knew the arrangements with the meetings referred to in the letter from another source (the email dated 12 July 2013). Mr Hancock apologised on behalf of the organisation for the errors and omission and he could understand clearly how the claimant felt aggrieved with these technical procedural aspects. Mr Hancock however concluded that the management of the claimant's capability was sound in terms of capturing the spirit and intention of the policy. Mr Hancock considered that there were regular opportunities for the claimant to meet and discuss the process with Ms Cossar. The claimant was regularly kept up to date via email and notes of meetings which he had the opportunity to respond. The claimant demonstrated a willingness to participate and engage with the process which Mr Hancock considered was very encouraging. Mr Hancock advised that the claimant had a right to appeal his decision.

91. Mr Hancock retired on 31 May 2016. On Mr Hancock's retirement, Ms Moffat (who had suspended the claimant in 2015) became the General Manager of the Mental Health Directorate.

*Appeal of outcome of first formal stage grievance G129 outcome*

92. The claimant wrote to Ms Davidson on 10 June 2016 appealing the outcome of grievance G129. The appeal extended to 10 pages. It included reference to Mr Hancock failing to consider all the grievances which the claimant then said he would in the letter "endeavour to list all the said grievances" presented to Ms Davidson. The claimant disagreed with Mr Hancock's comment about the first formal stage grievance hearing being in accordance with the grievance policy and set out the grounds for this. The claimant also set out his written responses to the investigation report which he said that he would have given at the first formal stage grievance hearing had he been afforded that opportunity.

93. The claimant was advised by letter dated 24 June 2016 that his appeal would be considered on 20 July 2016 by Jeff Ace, Chief Executive who would be supported by Ms Cooksey, Workforce Director. Ms Moffat was to present the management case supported by Ms Nisbet. The claimant was advised of his right to call witnesses and be accompanied.
94. The claimant wrote to Ms Cooksey on 28 June 2016 advising that he would be accompanied by his TU representative. The claimant referred to the grievances that he had sent Ms Davidson on 29 May 2016 which had not formed part of the first formal stage grievance hearing and asked that they be considered at the grievance appeal hearing.
95. Ms Cooksey wrote to the claimant on 11 July 2016 seeking clarification whether the issues raised in the letter dated 28 June 2016 were further particulars of the original points of appeal or in relation or new and separate grievances. If the former then the matters would be considered by the panel and outcomes be determined and be final.
96. On 13 July 2015 the claimant was sent the documentation for the grievance appeal hearing. It included the note of interview with Ms Cossar and Mr Keith on 9 September 2014. This was received by the claimant on 15 July 2015.
97. By letter dated 14 July 2016 the claimant advised Ms Cooksey that he was perplexed at the level of misunderstanding and expected "all grievances will be heard and offered to resolve as per Policy". As the matters that he included in the letter of 28 June 2016 concerned the first formal stage grievance hearing invite and subsequent misrepresentations at that hearing the claimant said he expected these to be thoroughly considered when he attended the grievance appeal hearing.

*Second and final stage grievance G129 hearing*

98. At the start of the second and final stage grievance hearing on 20 July 2016, Mr Ace who was chairing the panel clarified and agreed with the claimant and his representative all matters that were to be considered. The claimant wanted all the issues he had raised up and until the second and final stage hearing to

be dealt with. Some might be on the first formal stage hearing outcome and the claimant was told that there would be no further right of appeal if they were heard at this point. The claimant agreed to this. The claimant did not raise any specific issue about the content of the note of interview with Ms Cossar and Mr Keith on 9 September 2014 despite having the opportunity for all matters to be raised and considered at that stage.

99. Mr Ace went through each of the points and the claimant was engaged in the process and conversation. No witnesses were called. The panel saw the original grievance notification documentation and obtained the recording of the first formal stage grievance G129 hearing and had parts transcribed. The second and final stage grievance G129 hearing was adjourned.

*Grievances sent on 8 August 2016*

100. The claimant sent two further grievances to Ms Cooksey dated 8 August 2015 which she received on 23 August 2015. These grievances were about the content of the notes of interview with Ms Cossar on 9 September 2014. The claimant disagreed with what Ms Cossar had said.

101. Ms Cooksey was perplexed as to why the claimant had raised additional matters relating to grievances G129 and in such a similar timeframe to his second and final stage grievance G129 hearing. Ms Cooksey had not been involved in the original investigation and therefore sent an acknowledgement on 23 August 2016 to say that she would consider how these matters would be dealt with. In her absence on leave, Ms Cooksey asked Ms Nisbet to review the grievances and provide an assessment of what matters she believed had been dealt with during the grievance process and what had not.

*Second and final stage grievance G129 outcome*

102. Mr Ace issued the second and final stage grievance G129 outcome letter to the claimant on 24 August 2016.

103. During the course of the second and final stage grievance process and hearing, the claimant raised certain matters regarding colleagues and his particular responses and reactions to issues regarding his clinical practice. Mr

Ace considered that these matters were not within the scope of the grievance process and needed to be investigated and addressed separately by management within the mental health team.

104. The claimant was not content about the outcome and wrote to Mr Ace on 8  
5 September 2016. The appendices to the letter had not been attached. This was rectified.

*Disciplinary action (D335)*

105. As the process for grievance G129 had completed, this allowed the conduct  
10 issues which had been put on hold pending the outcome of the grievances G129 to be dealt with. A significant time had passed since the conduct issues were originally raised and the claimant had been suspended.

106. Ms Moffat wrote to the claimant on 25 August 2016 advising that as the second and final stage of the grievance process was completed, she was now writing to confirm next steps.

- 15 107. She advised the claimant that it was now necessary to commence an investigation in accordance with the Disciplinary Policy, a copy of which was enclosed. The claimant was reminded of the allegations that had been set out in the letter of 7 January 2015 which had not been investigated. The claimant was reminded that the suspension that was put in place in January 2015  
20 would remain in place.

108. Ms Moffat also advised that she was asking Ingrid Wilson, Senior Workforce  
25 Business Partner, to undertake the investigation. The claimant was referred to the second and final stage grievance outcome letter in relation to the capability process. This would remain in place at stage 2 of the Capability Policy until the conduct investigation was completed and the findings had been reviewed in relation to the claimant's suspension from work. It was confirmed that the capability management would not be progressed until such time as the claimant returned to work following the conduct investigation.



*Grievances G155, G156 and G157*

109. On 8 September 2016 the raised a grievance which he sent to Ms Cooksey about having been suspended on 7 January 2015 and having no intimation or communication reflecting his status.
- 5 110. Ms Cooksey wrote to the claimant on 19 September 2016 confirming the next steps and processes in respect of the three grievances that he had recently raised her:
- 10 a. Grievance received on 23 August 2016 (dated 8 August 2016) in which the claimant was aggrieved about not receiving the investigation notes (appendix A16) which was required under the employee capability PIN. This grievance was given number G155.
  - b. Grievance received on 23 August 2016 (dated 8 August 2016) in which the claimant was aggrieved about the content of appendix A16. This grievance was given number G157.
  - 15 c. Grievance dated 8 September 2016 (received 9 September 2016) in which the claimant was aggrieved about the length of his suspension and absence of communication about his status This grievance was given number G158.
- 20 111. Ms Cooksey considered what should happen given that the disciplinary process had been taken off hold and now there were more grievances. She decided that it was appropriate to deal with grievance G155 as this was a narrow point and could be investigated and considered separately and concurrently with the disciplinary process. As G157 related to some of the matters that raised in the claimant's grievances and were matters to be
- 25 considered in his conduct case and as the conduct case was ongoing, this needed to be concluded to establish what, if any matters remained following the conclusion. In the case of G158, Ms Cooksey considered that the claimant's suspension status was an ongoing position pending the conclusion of the disciplinary process which was underway and so the appropriate point

at which to review the length of suspension and communications associated with it was at the conclusion of the suspension not midway through it.

5 112. Lynette Dickson, Inpatient Service Manager, investigated G155. The claimant was not well enough to attend for interview in late 2016. It was hoped that the investigation would be completed by 14 October 2016 given that it was the narrow point as to why it had taken so long to provide the claimant with Ms Cossar's interview statement.

113. The claimant was on sick leave from 7 October 2016 to 23 March 2017. He was on annual leave from 24 April 2017 to 28 April 2017.

10 114. Ms Dickson wrote to the claimant stating that he would be interviewed when he was when he was fit enough to attend for interview.

#### *Investigation of D335*

15 115. Ms Wilson was appointed in September 2016 to investigate the disciplinary case which was allocated the number D335. An investigation interview was arranged for 3 October 2016. It was rescheduled. The claimant did not make contact to confirm if he was attending. The claimant remained absent from work. Ms Wilson contacted the claimant by telephone on a number that Mr Hannay had read out.

20 116. On 26 January 2017 the claimant wrote to Ms Moffat (copying his TU representative and Ms Cooksey) to complain about the manner in which he was contacted by Ms Wilson when he was signed off sick from work with stress and depression. Ms Moffat replied on 22 February 2017 explaining of the need to keep in touch during an employee's absence. The claimant had not been in touch. Ms Wilson had contacted the claimant on a number read  
25 out by his TU representative. She was unaware that this was a personal telephone number.

117. The claimant had objected to Ms Wilson as Investigating Officer as she had been Mr Keith's support in the grievance G129 investigation. The respondent appointed Ms Dickson as an alternative.

118. Ms Dickson arranged to meet with the claimant on 29 May 2017. The meeting did not go ahead. The venue had been changed at the claimant's request but due to a breakdown in communication, while his TU representative attended, the claimant did not. Another date was fixed for the interviews both in relation to the grievance G156 and the disciplinary case D335 investigation.
119. The claimant attended an investigation interview arranged on 20 June 2017 but needed time to access patient information. Arrangements were made for this.
120. The claimant sent a grievance to Linda Davidson on 6 July 2017 about Ms Dickson's handling of the disciplinary investigation, and the lack of availability of patient information and a comment she made in a letter. As Ms Dickson was not at work at the time, Ms Cooksey reviewed the concerns. She considered that they appeared to be part of the disciplinary case D335 process. In her view it was appropriate that the claimant raise these issues as part of that process as to have then proceeded with separate grievances would have introduced further delays in her view. This was confirmed to the claimant in a letter dated 16 August 2017.
121. The claimant was interviewed accompanied by a TU representative on occasions (26 July and 29 September 2017). The information was obtained from Ms Cossar, Justin Murray (Service Manager, Drug and Alcohol Service), Ann Fitzpatrick (Nurse Nonsultant, Public Protection, (Children and Adults)); the E-Case note patient record system; and David Hall, Clinical Director.
122. Ms Dickson prepared an investigation report dated 6 December 2017.

### *Retirement*

123. Ms Cossar retired from the services of the respondent on 29 August 2017. Mr Murray had taken over her role as Service Manager in 2016. Ms Patterson, who had supported Ms Cossar in the early stages of the management of the claimant's capability and conduct cases, also retired from her role in October 2017.

*Investigation of disciplinary case D366*

124. The second conduct issue arose from an investigation into the first issue. The new issue was allocated number D366. It was about the claimant sending confidential patient information on an insecure personal email address. Gail Meier, Lead Nurse and Deputy General Manager for Acute Services, was appointed to investigate the matter. The claimant was advised of this by letter on 12 October 2017.

125. An interview took place on 12 October 2017 but was terminated. A further interview was delayed to allow the claimant more time.

*Further grievances including G175*

126. The claimant sent three more grievances on 20 October 2017. The first related to the wording of one of the allegations in D335 which he said had changed. Ms Moffat had provided an explanation for this in a letter to the claimant dated 11 August 2017. Ms Cooksey decided that this issue could be addressed in the ongoing disciplinary case D335.

127. The second was that the claimant should not be undergoing a disciplinary case in relation to record keeping as he had been told that there would be an amnesty in relation to this. Again, Ms Cooksey decided that this issue could best and most timeously be addressed by him in submissions as part of the ongoing disciplinary case D335.

128. The third related to the 2012 capability process. Ms Cooksey considered that all issues in relation to this should have been concluded with the second and final grievance G129 hearing. However, there was now a specific issue raised by the claimant that Ms Cossar had lied in relation to a letter dated 15 July 2013. Ms Cooksey considered that this was a serious allegation of lying by a senior manager and because of that she decided that the Board would look into this via a review of the relevant papers held on grievance G129. Ms Cooksey hoped that by so doing, the claimant would get closure on the capability issues that the claimant felt aggrieved about for the previous four years by reviewing the grievance G129 papers on this point.

129. However, given all the other issues that were ongoing and the fact that HR and managerial resources were already devoted to dealing with other aspects of the claimant's case, Ms Cooksey decided that the review should take place once the other matters had been concluded. Ms Cooksey said that she would monitor the other cases and once the claimant once there was sufficient capacity and focus to undertake the review. This grievance was given the number of G175. This was confirmed to the claimant in a letter dated 11 November 2017.

*First formal stage grievance G155 hearing*

130. On 16 November 2017, Linda McKechnie Lead Nurse wrote to the claimant following the first formal stage hearing of grievance G155 on 14 November 2017. Ms McKechnie confirmed that the grievance was upheld. She formally apologised on behalf of the Board for not being given a copy of the notes of the interview with Ms Cossar's in connection with grievance G129. The claimant should have been given a copy for the grievance G129. Ms McKechnie apologised on behalf of the Board for any undue stress, anxiety or inconvenience this any have caused. The claimant asked why he had not received a copy with the investigation report for G129. Ms McKechnie said that it seemed to have been an administrative oversight.

*Continued investigation in disciplinary case D366*

131. Ms Meier continued to arrange to meet with the claimant. The claimant had sick absence and then intended to take annual leave in January 2018. The claimant's TU representative, now Stephen Hare advised Ms Meier that the claimant preferred to submit a written response as an alternative to an interview which was allowed. The clamant provided a response which was appended to the investigation report of disciplinary case D366.

132. In January 2018, the investigation into disciplinary case D366 was completed. The claimant had stated during the investigation that it appeared irrefutable on perusal that he did indeed send emails from his nhs.net email address to his own personal yahoo email account. His memory did not allow after such a long time to recall precisely why he would have sent those emails. He

assumed that he had been working on finalising work and sent the papers to his own email address not realising that elsewhere on the same file was his case load.

- 5 133. The claimant was advised on 12 January 2018 that the investigation report in disciplinary case D366 was being sent to Ms Moffat for review and to determine appropriate action.

*Further grievances*

- 10 134. Ms Forsen wrote to the claimant on 20 February 2018 confirming that his annual leave request for 19 March 2018 to 6 April 2018 had been approved by the claimant's manager, Justin Murray. Confirmation of the claimant's annual leave entitlement was also provided.

- 15 135. On 9 March 2018, the claimant wrote to Ms Cooksey advising of a change of address; raising concerns about breach of data protection by correspondence being set to multiple addresses; and complaining about the poor level of support from Ms Forsen's during his suspension. He also complained about the delay hearing from Ms Davidson and was critical of Ms Cooksey. The letter was copied to Mr Ace and Mr Hare.

- 20 136. Ms Cooksey was on leave and wrote to the claimant on 30 March 2018 confirming that Ms Forsen's line manager would respond to the concerns that had been raised regarding her. Ms Cooksey asked for clarification as to whether the claimant was raising grievances against her. If so, she would pass the matter to her line manager Mr Ace. Ms Cooksey said that if the claimant was not raising a formal grievance against her she would continue to work with him. She did not feel that continuing letter correspondence was  
25 achieving resolution for the claimant so she would plan to meet with him to discuss the situation and seek to reach a shared understanding of the position and support him. Ms Cooksey asked for a reply by 13 April 2018. None was received.

137. The claimant was on annual leave between 19 March 2018 and 6 April 2018.

*Disciplinary case D355 and case D366 proceedings*

138. In the meantime, Nicole Hamlet, General Manager within Acute Services, was asked to chair the disciplinary hearings as the investigations had concluded. Ms Hamlet had no previous involvement. She was senior General Manager with the experience of chairing hearings relating to employee conduct. She had also had experience in HR and was familiar with HR processes and chairing more complex hearings. She was to be supported by Pamela Jamieson who was the Head of HR.
139. Ms Hamlet considered the investigation reports and concluded that both cases could be considered at the same hearing. She was surprised at the duration of the claimant's suspension.
140. Ms Hamlet wrote to the claimant on 13 March 2018 proposing that a disciplinary hearing take place on 29 March 2018. The claimant was to be on annual leave on that day, so another date was arranged. The next date that could be arranged was 21 June 2018. Ms Hamlet wrote to the claimant to advise him of this on 12 June 2018. She explained that the potential outcomes were either no case to answer; informal action was required; or that a formal disciplinary sanction was required.
141. The disciplinary hearing did not go ahead. The claimant provided significant information. The panel, consisting of Ms Hamlet, Ms McKechnie, who was providing professional nursing advice and Ms Jamieson reviewed all the documentation provided by the claimant in conjunction with the investigation reports. The claimant was then absent on sick leave.
142. Ms Hamlet became aware that much of the information referred to previous grievances in which she had not been involved. In relation to the misconduct allegations, Ms Hamlet noted that there were a number of people involved in initial investigations who were no longer employed by the respondent. The ability to substantiate what had happened and question people was compromised.

143. In relation to disciplinary case D335, Ms Hamlet concluded that without Ms Cossar, there was limited information with regards to the poor record keeping allegation. She also felt that the allegation in respect of drug usage found that there was no protocol in place at the time. Ms Cossar's written submission was quite limited. Ms Hamlet decided that disciplinary case D335 should not proceed.
144. Ms Hamlet considered that the information in disciplinary case D366 was more substantial and that should proceed subject to the claimant being fit enough to attend. Ms Hamlet had been told that the claimant had not attended the last OHS review and wanted to encourage him to do so.
145. Ms Hamlet wrote to the claimant on 2 August 2018 advising him of this. She proposed a meeting with the claimant either before or after the hearing for disciplinary case D366 to bring the process to a close. Ms Hamlet was trying to engage with the claimant. He had been suspended for a number of years and she wanted to try and move matters forward. Ms Hamlet was aware that the claimant was on sick leave at the time and encouraged him to contact occupational health to determine if he was fit to take part in meeting or a disciplinary hearing. The letter was copied to Mr Hare.
146. Ms Hamlet also spoke to Mr Hare who advised that the claimant wanted to get everything out of the table. She did not hear from the claimant but understood from occupational health that the claimant had not been fit enough to participate in any form of hearing.
147. Ms Hamlet wrote again to the claimant by letter dated 18 January 2019. She confirmed that disciplinary case D335 was not proceeding although there would still require to be a disciplinary hearing in respect of disciplinary case D366. She understood that the claimant was not fit to take part in any process when she last wrote but understood the claimant was seeing occupational health at the end of the month. Ms Hamlet reiterated her offer in her earlier letter and explained her thoughts that she could work with the claimant to review all the different processes surrounding his employment and concerns that he may have so that he could make sure that they were dealing with the



right things at the right time by the right people. She considered that this would give an equal understanding of what grievances had already been heard and what decisions had been delivered, for issues still to be dealt with and then seek agreement on how that would be achieved and by whom. She stated that as disciplinary case D335 was closed, there was a need to review his suspension and she would like to discuss that with him. She reiterated she was keen to work with the claimant to move the current situation forward and that they work together to achieve this.

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148. Ms Hamlet received a response from the claimant advising that he would be on holiday from 23 January to 8 February 2019. He also wanted to discuss matters with his representative regarding the decision that had been made in the letter of 2 August 2018. The claimant stated that at the time, he was unable to make a full and informed reply to Ms Hamlet regarding proceedings which he would be prepared to undergo in respect of the issues that Ms Hamlet touched on in her letter of 2 August 2018.

149. Ms Hamlet was copied a letter from Cathy Baty, Specialist Practitioner in Occupational Health at the end of January 2019 advising that the claimant remained vulnerable and was able to participate in meetings with supported accommodations previously detailed. She said that the claimant was reluctant to meet until there was clarity around the organisation's position. He sought clarity regarding what issues are concluded and what processes remain outstanding. She suggested a pre-arranged agenda and for the claimant to write identifying his specific concerns.

150. Mr Hare wrote to Ms Hamlet on 27 February 2019 saying that having spoken to the claimant, he understood that the claimant wanted the disciplinary case D366 to conclude before dealing with the outstanding grievances. Mr Hare considered that dealing with the disciplinary case D366 would be a starting point.

151. Ms Hamlet spoke to Ms Baty and appreciated that the claimant's mental health had been impacted. Ms Baty had built up a positive relationship with the claimant and Ms Hamlet wanted Ms Baty to help build confidence in the

process including giving an opportunity to support the claimant from an emotional wellbeing point of view.

*Disciplinary case D366 hearing and suspension*

152. Ms Hamlet scheduled the hearing for disciplinary case D366 on 15 May 2018.

5 153. Although Ms Hamlet had communicated that she wanted to discuss the claimant's current suspension status in her letter of 18 January 2019, there had been no discussion with the claimant. She was aware of the information provided by occupational health and Mr Hare that the claimant wanted to get back to work. Before the disciplinary hearing the panel discussed lifting the suspension; the panel considered that it was important to discuss this with the claimant as soon as the conduct issues concluded on the day of the disciplinary hearing. The panel recognised that there would need to be an assessment by occupational health and a plan in place for his return which would involve engaging with the claimant's line manager.

10 154. At the disciplinary hearing on 15 May 2019 in addition to the panel, Ms Meier presented the investigation report along with Margot Martin, Lead HR adviser. The claimant was accompanied by Mr Hare. Ms Baty also attended for support the claimant.

15 155. Disciplinary case D366 was about the claimant sending to his own personal unsecured email address, emails from his NHS address which contained confidential patient information. The claimant accepted that he had done this. He had not responded to written questions about his knowledge of the respondent's email policy. He accepted that as a nurse of 27 years' experience he knew what he should and should not do with emails and patient information. Given the length of time the claimant could not recall why he had done this.

20 25 156. Ms Hamlet concluded that that the claimant had breached patient confidentiality by sending patient information to his unsecured email account. The claimant knew that this was something that should not have been done.

In doing so, the claimant had breached the respondent's policy on acceptable use of email.

157. Ms Hamlet then considered what was an appropriate sanction. While the claimant could not recall why he had sent the emails, in the statement he provided to the investigator, he did provide mitigating circumstances. This related to him having to leave the office to attend a meeting and he wanted to do some further work from home. Ms Hamlet also took into account the time it had taken to get to a hearing and his total NHS service. Ms Hamlet considered that it was relevant that he had not shared the information with anyone else. Taking all of this into account, she decided to issue a first and final warning to be recorded for 12 months. She considered that merited rather than simply a warning because the claimant was a senior nurse and knew that he should not have done so. This was not a one off but something he did on five occasions over a four-month period.

158. Ms Hamlet advised that the claimant that she was lifting the suspension with immediate effect. She asked Ms Baty to assess the claimant's fitness to work for a planned return to work on 17 June 2019. If the claimant was unfit, then sick lines would need to be submitted. The time frame would allow the claimant's line manager, Mr Murray to formulate a return to work plan. The claimant was asked to consider what steps were needed to ensure that his NMC registration was in place given the length of his absence. Ms Hamlet did not know nor did the claimant advise her that he had not maintained his resignation. Ms Hamlet's impression was that the claimant seemed fairly positive about a return to work and that Ms Baty and Mr Hare were keen that he engage with the process to get him back to work.

*Disciplinary case D366 outcome*

159. Ms Hamlet wrote to the claimant on 16 May 2019 confirming the decision in disciplinary case D366.

160. Regarding the claimant's return to work following the lifting of the suspension Ms Hamlet advised that after the disciplinary hearing, Ms Hamlet had spoken to Alice Wilson, Deputy Director of Nursing for support about the return to

work plan to ensure the claimant's return to practice went well. Ms Hamlet set out in detail how the return to work was envisaged including the need for a period of time to refresh competencies; the length of time, the support that he would receive and what the claimant needed to demonstrate. Ms Hamlet confirmed that Mr Murray was the claimant's key contact.

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161. At the end of the letter, Ms Hamlet said that she wanted to meet with the claimant (and Mr Hare subject to the claimant's confirmation) to discuss the claimant's outstanding grievances/issues to agree a way forward. That meeting was to be arranged within the next four to six weeks, subject to the claimant being fit to attend.

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162. The letter concluded advising the claimant of his right to appeal the decision.

*Appeal of disciplinary case D366 outcome*

163. On 22 May 2019, the claimant wrote to Ms Cooksey advising that he wished to appeal the outcome in disciplinary case D366. Due to Mr Hare's holiday commitments, the claimant advised that this could not be discussed until after the week commencing 10 June 2019.

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*Outstanding grievances G157, G158 and G175*

164. On 31 May 2019, the claimant wrote to Ms Cooksey seeking an explanation why he had not as yet allocated his outstanding grievances presented and acknowledged as far back as 14 October 2014. He referred to the grievances numbered by Ms Cooksey that continued to remain unheard as G157, G158 and G175 "to name but a few".

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165. Ms Cooksey was on annual leave and received the letter on 11 June 2019 when Ms Cooksey replied confirming that she would review the case and liaise with Mr Hare to discuss the process and grievances to be taken forward.

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*Capability process and suspension*

166. On 1 June 2019, the claimant wrote to Ms Moffat seeking clarification of his status under the capability process. He expressed his disappointment that he had not heard from Ms Moffat as his line manager regarding the removal of

his suspension given that she was the one who had suspended the claimant in the first place. The claimant also referred to his outstanding grievances and the fact that he had continued to feel aggrieved at the process that he had to endure and that he “feared for his safety” within any return to the workplace under the Workforce Business Directorate and informed her that he was appealing against the decision in the disciplinary cases.

*Follow up by Ms Hamlet*

167. Ms Hamlet and Ms Jamieson were unaware of the claimant’s letters dated 31 May 2019 and 1 June 2019.
168. Ms Hamlet knew that the claimant had appealed her decision. She considered that the grievances were separate from his appeal and it was still appropriate to have a meeting to discuss how to take matters forward. She had been notified that the claimant had not attended two appointments with occupational health. Another appointment was scheduled for the week commencing 10 June 2019.
169. Ms Hamlet wrote to the claimant on 7 June 2019. As the claimant’s suspension had been lifted and he was absent from work due to ill health, Ms Hamlet considered that it was appropriate for his absence to be managed by his direct line manager, Mr Murray. She was concerned that the claimant had not attended the occupational health appointments and urged him to do so.
170. Ms Hamlet asked the claimant to confirm if he wished to wait and deal with the outstanding grievances after the appeal hearing or proceed with a meeting to discuss the way forward with the outstanding grievances.

*17 June 2019 to 31 July 2019*

171. On 17 June 2019 the claimant wrote to Ms Moffat seeking a reply to his letter of 1 June 2019. He had attended occupational health who despite the claimant’s request had not been copied into correspondence. He provided a sick line for the period 17 June 2019 to 31 July 2019. He said that he felt ostracised by Ms Moffat removing his HR point of contact (Ms Forsan) without any replacement was an act of neglect by omission.

172. The claimant's letter crossed with Ms Moffat's letter of 19 June 2019, stating her understanding from the disciplinary case D366 outcome letter that had been sent to her was that the suspension had been lifted. Mr Murray would work with the claimant and occupational health colleagues to support and enable a safe return to work. Mr Murray was to be asked to make an occupational health referral to advise when the claimant was fit to attend and also to advise what support is needed to facilitate the claimant's safe return. If the claimant was not fit then he required to submit fit notes to Mr Murray going forward.
173. In relation to the status of the capability process given the length of time that had passed, Ms Moffat said that she would rather focus on the support for the claimant's return to work. Therefore, no further action will be taken in relation to the previous stage 2 capability process. Ms Moffat noted that the claimant had copied to her letter to Ms Cooksey dated 31 May 2019. She also noted that Ms Hamlet "intends to discuss with you how your outstanding grievances can be heard".
174. Ms Cooksey met with Mr Hare. They discussed and agreed that the best way forward would be for all outstanding grievance to be handed over to Ms Hamlet. On 1 July 2019, Ms Cooksey wrote to the claimant advising that she had agreed with Mr Hare that all outstanding matters raised in correspondence with her would be passed to Ms Hamlet "for consideration and action".
175. As their correspondence (dated 17 June 2019 and 19 June 2019) had crossed Ms Moffat confirmed in a letter to the claimant dated 3 July 2019 that the grievances were being progressed. The fit note had been passed to Mr Murray and any future fit notes should be sent to Mr Murray who would be contact the claimant going forward.
176. On 11 July 2019, Ms Cooksey wrote to the claimant advising that she had been informed that the claimant was not being represented by Unison at the appeal hearing. She asked if the claimant wished to proceed unrepresented

on 17 July 2019; proceed and have secured alternative support; or wish a postponement.

5 177. On 19 July 2019, Mr Murray wrote to the claimant advising that he had been aware that the claimant was currently off on sick leave but it was expected that he would be returning to work in the coming weeks. Mr Murray also confirmed that he had assumed line manager responsibilities for the claimant's post. He welcomed an opportunity to discuss planning on any support the claimant required for a return to his workplace. Mr Murray advised when he would be on annual leave and confirm that out with those times, he would be contactable by telephone or a one to one meeting. The letter was correctly addressed. The claimant did not receive it.

10 178. Following a telephone call between the claimant and Arlene Melbourne, Ms Cooksey's Executive Assistant, Ms Melbourne advised that as the claimant had requested that the appeal hearing be rearranged so that he could secure alternative supporting representation, it was now rescheduled for 17 September 2019. The appeal panel was to be Katy Lewis, Director of Finance, and Alice Wilson, Deputy Nurse Director. They were to be supported by Ms Cooksey. The management case was to be presented by Ms Hamlet and Ms Jamieson.

15 179. On 29 July 2019, Ms Baty wrote to Mr Murray advising that the claimant was unwell with work related stress and this was likely to be the case until his appeal and grievances were concluded. Ms Baty was to have a further review with the claimant in one month's time.

20 180. On 31 July 2019, the claimant wrote to Ms Melbourne withdrawing his appeal because of the prolonged length of time involved and the negative impact on his health.

#### *Attendance management policy*

25 181. The respondent's attendance management policy provides that the respondent has a legal right to contact an employee if they are absent due to illness. Managers must therefore maintain reasonable contact with absent  
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employees. Employee must provide a valid contact telephone number or a valid email address. The minimum period of contact for a long term absence is once every month. Where there is agreement, more frequent contact can be maintained. Managers must always act sensitively and with consideration for the nature of the illness when in contact with an employee.

*August 2019*

182. Having had no response to his letter of 19 July 2018, Mr Murray wrote to the claimant on 12 August 2019 asking if he would get in touch and provide him with an up to date contact telephone number. Once this had been received, Mr Murray proposed contact the claimant to ascertain how he was and if there was anything that could be done to support him. Mr Murray proposed to arrange a one to one catch up to agree a way forward. Mr Murray was unaware that the claimant had not received the letter dated 19 July 2019. Mr Murray knew that occupational health was reviewing the claimant by telephone. He was not sure where the claimant was living or based.
183. The claimant wrote to Ms Cooksey on 13 August 2019 while she was on annual leave. The claimant advised that he expected due process to be followed. He was waiting for the appointment of a panel to investigate his outstanding grievances "sisted by" Ms Cooksey some time ago. He did not consider that it was appropriate to wait for the appeal hearing. In any event the appeal had been withdrawn. He said that he had received no reassurance for a safe return to the workplace. He was looking forward to a safe return to work after the "outstanding numbered (by [Ms Cooksey]) grievances and the remaining grievances (which [Mr Hare] had told [the claimant] were in a folder within [Ms Cooksey's] department) were all heard'.
184. On 19 August 2019, the claimant wrote to Ms Moffat. The letter was copied to Ms Cooksey. The claimant complained about Ms Hamlet's continued involvement and her handling of the disciplinary issues. He considered Ms Hamlet's suggestion to meet regarding anything but that which she was appointed to do as Chair of the D366 was "preposterous in the extreme". He had no reassurances about hearing his "numbered and outstanding



grievances to date.” He was not reassured about returning to a safe workplace amongst management that he could trust. The claimant asked for a copy of the grievance policy and an opportunity to have heard his “numbered grievances G157, G158 and G175 and outstanding unheard grievances at the earliest opportunity.” He asked that the suggested panel set for 17 September 2019 appeal hearing be adopted to expedite matters and allow a safe return.

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185. On 22 August 2019, Mr Murray wrote to the claimant asking for a contact number in respect of his sick absence and planned return to work.

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186. The claimant received Mr Murray’s letters dated 12 and 22 August 2019. He responded by a letter dated “August 2019” (copied to Ms Baty, Ms Cooksey and Ms Moffat) which was received by Ms Cooksey on 2 September 2019 and Mr Murray on 5 September 2019.

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187. The claimant asked how long Mr Murray had been in post as his line manager and why he had not been informed when this occurred and any explanation for the delay. The claimant said that he perceived the tone of Mr Murray’s communications to be antagonistic and there was an implied threat in the second letter. The claimant was putting Mr Murray’s actions down to “lack of managerial acumen, rather than compare your actions to the despotic behaviours displayed by previous line managers who bullied and harassed” him. The claimant considered that Mr Murray was unaware of his outstanding grievances, which until dealt with through due process and in accordance with policy he would not feel safe to return to the workplace. The claimant reiterated that he could not return to an organisation that continued to deny the hearing of “numbered grievances (G157, G158 and G175) along with other outstanding matters.

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### *September 2019*

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188. Ms Baty wrote to Mr Murray by letter dated 2 September 2019 advising that she reviewed the claimant by telephone. He remained unwell and absent with work related stress and this was likely to last until his grievances were resolved. He was unhappy as he had not had any communication as to how this was progressing. Ms Baty hoped to engage with the claimant by

telephone in a month. She said that the claimant found, “any contact from [the respondent] very distressing, including from occupational health”.

189. Mr Murray considered that the claimant’s letter was disrespectful and derogatory personally and professionally. He replied by letter dated 16  
5 September 2019. He confirmed that he was appointed Service Manager on 2 April 2016. He was made aware that the claimant’s suspension was lifted and was making contact in accordance with the respondent attendance management policy to which he referred. Mr Murray stated that his preferred method of contact was telephone in the first instance which occupational  
10 health confirmed that from a health point of view would be appropriate in the circumstances. It was important to have regular contact. This was important to prepare for the claimant’s return to work so that it was supported and planned well in advance.
190. Mr Murray said that he appreciated the claimant’s point of view, that there  
15 were grievances that required to be resolved before he returned to work. This was consistent with the information that Mr Murray had received from occupational health. Mr Murray hoped that the grievances would be heard as soon as possible. While he had no involvement, he would stress to those concerned the impact this was having on the claimant’s return to work.
- 20 191. Mr Murray considered that a telephone contact would be the most convenient way to keep in touch. If the claimant did not have a telephone contact number, he asked the claimant to let him know his preferred way of keeping in touch by 2 October 2019. Alternatively, they could meet in person.
192. On 23 September 2019, the claimant sent a letter of grievance to Ms Moffat  
25 (copied to Ms Cooksey) complaining about Mr Murray’s harassing behaviour towards him.
193. Having been copied the claimant’s letter to Mr Murray, Ms Cooksey asked Ms  
30 Jamieson to respond to the letter providing an update. Ms Jamieson did so by letter dated 24 September 2019. She noted that Mr Murray had replied separately. Ms Jamieson listed the correspondence over the previous 13 months. She said that the claimant had been given a route by which to

progress the grievances: by meeting with Ms Hamlet but continued to write to Ms Moffat and Ms Cooksey. He also complained about Mr Murray's lack of background knowledge. However, Mr Murray was not provided with the background to the case as it was deemed confidential. Mr Murray's focus was to engage with the claimant on supporting his return to work. Ms Jamieson said that the claimant was failing to make contact with those appointed to move things forward and instead continuing to engage with those not involved.

194. Ms Jamieson noted that the claimant said that the respondent was failing to support him. However, he was not engaging in the processes offered to him in an attempt to move forward the situation recognising the length of time these processes have been ongoing. Ms Jamieson said everyone agreed about moving forward. She would contact Ms Baty about the claimant's fitness to attend a meeting with Ms Hamlet. The purpose of the meeting was to

- a. Discuss the various grievances to date and establish what stage they are at: investigation, first stage or final stage.
- b. Agree what process still required to be progressed.
- c. Agree who will conduct the investigation that require to be conducted.
- d. Agree where possible who may hear any outstanding grievances.
- e. Anything else the claimant needed to discuss.

195. Ms Jamieson confirmed that she and Ms Hamlet were aware of grievances G129, G155, G157, G158 and G175. The claimant had alluded to other matters of which they were not aware and would welcome discussing.

*October 2019*

196. In a letter dated "October 2019" the claimant wrote to Mr Murray enclosing his fit note for October 2019. The claimant also advised that he was raising a grievance against Mr Murray about his behaviour. The claimant said that Mr Murray was evading questions about when he knew that the suspension was lifted. He had written to Ms Baty about her confirming telephone was the first

option. The claimant asked for a full copy of the respondent's attendance management policy.

197. The claimant wrote to Ms Cooksey. The letter was erroneously dated 4 September 2019. It was received by Ms Cooksey on 7 October 2019. The heading in the letter stated, "This is to be considered a grievance letter". The letter asked who would be appointed to investigate his "grievances and other issues which include grievances presented throughout the years since [his] G129 appeal hearing held by Mr Ace in July 2016".
198. The claimant referred to harassment by Mr Murray. The claimant also referred to further harassed by a letter from "one of your minions, a P Jamieson, who appears to have taken it upon herself to put her opinion into the mix". The claimant criticised why he had not been informed of Ms Jamieson's involvement. The claimant reiterated that he was clear in all communications about what he considered in line with policy to the effective resolution to his issues in the outstanding matters. The claimant accused Ms Jamieson's letter of being unwarranted and unsubstantiated and considered that it was proof that there was no communication as the claimant had already objected with good reason to the suggestion of involving Ms Hamlet in the investigation of the grievances. The claimant recalled that Ms Jamieson was the HR support for Ms Hamlet at the disciplinary appeal.
199. The claimant also complained about the failure to follow policy. In particular Ms Cooksey's continued sanctioning of Ms Hamlet "as a possible hearer of [the grievances] and outstanding matters". The claimant said that this was not an option "per policy". He continued to await the appointment of investigators who are appropriately chosen as non-biased and non-judgment of his grievances.
200. The claimant advised that he was having Mr Hare's alleged representation of his case investigated by Unison and therefore he asked that Ms Cooksey cease copying letters to Mr Hare. He asked that letters to him be copied to the "Unison Branch".

201. As Ms Cooksey was going on leave, she sent an initial acknowledgment. Ms Cooksey expressed concerns about the language the claimant had used in relation to Ms Jamieson as Ms Cooksey felt that it was disrespectful, inappropriate and that it had to be highlighted to the claimant at the earliest opportunity.
202. On 7 October 2019, Mr Murray wrote to the claimant acknowledging the fit note. He asked the claimant to provide a written update every second Friday from 18 October 2019. The information provided was at the claimant's discretion. Mr Murray said that it would be helpful to have a general summary of his current sickness, any progress made and if there was anything Mr Murray could do to support the claimant's return. A copy of the respondent's attendance management policy was enclosed.
203. A further letter of grievance dated 8 October 2019 regarding Mr Murray was sent to Ms Moffat and copied to Ms Cooksey. The claimant said that Mr Murray had lied to the claimant regarding the advice that he had received from occupational health. The claimant said that Mr Murray's autocratic style of management did not help build a platform for his safe return to a workplace already fraught with dangers.
204. Ms Cooksey sent a letter dated 9 October 2019 to the claimant. Ms Cooksey highlighted both the seriousness of the allegations that had been made against Ms Hamlet and Ms Jamieson and the language that had been used which was defamatory and disrespectful. Ms Cooksey confirmed her intention to engage with them and others on the issues to make a preliminary assessment and determine if a fuller investigation is required in accordance with the policy framework. Ms Cooksey would revert to the claimant on this by the end of October. Meantime the respondent's position was that Ms Hamlet would consider the grievances with the claimant pending the outcome of Ms Cooksey review.
205. Ms Moffat wrote to the claimant on 11 October 2019 acknowledging the grievances that he had sent to her on 23 September 2019 and 11 October

2019. She said that an invitation letter would be sent in due course with the arrangements for a hearing.

206. Mr Murray received a further letter on 18 October (dated 16 October 2019) in which the claimant asked why he had not been advised any earlier that Mr Murray was his line manager, why he had not made a referral to occupational health when Mr Moffat had said that she was asking Mr Murray to do this. The claimant said that the only reason he was not coming back to work was that it was not a safe environment and that it would not be if policy was not followed and his grievances not investigated.

207. Ms Hamlet was provided with a copy of the claimant's letter to Ms Cooksey dated 4 October 2019. Ms Hamlet was taken aback by the letter. She had hoped to understand what had been heard, what was outstanding and if there was anything missed. She felt that it would have been useful to meet the claimant. She had been trying to facilitate or mediate the claimant's return to work.

208. On Ms Cooksey's return from holiday, she received a letter from Ms Hamlet dated 23 October 2019. Ms Hamlet advised that in light of the comments made by the claimant in the correspondence and the lengths that Ms Hamlet had gone to try and move things forward, Ms Hamlet felt that she had to withdraw her offer of support to the claimant. Ms Cooksey was disappointed but understood Ms Hamlet's position.

#### *November 2019*

209. Ms Cooksey was perplexed as to what, if anything more she could do to address matters given the number of people who had previously been involved who were no longer able or willing to engage with the claimant. She sent the claimant a holding response.

210. Ms Cooksey reached the conclusion that despite all efforts, the standard policy and process approach that she had been seeking to follow throughout previous years was not working and a continuation of this approach was highly unlikely to resolve matters. She felt that it was her responsibility to find a way to move the claimant and the organisation beyond the current level of

process frustration. Ms Cooksey took a highly unusual approach and decision for her, after reflecting on the continuing stress and challenge that the case was having on the claimant and others involved. Ms Cooksey decided to offer the claimant a process of internal mediation facilitated by a mediator external to the respondent.

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211. Ms Cooksey wrote to the claimant by letter dated 5 November 2019 (the 5 November Letter) enclosing a copy of the up to date grievance policy which would be used as a guide to process from this point. She confirmed that the claimant's letter dated 4 September 2019 (received on 7 October 2019) would be allocated case number G203. Ms Cooksey noted the letter raised concerns about her. This might limit her involvement in some aspects but she would continue to try and support the claimant and management to find a way forward to reach a resolution of the outstanding grievances and also facilitate the claimant's return to work. Ms Cooksey acknowledged that while Ms Hamlet and Ms Jamieson had her full trust and confidence in undertaking and completing a process review of all the claimant's outstanding grievances fairly and in accordance with the respondent's policies and standards that was not shared by the claimant.

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212. The 5 November Letter stated that the purpose of the mediation was to establish the process and material matters for consideration in a subsequent grievance investigation. It was confirmed the mediation was not intended to address the materiality of the grievances themselves. It was an attempt to address the claimant's express concern regarding his loss of trust and confidence in officers in the wider organisation. Ms Cooksey offered that mediation would be conducted by a mediator out with the respondent. She said that for mediation to be successful it required that claimant's full agreement to participate and his active and constructive participation during the process.

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213. Ms Cooksey asked the claimant to confirm his decision to engage or not in the proposed mediation within 14 days. Ms Cooksey did not receive a response from the claimant.

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214. On 15 November 2019, Mr Murray wrote to the claimant having taken HR advice responding to the questions raised. Mr Murray confirmed that he was content with the claimant updating once a month rather than twice a month at the same time he submitted his fit notes. Mr Murray considered that this was a reasonable compromise. That decision was also supported by occupational health.
215. Mr Murray also confirmed that he was aware of the claimant's suspension being lifted in mid-June 2019 when the claimant's line management was transferred to him. Mr Murray knew from that point the claimant was in contact with occupational health from whom Mr Murray was awaiting a summary about the claimant's fitness to return to work. Mr Murray then had a period of leave.
216. The claimant felt that he had been treated unfairly by the respondent. He considered the respondent had repeatedly refused to address his numbered grievances. He considered that suggesting mediation was required was untenable. The claimant felt that the respondent was "kicking the proverbial can further down the road". His mental health had deteriorated. He considered the respondent had denied due process in all its facets and intentions. He believed the respondent failed to follow both their grievance policy and not addressing any of his numbered grievances. He considered this to be unfair and unreasonable.
217. The claimant said that this was the last straw for the claimant. He sent his letter of resignation dated 28 November 2019 (the Resignation Letter).
218. The Resignation Letter was addressed to Mr Murray. The claimant gave 23 reasons for resigning:
- a. Failure in exercising a duty of care by not providing an annual appraisal since last recorded in 2009 having discriminated against him in completing the same with two other band 7 colleagues within the drug and alcohol policy in NHS Dumfries and Galloway;



- b. Removing the claimant from his substantive post on 29 July 2013 without any explanation or rationale for this decision and failing to provide the finding of the investigation.
- c. Failure to follow the capability policy in a fair and consistent manner breaching policy;
- d. Failure to review the claimant's status within the capability policy which had been ongoing from 29 July 2013 and has never had a review date;
- e. Extremely unreasonable extrapolation of due process which is ongoing without explanation;
- f. Condoning the actions of a bully, in supporting line management, the failing to investigate complaints registered with the respondent;
- g. Failure to register my fitness to work with pay office on 22 December 2014 leading to a threatened reduction of pay before actually due date;
- h. Failure to review his status under D335 at any time. Allowing these unfounded allegations to hang over the claimant for three and a half years at a time when his mental and physical health was affected;
- i. Defining his character through fabrication of allegations which contradict Scottish Government policy regarding his input at child protection meetings;
- j. Making scurrilous allegations of misconduct regarding a prescription which the responsible medical officers assigned condoned in circulation;
- k. Deploying an audit as a serious allegation against his practice which had been exonerated over a year before attributing this allegation, the status of a threat to his nursing career using midwifery council standards and threatening his nursing practice with an audit which had been amnestied;

- l. Consistently refusing access to requested documents necessary to reply to allegations;
- m. Failure to allow mitigation from case D335 to be used in case D366;
- n. Changing the wording of an allegation from involving a policy which did not exist to a protocol in order to establish claims against his practice which were untenable;
- o. Refusing to have grievances heard alongside the allegation against his practice which would have shone a clarifying light in matters, then choosing to hear other grievances alongside allegations (numbered by G155) thereby not following the grievance policy;
- p. Failure over many years to address grievances per the grievance policy;
- q. Breaching data protection, posting mail to an address changed by the claimant allowing the general public open access to his data;
- r. Failures of duty of care regarding updating his status while under a capability process;
- s. Failures in promptly dealing with the grievances leading to the eventual loss of opportunity to revalidate with the nursing midwifery council. As a consequence, it was impossible for the claimant to practice nursing.
- t. Coercing the claimant to accept suggested parties to deal with outstanding issues who were involved in disciplinary matters and in breach of policy despite letters of protestation;
- u. Failure to review suspension from work status for four years and four months claiming to have intention to have done this however failing to exercise his option albeit scope and duty were there to do so;
- v. The failure to consider deployment to an alternative posting to allow nursing registration to continue validating;

w. Failure of a duty of care by ignoring mental health status throughout and not having issues resolved promptly;

x. Failure to follow due process in various concerns and grievances and suggesting in the 5 November Letter that the claimant should engage in mediation under a revised policy which was not applicable to his terms of employment.

219. The claimant stated that he had been constructively dismissed. He said that he did not wish his resignation to be treated as a grievance. He no longer had faith in the processes carried out by the respondent as it had failed to address grievances in outstanding matters over the years. The claimant confirmed that his last date of employment would be 31 December 2019 in accordance with the period of notice in his contract.

*December 2019 onwards*

220. At the effective date of termination, the claimant was 61 years of age. He had been continuously employed for 11 years. His gross basic annual salary was £44,688. His net weekly wage was £597.50. He did not receive any stae benefits.

221. The claimant lost his NMC registration around 14 April 2018. This registration is required to allow him to practice as a nurse. The claimant considered that as he had a twelve month disciplinary warning, and his record expired on 14 May 2020, he could not apply for any jobs in the care sector as he would require to disclose this warning.

222. The claimant looked for posts which did not require a nursing qualification in the care sector. He registered with recruitment websites. He applied for posts in May and June 2020. He continued looking for a suitable role but wished to return to the NHS to assist with the COVID-19 pandemic. He registered to assist the NHS and was placed on a temporary register from 11 April 2020. The claimant became aware that there were Scottish Government funded positions which would allow him to retrain as a nurse (return to practice scheme) sufficiently to get him on the nursing register. The claimant was

successful in an application for a return to practice course within the Glasgow Caledonian University schedule.

223. The claimant commenced the academic course on 27 September 2021. He completed this at the end of March 2022. He was offered a position at Band 5 level within NHS Lanarkshire while as a student he was paid at Band Level 2 at £19,609.

*Observations on witnesses and conflicts of evidence*

224. The Tribunal considered that the claimant gave his evidence honestly based on his recollection of events. He answered questions as best he could on cross examination. The Tribunal's impression was that the claimant remained aggrieved about his dealings with Ms Cossar from 2012 onwards and was frustrated that she had not been held to account for the way in which he considered that she had mismanaged him. Although during the final hearing the claimant apologised to the respondent's witnesses for the language and tone of some of his correspondence, he appeared to have little insight about how his behaviour impacted on others. The Tribunal also felt that when the claimant had formed a view on a particular issue (for example interpreting the minimum level of contact between a manager and employee in the attendance management policy as being a set or a mandatory level of contract; and whether the discretion as to whether disciplinary or grievance cases should be dealt with sequentially or concurrently as an indication that they should in fact be dealt with concurrently), he appeared unable or unwilling to accept that his understanding may be open to other interpretation or explanation.

225. The Tribunal considered that the respondent's witnesses gave their evidence honestly and based on their recollection of events. Their evidence was consistent with contemporaneous documents. The Tribunal felt that the witnesses held no animosity towards the claimant. If anything the Tribunal felt that they were frustrated that their attempts to resolve matters had been unsuccessful. All the respondent's witnesses patiently answered the claimant's questions best as they could. Much of the evidence related to events many years before the claimant's resignation. None of the

respondent's witnesses had been directly involved during the 2012 disciplinary investigation; the capability process started in 2012; investigation of grievances G129; and the first formal stage grievance G129. Key personnel who had been involved were no longer employed by the respondent. The respondent's witnesses were limited to responding to these issues based on their understanding from the documents that had been produced.

226. The Tribunal considered that in relation to the material facts as found, there was little dispute between the parties. The Tribunal felt that it was important to make the following observations.

227. Various policies were produced. The Tribunal understood during 2012 to 2019 there were policy changes culminating in the "Once for Scotland " policies in 2020. The Tribunal has referred to the policies which were in place at the relevant times.

228. The Tribunal noted that throughout the various processes the operational managers were supported by different colleagues from the HR Department. The claimant was supported by Jimmy Beattie, Branch Secretary of Unison from around September 2014. The claimant gave evidence about his concerns about the support being provided. The Tribunal noted that the claimant continued to receive support from other Unison officers: Alf Hannay and Stephen Hare. The claimant expressed concern to the Tribunal about Mr Hare's "collusive" role as Employee Director. The Tribunal did not hear evidence from Mr Hare. However it is not usual for union officials to have dual roles representing employees on various boards and committees and having an operational caseload. The Tribunal understood that Mr Hare had a dual role. In his dealings with the claimant Mr Hare was acting in his capacity as a Unison representative. The respondent's witnesses were in no doubt that in relation to discussions about the claimant, Mr Hare was wearing his union representative hat rather than that of Employee Director. The Tribunal also noted that in addition to Mr Hare, Ms Baty also attended the disciplinary hearing in case D366 to support the claimant.

229. In the Tribunal's experience this case was unusual given the number of grievances that were raised; the number of individuals against whom the grievances were made; the different processes out of which they arose and were related. This was not a criticism of the claimant who was perfectly entitled to raise matters with the respondent. The Tribunal did however consider that while the capability, disciplinary, grievances and attendance management policies envisaged the possibility of some crossover between the policies they were not designed to deal with the volume of issues that arose in this case.
230. The Tribunal noted that it was not disputed by the respondent that this case was protracted. While employees were often suspended for significant periods the length of the claimant's suspension was accepted by the respondent to be out of the ordinary. The respondent referred to the nature and volume of issues, delays due to sick absence and annual leave; process scheduling and communication and behavioural challenges.
231. The claimant accepted that he had periods of sick absence. The Tribunal had some difficulty based on the evidence before it making findings about the start and end of all sick periods. The claimant also accepted that for the most part he was not contactable by telephone (mobile or landline) or by email. He was able to contact occupational health by telephone. The claimant changed address during the period being considered by the Tribunal. The claimant did inform the respondent but despite this not all the individuals to whom he wrote were aware of the change and some correspondence was sent to both addresses. The claimant did not accept that his grievances were numerous given they were made over a lengthy period. The Tribunal did not understand him to accept that some issues were more appropriately addressed as part of the disciplinary process or that matters ought to be addressed sequentially. The Tribunal has addressed these issues in its deliberations.
232. There was no dispute that the claimant's registration with the NMC had not been revalidated in 2018. This is the responsibility of the registered nurse although the respondent will provide support to any member of staff who

requires support as part of their revalidation. There was no evidence before the Tribunal that the claimant had made such a request.

### Submissions

5 233. Ms Craik helpfully provided the submissions and copies of the case authorities to which she referred. Ms Craik addressed the Tribunal orally and the claimant was given time and an opportunity to respond. The Tribunal has carefully considered submissions that were made and has endeavoured to address the points raised during its deliberations.

### Deliberations

10 234. The Tribunal started its deliberations by referring to the statutory provisions in section 94 of the ERA. The claimant's claim, commonly known as constructive dismissal, requires the claimant to meet four conditions.

- a. There was a fundamental actual or anticipatory breach of contract by the respondent.
- 15 b. That breach must be sufficiently important to justify the employee resigning or else it must be the last in a series of instances which justify him leaving.
- c. The claimant must leave in response to the breach and for some other connected reason.
- 20 d. The claimant must not delay too long in terminating the contract in response to the respondent's breach otherwise he may be deemed to have waived the breach and agreed to vary the contract.

25 235. The claimant's position was that he resigned following a "last straw". He relied upon a series of acts by the respondent which individually and taken together amounted to a fundamental breach of contract. The Tribunal considered that a course of conduct could cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a last straw incident even though the last straw by itself did not amount to a breach of contract.

236. The claimant relied upon the implied term of mutual trust and confidence which is found in every contract of employment.

237. The Tribunal reminded itself of the case authorities to which it had been referred in Ms Craik's written submissions. A decision whether there has a  
5 breach of contract by the respondent sufficient constitute the claimant's constructive dismissal is one of mixed law and fact. The Tribunal noted that an employer "will not, without reasonable and proper cause, conduct his business in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee". This is an  
10 objective test which the subjective perception of the employee can be relevant but is not determinative.

238. The test is demanding. Simply acting in an unreasonable manner is not sufficient. The qualifying word "damage" is "seriously". It covers a diversity of situations in which a balance has to be struck between an employer's interests  
15 in managing his business as he sees fit and the employee's interest in not being unfairly or improperly exploited. The test is stringent. The conduct must be such that an employee cannot be expected to put up with it. The employer demonstrates by its behaviour that it is abandoning altogether to perform the contract. These words indicate the strength of the term. It is not a test that the  
20 employer has to behave reasonably towards his employees. It should be borne in mind that conduct however reprehensible, may not necessarily result in a fundamental breach of contract.

239. The claimant gave detailed evidence about the 2012 disciplinary investigation which resulted in him being subject to the capability procedure.

25 240. From the information before the Tribunal, Ms Cossar had line managed the claimant for some time before an issue arose in 2012. The Tribunal did not understand the claimant to dispute that an incident arose which required investigation. The 2012 investigation was conducted under the disciplinary policy.

30 241. There was no explanation before the Tribunal why the 2012 investigation took the length of time that it did. It was undisputed that no disciplinary action



followed. The Tribunal considered that the purpose of an investigation is to establish the facts of the case. It was logical that not all disciplinary investigations resulted in disciplinary hearings particularly where as a result of the investigation, it was considered that the disciplinary process was inappropriate. While the Tribunal noted that it was not the respondent's practice to provide to the employee a copy of the investigation report in these circumstances it was regrettable that the claimant was not informed of the outcome of the 2012 disciplinary investigation until around June 2013.

242. The Tribunal understood that the conclusion reached in the 2012 disciplinary investigation was that it was appropriate for the claimant to be reported and managed under the capability process. The Tribunal noted that Ms Cossar was supported in relation to procedural matters by Ms Patterson of HR.

243. The Tribunal agreed with Ms Craik's submission that from the claim form and the claimant's witness statement the core of the case is set out in the conclusion of the paper apart to the claim form:

*"the employer failed to adequate deal with my grievances. They failed to adequately investigate any of my grievances including the one grievance out of many which proceeded to a hearing and appeal hearing... and fail to progress any of the others... My employer was under a duty to reasonably and promptly afford a reasonable opportunity to me, their employee to obtain redress of any grievances that I had... and to support me in performing my duties free from harassment of my manager... and provide a safe working environment."*

244. While the 2012 disciplinary investigation and management of the claimant under the capability policy were often the subject matter of the claimant's grievances, the Tribunal did not consider that its role in these proceedings was to reinvestigate the allegations of misconduct in 2012 or to form a view about the claimant's ability to carry out the duties of his post between 2013 and 2014. The Tribunal's focus was on how the respondent dealt with the grievances the first of which was raised by the claimant in October 2014.

*Grievance G129*

245. The Tribunal considered grievance G129 and whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.
- 5 246. In October 2014 the claimant was represented by Mr Beattie on whose recommendation he raised a grievance. The grievance was set out as a 14 page appendix which was acknowledged and confirmation was given to the claimant that the grievance was being managed by Ms Davidson.
247. Before Ms Davidson had an opportunity to respond to the grievance, the  
10 claimant raised a further grievance about the 16 October Incident with reference to dignity at work.
248. The Tribunal referred to the grievance procedure which provided a grievance notification form which may be used with or in place of a letter. While the  
15 Tribunal appreciated that completion of the grievance notification form assisted employees and HR identifying against whom the grievance was being raised and the desired outcome, the Tribunal considered that the grievance policy did not require the claimant to do so.
249. The Tribunal appreciated the claimant's frustration at Ms Davidson's request to complete the grievance notification form. However the Tribunal did not  
20 consider that Ms Davidson was being obstructive as she was unclear against whom (Ms Cossar and/or Ms Patterson) the grievance was directed. The Tribunal felt that Ms Davidson appeared to genuinely seek a sufficient distillation of the issues and understanding as to what the claimant was seeking by way of a resolution to the grievance process. The claimant  
25 submitted a grievance notification form on 24, 27 and 28 October 2014.
250. In the Tribunal's view matters were further complicated when Ms Cossar raised a concern regarding the claimant's conduct at a child protection case conference on 15 October 2014; the failure to follow an agreed prescribing policy; the content of the claimant's letter to a GP; issues about record

keeping. The allegations related to events around October 2014, some of which related to the grievances that the claimant had raised.

251. The Tribunal considered that it was reasonable and proper for the respondent to investigate the allegations of misconduct. The Tribunal did not understand the claimant to disagree with this particularly as there were concerns about patient safety. Given the nature of the allegations the Tribunal considered that it was reasonable for the respondent to place the claimant on suspension.
252. It was unclear from the evidence when the decision to suspend the claimant was first considered. The claimant was absent from work due to ill health from the end of October 2014 until 22 December 2014. In the Tribunal's view it was understandable that the respondent did not progress any of the investigations as it would be difficult to do so in the claimant's absence.
253. The claimant was declared fit to return to work on 22 December 2014 on restricted duties. Given the restricted nature of the return there would need to be operational input. The Tribunal was unable to make findings about what, if any consideration was given to this between 22 December 2014 and 7 January 2015 other than the claimant received no acknowledgement of having sent a fit note advising that he could return on restricted duties.
254. It was however apparent from the Suspension Letter that Ms Moffat hoped to discuss the suspension with the claimant but had been unable to contact him on his work mobile telephone or email address and he did not have personal ones. The Tribunal was unable to make findings about why the claimant ceased to have access to his work email and when that took effect other than it was before he was informed of his suspension. While either personal or telephone contact would have been helpful, the Tribunal did not consider it unreasonable given the time of year and the claimant's long-term absence (from late October 2014) for Ms Moffat to have written in the terms that she did. The Tribunal could understand why keys, identity card and a work mobile phone would be returned and access to work email restricted during suspension. It was not clear why the claimant's access to his work email had been discontinued before he was suspended.

255. The Tribunal considered that by January 2015, the respondent was dealing with grievances raised by the claimant along with disciplinary action subsequently initiated by Ms Cossar who was the subject matter of the grievances. The claimant's position at the final hearing was that the grievances and disciplinary proceedings should have been considered concurrently. The Tribunal considered that while this was an option available under the policies, there was a discretion for grievances and disciplinary issues to be dealt with sequentially. In the Tribunal's view, given that the grievances had already been raised involving Ms Cossar and the nature of the overlap of the issues, it was reasonable for the respondent to consider to deal with the grievances first, then the disciplinary process.
256. When this decision was taken it was not anticipated that further grievances would be raised. The claimant was absent on sick leave due to stress at work from 19 January 2015. He raised a further grievance in February 2015. He also remained absent from work due to ill health until 22 June 2015.
257. The Tribunal considered that given the nature of the claimant's ill health absence it was understandable that the respondent did not undertake an investigation into the grievances while he was on sick leave.
258. The Tribunal noted that when the claimant was fit to return to work in late June 2015 Ms Moffat reviewed the suspension and confirmed that it remained in place. The Tribunal considered that this was understandable as the decision had been taken to deal with the grievances which by that stage had been allocated the number G129 before investigating the disciplinary allegations. The claimant was informed that the suspension would be reviewed should circumstances change.
259. The respondent could have decided at this stage given the delay to deal with the grievances and disciplinary procedure concurrently. However the earlier rationale still applied. The Tribunal also felt that given the reason for the claimant's absence to do so might have caused him further stress.
260. The Tribunal noted that the investigation into grievances G129 was conducted by Mr Paul with HR assistance from Ms Wilson in late July and September

2015. The claimant was on sick leave from 7 October 2015 due to reactive depression. The Tribunal was unable to make findings about the duration of the claimant's sick absence from October 2015.

5 261. The Tribunal was also unable to make finding about when the investigation report into grievance G129 was finalised. The investigation report was not produced. The Tribunal noted that Mr Paul retired around April 2016. The Tribunal was assumed that it was finalised before then. There was no explanation for the delay in finalising the investigation report given that Ms Cossar signed her statement on 21 October 2015.

10 262. Nor was there any explanation why the first formal stage grievance G129 hearing did not take place until May 2015 other than possibly the claimant's continued sick absence and/or ensuring a mutually convenient date for all those participating to attend. Mr Hancock also retired on 31 May 2016. The claimant suggested that the timing of the first formal stage grievance G129  
15 hearing was perhaps part of a plan. While the claimant may have wondered about this, there was no evidence to suggest this was indeed the case. When Mr Paul was asked to undertake the investigation, there was no reason to expect that he would not have completed the investigation report and presented it at the first formal stage grievance hearing before retiring. It was  
20 unfortunate for all concerned that he was not able to do so. Mr Hancock also provided his outcome before retiring and any right of appeal would be to someone else. Ms Moffat was present at the first formal stage grievance G129 hearing and was able to present the management case if there was an appeal.

25 263. The Tribunal turned to consider the first formal stage grievance G129 hearing which was conducted by Mr Hancock. He did not have any previous involvement. Ms Moffat was present to offer nursing advice. Mr Hannay represented the claimant. They had been provided with the investigation report before the hearing which Ms Rankine presented. Ms Cossar was present for part of the hearing and the claimant had an opportunity to ask  
30 questions.

264. Mr Hancock admitted that there were procedural omissions in the management of the capability in accordance with the Capability Policy; that the correspondence sent lacked detail about the next stage in the procedure; the claimant was not asked to sign notes of the meetings; and the claimant was not formally informed that he was at stage 2 of the process until 15 July 2013 which was a letter that the claimant did not receive. Mr Hancock apologised for the errors and omissions. However conclude that the management of the claimant's capability was sound in terms of capturing the spirit and intention of the Capability Policy. The claimant had regular opportunities to meet and discuss the process with his manager and was kept up to date.
265. Before Mr Hancock's decision was issued, the claimant raised two more grievances with Ms Davidson in relation to the investigation report being sent to an old address despite the respondent having been informed of the change of address in the three to four weeks previously and the fact that the investigation report did not refer to the original 14 page grievance.
266. The claimant also appealed against the first formal stage grievance G129 outcome on 10 June 2016.
267. The Tribunal considered that as the grievance G129 was ongoing there was no change in circumstances so far as the claimant's suspension was concerned. The Tribunal also considered that the interplay between new grievances (arising out of the grievance G129 process) and the appeal of the outcome of grievance G129 complicated matters as different personnel within the Workforce Business Directorate: Ms Davidson and Ms Cooksey were dealing with matters.
268. Chief Executive, Jeff Ace who had no previous involvement was appointed to conduct the second and final stage grievance G129 hearing on 20 July 2016. Ms Cooksey advised him in relation to process. The Tribunal considered that the claimant's grievance appeal was being considered promptly at a senior level in the organisation.

269. The Tribunal's impression was that Ms Cooksey carefully considered the papers. She identified that matters had been raised but had not been considered at the first formal stage grievance G129 hearing. She took time to ensure there was clarity as to what was to be decided at the second and final stage grievance G129 hearing and, in this context, she consulted with the claimant and his representative.
270. At the start of the hearing, the points of appeal were agreed with the claimant and his representative. The Tribunal considered that Mr Ace and Ms Cooksey were treating matters seriously and wanted to resolve issues as expeditiously as possible.
271. The Tribunal's impression was that the final formal grievance G129 hearing was an attempt by the respondent to agree with the claimant to deal with all outstanding issues in relation to the grievances with a view to progressing matters. The claimant was cooperative and agreeable to this. The claimant confirmed that he felt that he was being listened to. Mr Ace and the claimant engaged in the process and went through the points thoroughly. The claimant was content that all issues that he had raised up and until the second and final formal grievance G129 hearing be dealt with notwithstanding they went beyond the first formal stage hearing.
272. The Tribunal considered that Mr Ace carefully went over the grievances. In the Tribunal's view the respondent was behaving in a way that demonstrated that it wanted to build the claimant's trust and confidence in the relationship. Mr Ace issued the outcome letter.
273. In the meantime however the claimant wrote to Ms Cooksey submitting two further grievances: a failure to provide Ms Cossar's notes of interview as part of the documentation for the first formal stage grievance G129 hearing and a grievance about the content of the notes of interview with Ms Cossar. Given that the claimant and Mr Hannay were aware of these issues before the second and final stage grievance G129 hearing and the time that was taken to ensure that all issues were being dealt with the Tribunal questioned why the claimant did not include these issues as part of that discussion.

274. As these issues were raised by the claimant following the second and final stage grievance G129 hearing and indeed not received by Ms Cooksey until after Mr Ace had considered and prepared his outcome letter, the Tribunal considered that it was reasonable and understandable for these matters not to be considered by him as part of that process.
275. The Tribunal considered there was delay in considering some of the claimant's grievances. While some of the delays were caused by the claimant's ill health, the delay from October 2015 to May 2016 was unexplained. There did not on the face of it appear to be reasonable and proper cause for this delay. However it was in the Tribunal's view not a fundamental breach as within eight weeks, the respondent was able to conduct a first formal stage grievance hearing but also a second and final stage grievance hearing encompassing not only those grievances raised by the claimant up to and including the first formal grievance hearing but beyond. While the claimant was aware of other issues that he wanted to raise he chose not to do so despite Mr Ace's willingness to listen to claimant's concerns.
276. Mr Ace considered all the issues that it had been agreed with the claimant that he consider. He issued his outcome and brought the grievances G129 to a close. The claimant knew that Mr Ace's decision was final and there was no further right of appeal. It was reasonable in the Tribunal's view for the respondent to bring matters to a close.
277. Having done so the Tribunal considered that it was appropriate for the respondent to write to the claimant regarding the next steps. The capability process was on hold while the respondent dealt with grievance G129. The was in the Tribunal's view understandable given the nature of the grievance pending the grievance.
278. As grievance G129 was at a close, there would have been a review in relation to the claimant's place in the capability process. In this case, there were also disciplinary proceedings that had been paused to allow grievance G129 to be processed. The Tribunal considered that it was reasonable for the respondent to provide clarification of this.



279. Ms Moffat, who was now General Manager, Mental Health Directorate wrote to the claimant advising of next steps. She confirmed that the conduct investigation would commence and that Ms Wilson had been asked to undertake the investigation as she had commenced a new role undertaking all investigations for the respondent.
280. When advising the claimant of the next steps Ms Moffat confirmed that the suspension would remain in place. The claimant was told that until the conduct investigation was complete and the findings had been reviewed in relation to his suspension, the capability process would remain at stage 2. The capability support and management would not be progressed until such time as the claimant returned to work following the conduct investigation. The Tribunal considered that as the claimant was suspended and the disciplinary process was no longer on hold this was a reasonable approach.
281. The Tribunal acknowledged that there were other grievances raised with Ms Cooksey that were outstanding. The claimant raised a further grievance in September 2016 relating to the claimant's continued suspension, having had no intimation or communication reflecting his status in this regard. Ms Cooksey acknowledged the grievances and allocated grievance numbers G155 in relation to Ms Cossar's interviews notes not being sent with the investigation report; G157 relating to the content of those interview notes; and G158 in relation to the claimant's continued suspension.
282. The Tribunal considered how the respondent handled the receipt of these grievances when it was intended that the disciplinary process should proceed. Objectively given that the disciplinary process had been on hold for some time and the claimant was suspended it was appropriate for the disciplinary process to be progressed albeit further grievances had been received.
283. The Tribunal considered that Ms Cooksey thought about the extent to which any of these grievances could be dealt with concurrently and viewed objectively the Tribunal considered was reasonable and proper cause for Ms Cooksey to progress G155 as it was on a narrow point: why had it taken so long for the claimant to be provided with Ms Cossar's statement.

284. In relation to grievance G158, Ms Cooksey considered that as the suspension was an ongoing act, it should be considered at the end of the period of suspension and not made its way through. The Tribunal considered that this was a reasonable approach for the respondent to take particularly as the suspension was still in place and investigator had been appointed for the conduct investigation. The claimant was on suspension rather than on sick leave. The Tribunal considered that the respondent had reasonable and proper cause keeping the claimant on suspension and delaying consideration of his grievance G158 pending completion of the disciplinary process. The Tribunal did however consider that the claimant had been suspended for some time and while that suspension was confirmed as being a neutral act in Ms Moffat's letter of 25 August 2016, that letter did suggest that the claimant's suspension from work would be subject to review.
285. The Tribunal could also understand why in relation to grievance G157 there was potential crossover with the disciplinary process. It was therefore reasonable that to avoid matters being consider under two processes that grievance G157 be put on hold. Ms Cooksey stated that once the findings of the disciplinary investigation were concluded the claimant would have the opportunity to consider if the point of the grievance on this matter remained outstanding. The Tribunal therefore considered that the respondent was willing to deal with any remaining issues that the claimant had. Objectively it was reasonable for the respondent to endeavour to deal with the grievances in this way.
286. Meantime the claimant objected to Ms Wilson's investigating the disciplinary case that was allocated case number D335 given that she was involved in Mr Paul's grievance G129 investigation. While the Tribunal noted that Ms Wilson had been Mr Paul's workforce support and she now had a new role, given the criticisms of the grievance G129 investigation the Tribunal considered that the claimant's reservations were understandable.
287. Ms Dickson was appointed investigator of grievance G155. There was a delay due to the claimant's sick leave from 7 October 2016 to 23 March 2017.

288. Ms Wilson's was the subject of further complaint by the claimant as she contacted the claimant on his personal mobile telephone number in November 2016 while he was on sick leave about whether he would be attending an investigation interview. The contact details had been provided by Mr Hannay. Ms Wilson had already explained the circumstances in a letter predating the claimant raising the matter with Ms Moffat.
289. The Tribunal appreciated that the claimant was absent from work due to ill health. However given that the investigation meeting had already been rescheduled, the claimant had not made contact with Ms Wilson or occupational health and Mr Hannay was unable provided information other than a contact number the Tribunal could understand why Ms Wilson made contact with the claimant. The Tribunal appreciated that the claimant was distressed by this but this could have been avoided if the claimant had contacted Mr Hannay and asked him to clarify the situation. In any event, Ms Wilson had no further involvement.
290. Ms Dickson who was appointed to investigate grievance G155 was also asked to investigating the disciplinary allegations that were allocated the disciplinary case number D335. The Tribunal did not understand that the claimant objected to Ms Dickson investigating both matters particularly given his previous objection to Ms Wilson. Even so, the Tribunal considered that this was reasonable given that grievance G155 was on a narrow point. The claimant did however raise a grievance regarding Ms Dickson's handling of the disciplinary investigation in relation to the lack of availability of patient information in comments she made in a letter.
291. The second conduct issue arose during the investigation into disciplinary case D335. This related to the claimant sending confidential patient information to an insecure personal email address. The claimant appeared to accept that this was potential misconduct and it was appropriate for the respondent to undertake an investigation. From the information that was before the respondent, the Tribunal considered that the respondent had reasonable and proper cause for carrying out a disciplinary investigation into what became known as disciplinary case D366.

292. In the meantime, the claimant raised three more grievances on 20 October 2017. Two of those grievances related to the issues in disciplinary case D335. The Tribunal considered viewed objectively that it was reasonable for Ms Cooksey to say that these two issues should be addressed as part of the disciplinary process either as part of the investigation or in submissions as this would ensure that they were considered sooner rather than later. The Tribunal noted that the claimant was encouraged to discuss with his representative how best to take these issues forward as part of the disciplinary process.
293. The third issue related to the capability process, in particular that Ms Cossar had lied in relation to a letter dated 15 July 2013. This was a serious allegation. Ms Cooksey treated it as such and that while notwithstanding that it arose out of grievance G129 which had been determined. Ms Cooksey allocated a grievance number G175 and said that there would be a review.
294. The Tribunal considered that given the different ongoing processes, and the new issues that were being raised it was reasonable for the respondent to consider the most appropriate and expedient process in which the claimant's concerns could be addressed. The Tribunal did not accept the claimant's suggestion that the respondent was cherry-picking which complaints to deal with and when. The Tribunal felt that Ms Cooksey carefully considered each of the concerns that were raised and set out her reasons for proposing that they were progressed in the way that she did. Viewed objectively the Tribunal felt that the respondent was genuinely trying to resolve the issues raised by the claimant and deal with them as quickly and efficiently as possible.
295. While the Tribunal appreciated the claimant's frustration in relation to some of his grievances being put on hold or diverted into the ongoing disciplinary procedure the Tribunal considered that objectively the respondent had limited resources to investigate and manage each issue concurrently or separately and therefore required to focus resources. As two of the issues appeared to be part of the disciplinary process it was reasonable given the ongoing disciplinary process that these issues were raised by the claimant as part of that process rather than separate grievances as this would introduce yet

further delays in the process. The Tribunal did not consider that the respondent was unwilling to consider the issues but had limited capacity to do so given the volume of issues being raised and the number of people involved. It was reasonable that other grievances were on hold until the disciplinary process was completed.

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296. Grievance G155 was progressed although there were again delays. The claimant was not well enough to attend an interview in late 2016. The claimant was interviewed when he was fit enough to do so. Once the investigation into grievance G155 was concluded and there was a first formal stage grievance hearing on 14 November 2017 upholding grievance G155 and apologising for Ms Cossar's interview notes not being enclosed and for any undue stress, anxiety and inconvenience caused and explaining that it seemed to have been an administrative oversight. The Tribunal appreciated that there were delays but again concluded that there were genuine reason for this.

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297. In relation to the investigation of disciplinary case D335, it took a considerable amount of time. The Tribunal noted that from the investigation report the delay was due to a number of factors: the completion of the procedure in grievance G129; interviews being cancelled due to the claimant's health; a change of investigator; and issues arising from the claimant's access to information.

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298. The respondent appointed an investigator and a workforce support for disciplinary case D366 who had not been previously involved. From September 2017 the investigation of disciplinary case D366 progressed concurrently with ongoing investigation in disciplinary case D335. It progressed more quickly although there was some delay due to interviews being rescheduled.

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299. The Tribunal considered that the length of time for the investigation of disciplinary case D335 was unfortunate particularly as the claimant was on suspension. The Tribunal appreciated the reasoning for considering the grievance G129 first and that the claimant was absent for significant periods due to his ill health. The Tribunal considered that there was reasonable and proper cause for the delay.

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300. The conduct investigation into disciplinary case D336 concluded around December 2017. Around early January 2018 the investigation into disciplinary case D366 completed. The claimant was on annual leave in January 2018. Despite both investigation reports being available in early January 2018, it was unclear why it took until March 2018 before the investigation reports were sent to the claimant and he was invited to a disciplinary hearing. The Tribunal appreciated that neither Ms Hamlet or Ms Jamieson had any previous involvement. Ms McKechnie was also sitting on the panel. They would require consider the how to deal with the disciplinary cases and coordinate their diaries. The Tribunal did not understand the claimant to take issue with both disciplinary cases being dealt with at one time. Indeed given that the investigations completed around the same time and that the same manager was to consider both cases, it seemed entirely appropriate to do so.
301. The Tribunal considered that Ms Hamlet was aware of and indeed surprised by the length of the claimant's suspension. The Tribunal's impression was that she prioritised the disciplinary cases in her workload and endeavoured to progress matters.
302. The Tribunal considered that it was unfortunate that Ms Jamieson who was providing HR assistance was unaware of the claimant's recent change of address which had only been recently communicated. It was also regrettable that the date proposed for the disciplinary hearing (29 March 2018) was not suitable to the claimant as he was on leave. While given the overall delay, the Tribunal felt it would have been helpful for there to have been improved communication, the situation was not assisted by the fact that the claimant requested communication by letter. This caused delays in that the claimant would send a letter but it would not be received by the relevant recipient until sometime later and the claimant appeared to proceed on the assumption that if a communication had been sent, that everyone organisation was aware of the contents.
303. The Tribunal noted that the disciplinary hearing was rescheduled to 21 June 2018. In the meantime, the claimant wrote to the respondent raising concerns about the manner in which information had been sent. The claimant then sent

a file of additional documentation to be considered at the disciplinary hearing.  
The claimant was sick absent.

- 5 304. The Tribunal considered the respondent has taken steps to ensure that Ms Hamlet had not been involved in any pre-existing procedure relating to grievances raised by claimant. She was also senior management and supported by senior colleagues in their expertise of HR and Nursing.
- 10 305. As the disciplinary hearing was not proceeding and the claimant had sent a substantial additional information, it was reasonable in the Tribunal's view for the panel to consider that information in his absence. The Tribunal noted that it was the claimant rather than the respondent who provided Ms Hamlet with information about the other grievances.
- 15 306. Having considered matters on the papers, Ms Hamlet concluded that in respect of disciplinary case D335, there was no case to answer. While the decision was reached in the claimant's absence the Tribunal considered that the claimant was fully aware of the allegations against him and had provided substantial written documentation in support of his position. The Tribunal was satisfied that Ms Hamlet carefully considered that allegations and the evidence. The Tribunal did not accept the claimant's position that it was his word against the word of Ms Cossar. The investigation report in disciplinary case D335 refers to comments from other healthcare professionals. While the Tribunal appreciated that the claimant wanted to be heard the Tribunal felt that given the length of time it had taken for disciplinary case D335 to reach the stage of a disciplinary hearing, it was reasonable in the circumstances for the respondent to take this approach particularly as Ms Hamlet had concluded that disciplinary case D335 should not proceed.
- 20 307. As regards disciplinary case D366 Ms Hamlet decided that it should proceed to a disciplinary hearing. From the information in the investigation report the Tribunal did not consider that this was an unreasonable course of action.
- 25 308. The Tribunal noted that Ms Hamlet was aware that the claimant was on sick leave and that he had not attended recent occupational health appointment. While the claimant wished to communicate by post, viewed objectively the
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written correspondence was creating more issues than it was resolving. The Tribunal considered that it was reasonable for the respondent to explore the claimant's fitness to attend a meeting. The Tribunal appreciated the challenges of such an approach while an employee is absent from work. However given nature of the issues that needed to be discussed the Tribunal considered that the respondent had reasonable and proper cause to do so.

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309. The claimant's suspension was related to disciplinary case D335. Ms Hamlet did not specifically mention the suspension in her letter to the claimant dated 2 August 2018. Nonetheless the Tribunal accepted Ms Hamlet's evidence that she wanted to discuss the matter of his suspension as well as other matters. While Ms Hamlet could have lifted the suspension without having a discussion with the claimant, the Tribunal felt that the circumstances were unusual. The claimant was on sick leave. He had been suspended since 2015 (albeit with periods of long term sick absence). Ms Cossar had retired and the claimant would be reporting to a new line manager. Occupational health advice would be required along with consideration of a phased return to work. The Tribunal therefore considered that the respondent had reasonable and proper cause to want to discuss these issues with the claimant rather than writing to him and becoming involved in protracted correspondence.

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310. Ms Hamlet was also aware from the information provided by the claimant that there were outstanding grievances that had been put on hold. She had not been involved in these matters but had read the information provided by him. Ms Hamlet knew that the processes had been ongoing for a considerable period of time and the claimant was sick absent. Ms Hamlet offered to meet either before or after concluding the disciplinary case D366 in order to conduct a process review of all the different processes surrounding the claimant's employment and concerns to deal with the right things at the right time and by the right people.

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311. While the claimant considered that it was inappropriate for Ms Hamlet to be involved in the grievance process given her involvement in the disciplinary process, the Tribunal considered that viewed objectively, there was reasonable and proper cause for her offering to meet the claimant to discuss



a process review. She had through the grievance process an awareness of the outstanding grievances. There was no suggestion by Ms Hamlet that she would be investigating or deciding the outstanding grievances indeed her letter was explicit in saying that it was with a view to ascertaining how and who would be best placed to deal with them. She was a senior manager who had the authority to decide the timing and manner of the hearing in disciplinary case D366; she could make a decision about the claimant's suspension which was the subject matter of one of the grievances; she could consider which grievances could be considered concurrently or separately with each other and disciplinary case D366 and who would be best placed to deal with them to move the process forward in a timeous manner. The Tribunal accepted that there were policies in place. The Tribunal did not accept the claimant's argument that it was for the respondent to tell the claimant what was to happen and just to press on with the policy. It was not straightforward as these policies did not in the Tribunal's view envisage that there would be simultaneous and interrelated grievances by one employee involving so many of the people who were managing the process. The claimant had previously taken issue with the respondent's appointment of investigators and sequencing of grievances. The Tribunal considered that it was reasonable given the number of issues that required to be addressed for the claimant's views and those of his representative to be taken into consideration to endeavour to avoid further delay and dissatisfaction.

312. The Tribunal considered that it was significant that Ms Hamlet offered to meet rather than insisting that a meeting take place. The Tribunal noted that she wanted to involve occupational health and the claimant's representative. While the Tribunal accepted that the claimant later had concerned about Mr Hare's dual role, Ms Hamlet was unaware of this in August 2018 or later in February 2019 when she discussed with Mr Hare the sequencing of the grievances and disciplinary case D366.

313. The claimant did not respond to the letter dated 2 August 2018. He continued to be absent from work and occupational health did not consider that he was fit to take part in any process at that time. The suspension was not lifted. The

Tribunal felt that while Ms Hamlet could have done so given the advice from occupational health it was reasonable to allow the suspension to be left in place as the claimant was not fit to return to work; there had been no opportunity have a discussion with him to ensure that any return to work was genuine and supported.

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314. The Tribunal noted that in the letter dated 18 January 2019 there is specific reference to discuss the suspension. Ms Hamlet again reiterated a desire to meet the claimant to ensure that the right people were dealing with the right matters. The claimant provided a response indicating that he needed to discuss matters with Mr Hare. The Tribunal could understand why the respondent would wish to give the claimant time to do so and seek support from occupational health which he did. The claimant did not respond directly but there was a response from Mr Hare indicating that the claimant wanted a clear outline of the topics for discussion and he wanted to return to the substantive post but needed reassurance that he would be given support and that he needed to feel safe in returning to practice. Mr Hare indicated that the claimant wanted disciplinary case D366 dealt with before addressing any other matters. The Tribunal considered it was reasonable for the respondent to assume that Mr Hare was acting on the claimant's instructions and in view of this response, it was reasonable for the respondent to understand the grievances and any meeting to discuss their progress should be put on hold pending determination of disciplinary case D366.

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315. The respondent could have considered withdrawing the claimant's suspension at this point. However viewed objectively it was reasonable to leave matters in abeyance given the comments about the claimant needing to feel safe in returning to practice. By remaining on suspension, when the claimant was not on sick or annual leave he was paid full pay. He did not require to attend work. While the Tribunal acknowledged that there was an issue in relation to the claimant's NMC registration, he had not raised the matter and this would need to be part of the discussion in supporting his return to work.

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316. While Mr Hare responded in February 2019 the disciplinary hearing date was 15 May 2019. There was no explanation as to why there was a delay in fixing this hearing. However given the seniority of a number of people involved, annual leave and public holidays, the time period did not seem unreasonable.
- 5 317. The disciplinary hearing went ahead. Mr Hare represented the claimant. The claimant was supported by Ms Baty, Occupational Health Practitioner which was not normal practice. The claimant expressed concern that he was not allowed to produce evidence in relation to disciplinary case D335 as it was closed. The claimant had however not taken advantage of the right to submit  
10 a written statement before the hearing or to bring witnesses.
318. It appeared to the Tribunal that the claimant was disappointed that at this disciplinary hearing, he was not given an opportunity to air his position in relation to disciplinary case D335 or indeed to any of his grievances. However, the Tribunal did not consider that the respondent's position was  
15 unreasonable. There had already been a hearing (albeit the claimant was not present) at which the disciplinary case D335 was considered on the papers (including those provided by the claimant) and no case to answer was the outcome. The claimant had indicated through Mr Hare that the grievances were to be left in abeyance until disciplinary case D366 had been progressed.  
20 While Ms Hamlet had indicated a willingness to discuss how these grievances might be progressed, this hearing was scheduled to deal specifically with the disciplinary case D366.
319. The Tribunal noted that the claimant admitted to the misconduct in disciplinary case D366. Due to the passage of time he was unable to provide an  
25 explanation for it. The claimant knew that the conduct was wrong and that it had occurred on several occasions. The claimant was issued with a first and final warning. He was advised of the outcome and of his right to appeal which he exercised and then withdrew. From the information available the Tribunal considered that the outcome was in the band of reasonable responses.
- 30 320. The claimant was aware that Ms Hamlet wished to address the issue of his suspension. The Tribunal considered that it was entirely reasonable for the

respondent to wish to discuss that with him given the length of the claimant absence from work and this was the first face to face meeting for some time. The Tribunal also considered that it was reasonable for Ms Hamlet who did not directly line manage the claimant to seek an understanding about what supports needed to be put in place and have guidance from occupational health.

5 321. Ms Hamlet advised that the claimant would not be going back to the capability process and there would need to be support in place to ensure that he was performing his duties competently and safely.

10 322. The claimant appeared to take issue that the capability process was disregarded despite him being at the stage 2 level. However, the Tribunal considered that given the absence due to ill health and his suspension, the claimant would require a supported return to work to rebuild the claimant's skills and confidence. The Tribunal noted that this had been in discussion with the deputy nurse director. The Tribunal felt that while the onus was on the claimant to renew his NMC registration, it was surprising that this was not discussed. That said, the Tribunal formed the view that would be part of the discussion in relation to the claimant's supported return to work.

15 323. The claimant appealed against the decision in disciplinary case D366. An appeal hearing was arranged for 17 July 2019, but the claimant sought an extension because he wanted to secure representation. A new date was set for 17 September 2019. While it was unfortunate that a date could not be fixed earlier, the Tribunal did not consider that the delay was unreasonable given the number of people who were involved and the time of year. The claimant decided to withdraw the appeal. The Tribunal considered that was a matter for the claimant and the effect of that decision was that the disciplinary proceedings had reached a conclusion.

20 324. The Tribunal then considered the ongoing proposal in relation to reviewing the remaining grievances which had been put on those hold and those concerns that had been raised which were not addressed as part of the disciplinary process.

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325. The claimant was absent from work to ill health from 16 June 2019. While he had appealed the decision in disciplinary case D366, Ms Hamlet's involvement was only to present the management case. She was not the decision maker at the appeal hearing. The appeal panel was the Director of Finance and Deputy Nurse Director who were to be supported by Ms Cooksey. Nonetheless Ms Hamlet asked the claimant if he wished to await the outcome of the appeal hearing before meeting to discuss the grievances. The Tribunal considered that this was a reasonable approach. It was possible to deal with the appeal and review meeting concurrently. However as claimant was absent from work due to ill health it was prudent to seek the claimant's preference given that he and Mr Hart would be involved in both processes.
326. The Tribunal appreciated that the proposed review meeting was not part of the grievance policy. However as previously explained this case was unusual given the volume and crossover of the issues that had been raised. The Tribunal considered that it was reasonable for the respondent to seek a consensus about what was still to be investigated, by whom and who would be appointed to deal with the hearings. The Tribunal felt that by so doing the respondent was endeavouring to progress matters and by involving the claimant and his representative minimising the potential risk and delay.
327. The claimant's understanding was that Ms Hamlet would be conducting the grievances. While the Tribunal did not doubt that was his concern, that was not what was being suggested in the correspondence. The Tribunal noted that the claimant's issues were being dealt by senior managers within the respondent's organisation. There was a need to ensure that the decision makers were independent but there was a need to manage the workload and avoid unnecessary duplication and delay.
328. Around this time the input from occupational health was that the claimant was likely to be absent from work with work related stress until his appeal and grievances were concluded. As the claimant was no longer suspended his sick absence required to be managed by his line manager who at that stage was Mr Murray. The Tribunal considered that this was reasonable and what would have happened had the suspension been lifted at an earlier stage.

329. The claimant said in correspondence dated 13 August 2019 that he wanted an appointment of a panel to investigate his outstanding grievances and that due process should be followed. The claimant indicated that he had no reassurance of a safe return to the workplace and he wanted a date for hearing the grievance which he described as “the outstanding numbered (by you) grievances and the remaining grievances (which my staff site representative told me were in a folder within your department) are all heard”.
330. The Tribunal noted that at this stage, Ms Hamlet was the designated person who would take matters forward. The claimant’s position was that Ms Hamlet had been involved in the disciplinary process and had issued a sanction. He considered that she was not the appropriate person to deal with his outstanding grievances.
331. For the reasons set out above the Tribunal considered that the respondent’s position was not unreasonable. The claimant referred to “outstanding numbered” and “remaining grievances”. Ms Jamieson was Head of HR and provided support to a general manager. Ms Moffat was at that time part of the claimant’s line management structure. Ms Hamlet was a senior manager with considerable experience and was not involved in the claimant’s line management. While she had made decisions in respect of the disciplinary procedure, she had not previously been involved in any of the grievance process. Her awareness of those grievances had come from the claimant who had provided this information as part of his response to disciplinary case in D335. Ms Cooksey was involved in managing the process. It seemed to the Tribunal that in addition to any grievances having to be investigated, they would also require to be enough managers of the appropriate seniority to deal with the first formal stage grievance hearing and any subsequent appeal.
332. The Tribunal considered that in all these circumstances the proposal that Ms Hamlet should consider what remained outstanding and who would be best placed to progress the grievance was reasonable and the respondent had proper cause for suggesting that Ms Hamlet was the appropriate person to take this forward. The Tribunal appreciated that the claimant appeared to be under the impression that Ms Hamlet was actually going to either investigate

or conduct the first formal stage hearing and was in the Tribunal's view mistaken. From the evidence this decision had not been taken. In any event had Ms Hamlet indicated at a later stage that she would be involved, the claimant would have been given an opportunity to raise his concern and request that someone else to deal with it. The claimant was aware that he was able to do so as he made objections to various personnel being involved in other grievances. The Tribunal had no reason to believe that the respondent would not have considered and taken this on board as on each other occasion, the respondent was agreeable to doing so even if in the respondent's view there was no conflict of interest as the individuals were advising on the process rather than being a decision maker.

333. The claimant also commented on the number of personnel involved. The Tribunal accepted that he appeared to be confused as he would on occasions write to Ms Moffat rather than Ms Cooksey. The Tribunal felt that the respondent did its best to signpost the claimant to the appropriate person. The Tribunal's impression was that matters may have become more confused as the claimant was no longer represented by a staff representative.

334. The claimant suggested that the respondent could have expedited the grievances by using the appeal hearing date as a date to consider matters. The Tribunal considered that there was lack of clarity about what exactly was being considered. Also the people who were convened to hear the disciplinary appeal would not necessarily be the appropriate people who would investigate or conduct the first formal grievance hearing. In any event, the Tribunal considered that while Ms Hamlet and Ms Jamieson would be available (as they were intending to present the management case at the disciplinary appeal hearing) the claimant had by this stage objected to Ms Hamlet being involved in the grievance procedure. The Tribunal considered that the respondent had reasonable and proper cause for not using the disciplinary appeal date.

335. The claimant also says that there were continued breaches by the respondent in relation to the way he was handled by his line manager Mr Murray. Before the claimant's suspension, he was line managed by Ms Cossar. Given that

the claimant raised a number of grievances against Ms Cossar, and she was the manager who initiated the disciplinary process, the Tribunal considered that it was reasonable during his suspension for Ms Moffat, General Manager to be involved. The Tribunal also considered that it was reasonable for the respondent, following the claimant's removal from suspension, be returned by his direct line manager who by that stage was Mr Murray as Ms Cossar had retired in 2016. The claimant was aware from earlier correspondence from his grievance outcome letter that Mr Murray was the service manager within the service the claimant worked and would be the claimant's line manager. The claimant was also aware that Mr Murray would be dealing with the claimant's sick absence. Mr Murray confirmed this in a letter sent on 19 July 2019. The claimant did not respond to this letter. It was unknown to Mr Murray that the claimant had not received the letter. The Tribunal considered that it was reasonable that Mr Murray who would have an ongoing direct relationship with the claimant should not be involved in the outstanding grievance issues.

336. While Mr Murray made assumptions that the claimant was contactable by telephone given that he appeared to be having telephone consultations with occupational health, the Tribunal did not consider that it was unreasonable for Mr Murray to ask the claimant to make contact by telephone. It is unusual for people not to be contactable by mobile telephone even if they do not have a landline. The Tribunal noted that Mr Murray also offered the claimant to contact him and for a face to face meeting. The Tribunal did not consider that viewed objectively Mr Murray's attempts to communicate with the claimant during this period were unreasonable.

337. The claimant also said that Mr Murray failed to follow the attendance management policy as Mr Murray had asked the claimant to provide an update every fortnight. The Tribunal considered that the policy provided for a minimum contact. Given that Mr Murray had not been previously involved and wished to be supportive in assisting the claimant in his return to work, the Tribunal did not consider that Mr Murray's request was unreasonable. In any event, when the claimant complained, Mr Murray agreed to the contact being monthly in line with the occupational health reviews.



338. In the meantime, the claimant had raised concerns with Ms Cooksey in relation to Ms Jamieson and Ms Hamlet. As a result of these communications by 23 November 2019, Ms Hamlet had written to Ms Cooksey indicating that she was no longer able or willing to be engaged with the claimant given the comments and tone of his letter.
339. The Tribunal considered that at this stage, the respondent was aware that there were outstanding grievances which had been put on hold (G157, G158 and G175). In addition, there were further grievances which had not yet been allocated numbers which the claimant had raised and were outstanding. The claimant was aggrieved about who was being appointed to manage these grievances and the advice from occupational health was that the claimant would not be able to return until these matters were resolved. Attempts to manage the claimant's sick absence had in itself given rise to further grievances. The Tribunal considered that while the claimant said that he wanted the respondent to follow the process, he did not appear to appreciate that involved his cooperation. The claimant appeared to want the respondent to make decisions but when a decision was made, the claimant made a complaint. The Tribunal considered that it was significant that multiple managers had been involved and there had been support from the vast majority of the HR because of his multiple grievances.
340. Against this background, the Tribunal considered that it was reasonable for the respondent to speak to the claimant to see how the grievances were to be processed, who would be dealing with investigating those grievances and who would be considering them. The respondent had a limited pool of people who had not been involved and against whom the claimant had not raised a concern. The Tribunal felt that in these circumstances, to agree the personnel and the scope of the grievance investigation and subsequent first formal hearing was prudent.
341. Given the time that had passed and the challenges that had arisen by communicating by letter, the Tribunal felt that it was reasonable for the claimant to be asked to attend a meeting to engage in that discussion before the grievances were addressed. The Tribunal did not consider that at any

point, there was any suggestion by the respondent that those grievances would not be considered. To the contrary the respondent wanted to deal with these matters so that the claimant was able to return to work. The Tribunal's understanding at the final hearing was that the claimant was only concerned about the three numbered grievances that were outstanding. However, that was not apparent from the contemporaneous correspondence nor did it address was to happen about the numerous other issues the claimant had raised.

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342. The claimant said that the letter of 5 November was the last straw. The Tribunal accepted that there was no provision within the grievance policy for the mediator to be appointed in the manner suggested by Ms Cooksey. However, this was an attempt to find a way forward, recognising the continuing stress and challenge for the claimant and others that had been involved. The Tribunal did not consider that by making this offer, Ms Cooksey was in breach of contract or in any way objectively acting in a way that showed that she was abandoning or refusing to deal with the grievances or indeed the contract of employment. The Tribunal did not consider that it was in any way blameworthy or unreasonable. The Tribunal however felt that from the claimant's point of view, it was a further delay in dealing with his grievances and therefore amounted to a last straw.

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343. During its deliberations the Tribunal considered that the respondent demonstrated its commitment to the claimant's continued contract of employment. There were lengthy delays in the processes and the length of the suspension was unusual but the Tribunal was satisfied that there was reasonable and proper cause for the conduct relied upon by the claimant. There were administrative errors which were understandably frustrating for the claimant but any breach was not so serious that the claimant was entitled to treat the contract as being at an end.

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344. The Tribunal looked at the respondent's conduct as a whole in order to determine whether it was such that its effects, judged reasonably and sensibly were such that the claimant could not be expected to put up with it.

345. In the Tribunal's view the claimant was a senior employee who had been a valued member of the team. Issues arose about the claimant's working practice. The claimant's relationship with Ms Cossar became strained because of her management of the claimant under a capability process. The relationship further deteriorated when grievances were raised and disciplinary action followed. The respondent was entitled to deal with the process sequentially. While Ms Cossar was not involved in any subsequent decision making the processes had a significant effect on the claimant. The respondent acknowledged procedural failings in the capability process. Grievance G129 came to a close in August 2016 when the appeal was considered by the Chief Executive. Notwithstanding this Ms Cooksey agreed to review that process in relation to grievance G175. The respondent undertook a disciplinary process which it was entitled to do. While the suspension was very lengthy it was reviewed from time to time. The respondent acknowledge further grievances that were raised and endeavoured to deal with them under the appropriate procedure to endeavour to have the issues dealt with proportionately and as soon as possible. This involved some matters being considered in disciplinary process while other were being dealt with concurrently as a grievance or being put on hold. There was no evidence to suggest that the respondent did not want to deal with the issues or that the respondent wanted the claimant to leave. To the contrary the Tribunal's impression was that the respondent was seeking the claimant's cooperation to resolve matter and have him return to work.

346. The Tribunal was satisfied that the respondent's conduct as a whole was not a breach of the implied term of trust and confidence entitling the claimant to resign.

347. Being satisfied that there was no fundamental breach of contract the Tribunal did not require to consider whether the claimant had affirmed the contract following the breach.

348. The Tribunal did not need to consider the issue of remedy.

349. The claim of unfair constructive dismissal was dismissed.

Employment Judge: Shona McLean

Date of Judgement: 15 July 2022

5 Entered in register: 21 July 2022

and copied to parties

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