EMPLOYMENT TRIBUNALS

Claimant: **Dr G Watts**

Respondent **Manchester University NHS Foundation Trust**

HELD AT: Manchester **ON:** 4-8 + 11-14 October 2021 (in chambers: 15 October 2021 + 14-15 March 2022)

BEFORE: Employment Judge Batten
A Egerton
I Taylor

REPRESENTATION:
For the Claimant: N Grundy, Counsel
For the Respondent: M Sutton, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. the complaint of unfair dismissal is well-founded;

2. the claimant was wrongfully dismissed; and

3. the complaint of sex discrimination fails.

REASONS

1. By a claim form presented on 7 May 2019, the claimant presented her claim comprising complaints of unfair dismissal, sex discrimination, unauthorised deductions from wages and of breach of contract. On 18 June 2019, the

respondent submitted a response to the claim. The complaint of unauthorised deductions from wages was dismissed upon withdrawal on 14 September 2019.

2. A case management preliminary hearing took place on 23 August 2019 before Employment Judge Hoey at which the claims were clarified and a list of issues was drawn up. In early 2020, the parties worked to clarify the comparators relied upon. A further case management preliminary hearing took place on 11 September 2020, before Employment Judge Warren, to review progress and make further case management orders to prepare for this hearing.

Evidence

3. A bundle of documents comprising 2 full lever arch files, 695 pages, was presented at the commencement of the hearing in accordance with the case management Orders. A number of further documents were added to the bundle in the course of the hearing. References to page numbers in these Reasons are references to the page numbers in the bundle. In addition to the documentary evidence, by agreement between the parties, the Tribunal was presented with and listened to excerpts from the audio recordings of certain meetings and hearings.

4. The claimant gave evidence herself by reference to a lengthy witness statement and also called Dr S Ahmad, a former work colleague, to give evidence in support.

5. The respondent called 4 witnesses to give oral evidence, being: Dr A Bentley, who conducted the investigation of the claimant; Ms D Baker, former Director of Operations, who had chaired the disciplinary panel; Mr R Montague, Medical Director and case manager of the investigation; and Professor J Eddleston, Joint Group Medical Director who chaired the appeal hearing. All of the witnesses gave evidence from written witness statements and were subject to cross-examination. In addition, the respondent tendered a witness statement from Professor B Clarke, the respondent's Group Associate Medical Director who was not called to give evidence and, accordingly, the Tribunal attached little weight to the contents of his statement in the absence of attendance for cross-examination.

6. The Tribunal was also provided with a cast list and each party produced their version of the chronology. In the course of the hearing, the parties produced a list and table of the various comparators' circumstances.

7. The oral evidence and submissions were completed in the afternoon of the ninth hearing day. The Tribunal then retired to deliberate, which required a further 2 days to complete. Regrettably, the further deliberations' days had to be delayed due to a Tribunal member being unavailable due to unanticipated medical treatment in the interim.

Issues to be determined

8. A draft list of issues had been prepared at the case management preliminary hearing on 23 August 2019. At the outset of the hearing, the Tribunal discussed the draft list of issues with the parties. After amendment, and clarification of further information required of the respondent in respect of the comparators (which information was later provided in a table agreed between the parties) it was agreed that the issues to be determined by the Tribunal were as follows:

LIABILITY:

Unfair dismissal

(i) What was the principal reason for dismissal?

(ii) was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's conduct.

(iii) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the 'band of reasonable responses'?

a. Did the respondent genuinely believe the claimant to be guilty of misconduct?

b. Did the respondent have reasonable grounds for that belief?

c. Did the respondent carry out as much investigation as was reasonable?

d. Was a fair procedure followed?

e. Was the ACAS Code followed?

Direct discrimination because of sex – Equality Act 2010 section 13

(iv) It is not in dispute that the respondent subjected the claimant to the following treatment: she was dismissed by reason of misconduct.

(v) Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

The claimant relies on actual comparators and/or hypothetical comparators.

(vi) If so, was this because of the claimant's sex?

Breach of contract

(vii) To how much notice was the claimant entitled?

(viii) Did the claimant fundamentally breach the contract of employment by an act of so-called gross misconduct?

REMEDY:

Remedy for unfair dismissal

(ix) The claimant seeks reinstatement, failing which reengagement, failing which compensation.

(x) If the claimant was unfairly dismissed and the remedy is compensation:

a. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway?

b. would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

c. did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

Remedy for sex discrimination

(xi) If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation including injury to feelings and/or damages, will decide how much should be awarded. Issues arising include:

a. if it is possible that the claimant would still have been dismissed at some relevant stage even if there had been no discrimination, what reduction, if any, should be made to any award as a result?

b. did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A")?

c. did the claimant unreasonably fail to comply with a relevant ACAS Code of Practice?

d. If so, would it be just and equitable in all the circumstances to decrease any compensatory award and if so, by what percentage (again up to a maximum of 25%), pursuant to section 207A?

Remedy for breach of contract

(xii) If the claimant succeeds, how much notice pay and other benefits are due for the contractual/statutory notice period?

Findings of fact

9. The Tribunal made its findings of fact on the basis of the material before it, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts

of evidence as arose on the balance of probabilities. The Tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts. Having made findings of primary fact, the Tribunal considered what inferences it should draw from them for the purpose of making further findings of fact. The Tribunal have not simply considered each particular complaint, but have also stood back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination.

10. The findings of fact relevant to the issues which have been determined are as follows.

11. The claimant was employed by the respondent from 6 December 1999 as a Consultant Gastroenterologist, based at Wythenshawe Hospital. Her contract of employment appears in the bundle at pages 89-98 with previous contracts at pages 86-88. At the relevant time, the claimant was in receipt of a Clinical Excellence Award ("CEA").

12. The respondent is the product of the merger of 2 NHS Trusts, namely University Hospitals of South Manchester NHS Foundation Trust ("UHSM") and Central Manchester University Hospitals NHS Foundation Trust ("CMUH"). Whilst the merger was effective from 1 October 2017, there was much outstanding work to do in terms of merging the various policies and procedures as between the 2 predecessor Trusts. At the material time, in 2018 – 19, that work was ongoing. This was apparent because the respondent's witnesses were at times unsure which policy was in place and which had been superseded. The Tribunal accepted the evidence of Mr Montague to the effect that the "legacy policies" of the predecessor Trusts should have been used until agreement was reached on a policy for the merged organisation.

Policies, procedures and services

13. The relevant policies and procedures of the respondent or relevant services available to it, to which the Tribunal were referred, included the following:

14. Managing High Professional Standards ("MHPS") is a national framework for handling concerns about Doctors in the NHS and appears in the bundle at pages 99-129.

15. National Clinical Assessment Service ("NCAS") is a service to which NHS Trusts can refer concerns about healthcare professionals for informal consideration, advice and support to manage and resolve those concerns.

16. UHSM Disciplinary policy and procedure which appears in the bundle, policy version 3.0 at pages 159—174 and the procedure at pages 175-192, followed by an investigation procedure at pages 193-199.

17. The Tribunal was shown the legacy Values and Behaviours statement of CMUH, in the bundle at page 671.

18. UHSM Dignity at Work policy (also known as the Bullying and Harassment policy) in the bundle at pages 672-679.

19. It was unclear to the Tribunal and to the respondent's witnesses which policy the respondent was following at any particular time. Several witnesses told the Tribunal that they were following a particular policy whilst other witnesses, in speaking about the same event or action, referred to a different policy including, variously, MHPS and/or the respondent's legacy disciplinary policies. In addition, some of the witnesses appeared to be following a blend of policies. When challenged on this aspect, witnesses such as Mr Montague resorted to telling the Tribunal that he was following legal and/or HR advice, which became his default answer when he was unable to identify with precision the basis for his actions.

2013

20. In 2013, the claimant was subject to a disciplinary process which resulted in a final written warning which, on appeal, was downgraded to a warning. The allegations against the claimant at the time were of misconduct, being 'deliberate and unwanted verbal and physical aggression towards a staff nurse'. The warning was to be live for 12 months. There was no repeat of any disciplinary matter in the 12 months following and so the warning expired in 2014.

21. Subsequently, the claimant had a number of appraisals which identified no issues arising. The appraisal documents confirmed that the claimant was dealing with a significant and complex caseload, that the claimant communicates well with peers and allied professionals, with an emphasis on partnership and teamwork. In 2017, the claimant was rated as "excellent" for communication, partnership and teamwork. She was commended for helping to improve staff morale amongst other things and, in the bundle at page 699, the claimant is described as supportive, approachable and working well both within her team and with the wider team.

4 April 2018

22. On the morning of 4 April 2018, the claimant conducted a regular outpatients' clinic at Withington Hospital. After the clinic, the claimant emailed Pauline Taylor, one of the managers, about the clinic list and issues which had arisen during the morning including the fact that extra patients had been added to the list. Ms Taylor agreed to look into the issue and subsequently discovered that extra patients had been slotted into the list, so the list was overbooked.

23. Sometime later that day, an incident during the clinic was reported to Christine Miles, the Matron, by Lindsey Chapman, a sister in the outpatients' department. Ms Chapman had not witnessed the matters which she reported but nevertheless she gave brief details (hearsay) of what she had been told, including that a Healthcare Assistant ("HCA"), Sheila Neenan, had apparently been shouted at by the claimant and pushed, reportedly "knocking her off balance". Ms Chapman reported that Sharon Grennan, another HCA, had witnessed events and "wants to see [Matron] ASAP please", see bundle page 388. No complaint was made or pursued by the staff who were said to have been involved in the incident.

The initial investigation

24. On 10 April 2018, Mr Butcher spoke to HCAs Neenan and Grennan, on an informal basis, during which HCA Neenan described what happened, namely that the claimant had "walked her out of the room like a doll with her hands on [her] shoulders" telling HCA Neenan to explain to the patients who were waiting why the clinic was running 10 minutes late. Mr Butcher made a file note of this interview which is in the bundle at page 506. For reasons unknown, this note was not disclosed to the claimant until it appeared in the appeal papers.

25. On 12 April 2018, Mr Butcher and Dr Jones, the claimant's line manager, met with the claimant who was told that her behaviour during the clinic on 4 April 2018 was to be investigated. Later that day, the claimant emailed her written account of the matters discussed and about the clinic to Mr Butcher and Dr Jones, opening with a statement that she was devastated to hear that she had upset the nurses in clinic. The claimant's email is in the bundle at pages 239-240.

26. On 13 April 2018, the claimant emailed her line-manager, Dr Jones, asking him to facilitate a face-to-face meeting between her and HCA Neenan, in order for the claimant to apologise to HCA Neenan. Mr Jones did not reply but, in the meantime, the claimant encountered HCA Neenan who had come to her clinic. The claimant took the opportunity to apologise to HCA Neenan. The claimant then emailed Mr Butcher and Dr Jones to inform them of the encounter and to report that HCA Neenan had said she had not wanted to take it further.

27. From the bundle of documents, it is apparent that Mr Butcher had at some point drafted a reply to the claimant to the effect that he was pleased that the claimant had spoken to HCA Neenan, and that "things seem to be resolving with her". Mr Butcher's draft reply included a statement "The only issue for me is the alleged raising of voices and doors being slammed during clinic" and "Hopefully this can be resolved quickly", concluding with "You're an excellent and valued colleague …and a leader to others." For reasons unknown, Mr Butcher's reply was never sent to the claimant.

28. On 17 April 2018, Mr Butcher interviewed Pauline Taylor, the outpatients' clinic manager, who outlined communications between herself and the claimant on 4 April 2018. These were about matters unrelated to any allegation concerning the claimant's conduct towards HCA Neenan. Ms Taylor reported that she had sent a patient away from the clinic because the claimant had said she was busy and she had not allowed Ms Taylor to explain the situation at the time. Ms Taylor put matters in writing to Mr Butcher in an email that day which appears in the bundle at page 384. The contents are in stark contrast to the email exchanges between the claimant and Ms Taylor at the time, which show that there had been a misunderstanding about extra patients being added to the clinic list and that this was cleared up on 4 April 2018 within or shortly after the clinic. There was no evidence that the respondent had taken the time to gather the contemporaneous emails which existed and which would have evidenced events and communications. Instead, the respondent decided to add in an allegation about a patient or patients being upset, for good measure, the effect being that the respondent embarked on building a case against the claimant.

29. On 18 April 2018, Mr Butcher emailed Susannah Glasgow, a research nurse, and a Ms Yuille asking them to email him with details of what they had heard or witnessed. In his email Mr Butcher commented that "Some of the behaviours that day experienced by the staff and patients wasn't acceptable and I'm keen to address this a.s.a.p." – see page 244 of the bundle.

30. Sometime before 18 April 2018, Mr Butcher had interviewed Ms Glasgow. She then emailed Mr Butcher in response to his email of 18 April 2018, to record that she had been aware of the claimant shouting at HCA Neenan, "Do you want to explain to these patients why the clinic is running late?" and alleging that the claimant slammed the door with force whilst HCA Neenan was distressed. Ms Glasgow also stated that patients were distressed and that she had offered one reassurance. Her brief account by email appears in the bundle at page 383. The allegation of distress to patients was an entirely new matter which had not been reported before.

31. On 24 April 2018 Mr Butcher sent a number of statements to HR and senior colleagues, asking them to review matters on the basis that he needed to "know which direction we are taking this" see bundle page 246. The respondent's case described Mr Butcher's work as 'the initial fact-find' - it was a series of informal meetings, followed by invitations to comment by email leading to responses from some, which were then referred on for a decision on whether to investigate. The few documents referred on by Mr Butcher included his note of the first meeting he had, with HCAs Neenan and Grennan, on 10 April 2018 even though this note was withheld from the claimant until after her dismissal.

32. The Tribunal considered that the approach adopted by the respondent to potential witnesses in this initial phase: "What can you tell us about the claimant?", amounted to a fishing expedition, inviting comments which led to more issues being added to the matters under investigation without any checks thereon. Mr Butcher met with a number of individuals but his notes of these enquiries were largely absent, the respondent instead relying on emails sent by certain individuals in response to Mr Butcher's invitation to comment. It was impossible to ascertain precisely who had been spoken to. It was therefore entirely possible that some had chosen not to submit comments by email or at all. The result, therefore, was that only those who spoke out against the claimant had their comments referred on. In this regard, the Tribunal accepted the description of Counsel for the claimant, as being apt, namely that the matter was 'growing in the telling'.

The Background document

33. On 28 April 2018, the respondent's HR Business Partner, Charlotte Vaughan, wrote and sent a "Background document" to Mr Montague who had by then appointed himself as the case manager. The document appears in the bundle at pages 251-253 and was sent under cover of an email from Ms Vaughan saying, "This incident does need investigating". The Background document comprises 2 pages, of which one page and a third of the second page are about the disciplinary incident in 2013 with a detailed analysis of the evidence in 2013. The fact that the sanction was reduced on appeal features as only one sentence in the report. The remainder of the Background document is about the incident on 4 April 2018 itself. The Tribunal considered this not to be background at all but constituted the respondent's HR setting the scene and direction of the investigation.

The allegations

34. On 14 May 2018, the claimant was called to a meeting, and was told of a single allegation against her, namely that *'On Wednesday 4 April 2018 you shouted at Miss Sheila Neenan, Health Care Assistant, in the presence of staff and patients. You also slammed the door and acted in a manner which distressed staff and patients*.' This was 6 weeks after the incident. The claimant had thought the matter as between herself and HCA Neenan was closed. The claimant formed the view that she was the subject of a witch-hunt.

35. On 16 May 2018, the respondent wrote to the claimant to inform her that there were to be 2 allegations, namely the allegation above and also an allegation that '*On the same day, you refused to see a patient who was waiting to see you in your clinic*.' – see bundle pages 260-261.

36. On 17 May 2018, Dr Briggs, the respondent's Divisional Medical Director, wrote to the claimant following the meeting on 14 May 2018, to clarify that none of the individuals involved in the incident on 4 April 2018 had brought a

formal complaint but that the individuals had made management aware of the incident – see bundle pages 264-266. In fact, the Tribunal found that none of them had made any form of complaint nor referred to management as the letter implies. The Tribunal considered that the evidence showed an entirely different scenario – the whole matter had started through hearsay; somebody reporting what they had been told by a third party. The respondent's letter of 17 May 2018 also sets out a number of matters as a factual account despite that such matters are to be investigated.

The formal investigation

37. On 21 May 2018, Mr Montague sent the claimant a terse email to confirm that the formal investigation had been launched and referring her to a policy via a hyperlink – it remains unclear to which policy this related. A letter of 16 May 2018 from Mr Montague to the claimant had also erroneously referred to "the Trust's Disciplinary Policy" despite that a combined or revised policy, following the merger, had yet to be decided upon.

38. The respondent's investigation was led by Mr Montague as the case manager. It was his first time in the role of case manager. Mr Montague was not independent and he did not come to the investigation with an open mind. He told the Tribunal that he had appointed himself as the case manager although he was unable to explain why it was necessary for him to do so and he seemed unable to understand that his involvement in the preliminary investigations and previous processes was likely to compromise the independence required of him. In addition, Mr Montague had no MHPS training and no experience of case management. He admitted he had had, at best, "a couple of hours of verbal training". In those circumstances, the Tribunal considered that his self-appointment was wholly inappropriate, taking account also of the fact that he admitted under cross-examination, that there were other managers at the respondent who were better placed to handle the case.

39. The terms of reference for the investigation, whilst signed off by Mr Montague, were written by another senior manager, and are factually inaccurate. This is despite that Mr Bentley's evidence was that he had "carefully reviewed" the terms of reference himself. For example, it suggests that the investigation arose following a complaint by a HCA to her manager about the claimant's behaviour when that was simply not the case. HCA Neenan, the focus of the first allegation, had never complained and others had only raised matters for investigation when invited to do so by the respondent's managers, rather than submitting complaints themselves. There was no evidence of complaints volunteered by the staff concerned.

40. In the midst of events, on 24 May 2018, the claimant had an appraisal at which she was told she "demonstrates partnership and teamwork" and is a valued colleague.

41. On 1 June 2018, the claimant underwent a lengthy investigatory interview with Dr Bentley accompanied by Ms Vaughan from HR. Mr Montague had chosen Dr Bentley to investigate matters for him. However, as case investigator, Dr Bentley was not aware that the claimant should have been provided with any information and/or evidence prior to the interview. Hence, the claimant was provided with nothing, despite the clear requirement under MHPS, paragraph 13 (bundle page 109) for the practitioner concerned to be given sight of any correspondence relating to the case together with a list of those to be interviewed. In a flagrant breach of procedure, and contrary to the claimant's rights, some of this documentation was withheld by the respondent throughout the disciplinary and appeal process and was only disclosed to the claimant in the course of these Tribunal proceedings.

42. Dr Bentley did not approach the investigation with an open mind. He described, in his evidence, the claimant's apology as a "perceived apology" demonstrating at best a grudging acceptance that the claimant had apologised, coupled with his suspicion about the claimant's motives for doing so and he was at pains to highlight the claimant's "focus on the technical and practical aspects of the incident", going on to dismiss that focus with a suggestion that IT issues in the NHS were not out of the ordinary. The claimant told Dr Bentley that she had reflected on her behaviour in any event. However, there was no attempt to reference the claimant's request for mediation nor to give any credit for the claimant's apology. Whilst the terms of reference of the investigation were that Dr Bentley, as the investigator, would not make recommendations unless invited to do so, the Tribunal considered that he had formed an adverse view of the claimant which he decided to include in his report, even though he had told Mr Montague that this was "not within my remit".

43. On 7 June 2018 Dr Bentley interviewed HCA Neenan and other employees with whom she worked, including HCA Grennan, and Ms Taylor. The record of the interviews show that Dr Bentley's questions were not open; they were leading and suggestive, expanding the allegations, putting ideas into the witnesses' heads and inviting them simply to agree with his statements. Dr Bentley described HCA Grennan as an "outlier" but reported her as being quite outspoken in her view of the claimant and he gave weight, in his statement, to her view of the claimant as "well known by staff for being in a bad mood". This view is not probed by Bentley for examples of others who might share that view. Nor is it substantiated by Ms Grennan. Further, it is contradicted by HCA Neenan, who said that "this was out of the ordinary for [the claimant]". Importantly, the Tribunal noted that HCA Grennan was the only witness to suggest that the claimant "slammed the door" in her and Pauline Taylor's faces, whist Ms Taylor said that she hadn't been offended and that the claimant had "just closed [the door]" – see bundle page 370.

44. On 14 June 2018, Dr Bentley interviewed Nurse Glasgow, who had "heard raised voices" without specifying whose voices were raised. At the end of her interview, Ms Glasgow is prompted by HR to remember another alleged

incident with the claimant. Although it is not apparent that Ms Glasgow in fact remembered the incident as described to her or at all, she says in response, “yes, and that’s the sort of thing I think…” Dr Bentley accepted in cross-examination that the inclusion of an unrelated and unsubstantiated event was prejudicial. However, although he said that was not his intention he then sought to justify its inclusion, and said that he was “compelled” by Nurse Glasgow’s evidence. The interview ends, tellingly, with Nurse Glasgow asking Dr Bentley, “Do you want me to do it a bit better?” and he says “No, that’s fine” - see bundle page 380.

45. The investigatory interviews were recorded and transcripts produced by the respondent’s HR Business Partner, Ms Vaughan, who typed up the recordings herself, rather than give the job to a competent typist who would no doubt have been cheaper. Her transcripts appear in the bundle. They include gaps, said to be for inaudible parts, and a significant number of serious and important inaccuracies, including in the transcript of HCA Neenan’s interview. For example, certain words and phrases are set out in capital letters, which draws attention to them, including the word “shove”, said to have been used by HCA Neenan albeit that Dr Betley accepted in his evidence that the word “shove” had never been used by HCA Neenan in her interview – see bundle pages 363 and 364. HCA Neenan also did not describe events in those terms to the disciplinary hearing.

46. Once the interviews were completed, on mid-June 2018, there was a significant and unexplained delay in concluding the investigation. The claimant was updated in meetings at the end of July and the beginning of September 2018. The claimant then suffered a close bereavement and was absent on bereavement leave in early September 2018.

47. On 19 September 2018, Mr Montague wrote to the claimant about his decision to proceed to a disciplinary hearing. His letter appears in the bundle at pages 293-294. Mr Montague states his view that there was a case to answer and that the allegations needed to be considered at a disciplinary hearing. Despite the respondent having delayed matters for over 3 months, the claimant was then given 9 days to submit her statement of case and any documents to Mr Montague. Nevertheless, on 27 September 2018, the disciplinary hearing had to be re-arranged due to the unavailability of the claimant’s union representative. Mr Montague gave the claimant a choice of 2 alternative dates: 29 or 30 November 2018, and he informed the claimant that if she could not do either date the case would proceed in her absence on 29 November 2018. In that event, the claimant was told that she could provide written representations. The Tribunal considered Mr Montague’s approach to be inflexible and inconsiderate of the claimant.

The investigation report

48. Dr Bentley wrote the report on his investigation which appears in the bundle at pages 311-384. Despite that the terms of reference for the investigation

specifically provide that Dr Bentley will not make recommendations unless invited to do so by the case manager, he does just that and Mr Montague, as case manager, did not remove those recommendations. The Tribunal considered, on a balance of probabilities, that Mr Montague agreed with and accepted them - he put his name to the report, apparently without question.

49. Throughout this episode, and despite the respondent's witnesses telling the Tribunal how serious the allegations were, the respondent at no stage considered suspending the claimant from work. Dr Bentley sought to explain this in the investigation report by saying that the claimant did not work with the HCAs concerned during the course of the investigation. The evidence was that the claimant did not work with one of the HCAs, Ms Neenan but there was no evidence that she did not work with any others involved. In light of the lack of complaints, the Tribunal considered that there would be no reason for the respondent to arrange the claimant's work in order to avoid up to 5 HCAs and, in any event, the respondent did not do so.

50. In the investigation report, Dr Bentley sets out his "findings" followed by an "investigation conclusion". In respect of the first allegation, he states "I am satisfied, on the balance of probabilities, that this incident occurred as described in the allegation" – see bundle page 322. The Tribunal considered this to be tantamount to suggesting that allegation A was proven. To add to such, Dr Bentley stated that witnesses had "reflected on a past history of rather dismissive behaviour towards nursing and ancillary staff" when there was nothing to substantiate this statement beyond hearsay and anecdote, none of which were checked out. The respondent simply accepted what it heard, some of which had been prompted by HR. In addition, the claimant's apology is couched in terms of an admission. In relation to the second allegation, Dr Bentley concluded that this was an unfortunate set of circumstances, of misunderstanding and miscommunication but nevertheless sought to link it to the first allegation by suggesting that it was "at least in part related to the earlier events" – see bundle page 323. In fact, the second allegation was not made out in terms of a refusal to see a patient. Additional patients had been added to the clinic list and there was insufficient time to see them. The claimant had another clinic shortly after the clinic in question and, in any event, the patient notes were not available, a fact that had been acknowledged by Ms Taylor in an email. Nevertheless, Mr Montague did not give any thought as to whether the second allegation should be withdrawn. He decided to proceed with both allegations.

The disciplinary hearing

51. On 29 November 2018, the claimant's disciplinary hearing was convened. The transcript of the hearing appears in the bundle at pages 405-460. The management statement of case appears in the bundle at pages 307-309 and the claimant's statement of case is at pages 389-404. The hearing was chaired by Ms Baker who was unable to say with any certainty who had appointed her and she was unclear about which procedure they were

following. Ms Baker had the details of the incident in 2013 and the claimant's expired warning in her mind and she admitted that it influenced her thinking.

52. On 4 December 2018, the respondent held a "disciplinary outcome meeting" at 3pm at which the claimant was informed that she was to be dismissed summarily for gross misconduct. No notes of this meeting were produced by the respondent. However, Ms Baker said in evidence that she had told the claimant that her conduct amounted to bullying and harassment of a junior colleague despite that this was not in fact the allegation faced. The Tribunal considered that Ms Baker deliberately added such a prejudicial description to the claimant's situation in order to make it worse.

53. That same day, 4 December 2018, the claimant was sent a letter of dismissal which appears in the bundle at pages 466-472. The letter states at page 471 the claimant offered no mitigation when that was not true.

54. On 12 December 2018, a colleague contacted the claimant offering to help with a statement in support of her appeal and said that others, including HCA Neenan, were upset about the claimant's dismissal. However, within a matter of a couple of days, colleagues returned to the claimant to say that they were unable to assist with her appeal because a member of the respondent's management had instructed them not to help the claimant.

The appeal

55. On 17 December 2018, the claimant appealed her dismissal through her BMA representative. The grounds of appeal were that the sanction of dismissal was wholly disproportionate, that the finding of a lack of insight was contrary to the evidence, that the management case was biased and included the 2013 spent warning, there was evidence of mitigation presented which was not given due consideration, that the disciplinary process undertaken was flawed and that alternatives to dismissal were not considered. In addition, the claimant raised sex discrimination, contending that she did not believe a male Consultant would have been treated in the same way or dismissed as she was – see bundle pages 476-478.

56. For unexplained reasons, the respondent failed to proceed to arrange an appeal hearing and the claimant's BMA representative had to chase the respondent to do so. This took a period of over 2 months, with the BMA representative having to point out the inordinate delay there had also been in arranging the disciplinary hearing.

57. On 25 February 2019, the claimant went to ACAS to commence early conciliation due to the impending deadline for such.

58. On 27 February 2019, the respondent advertised the claimant's role as vacant despite her appeal having been submitted.

59. On 10 March 2019, one of the claimant's potential witnesses texted the claimant to say, "we have all be warned" and asking how the claimant can guarantee there will be no repercussions from their involvement.

60. On 12 March 2019, the claimant's appeal hearing took placed, chaired by Professor Eddleston. The transcript of the appeal hearing appears in the bundle at pages 523-570. The management statement of case was presented by Ms Baker and appears in the bundle at pages 490-503 with the claimant's statement at pages 507-522. A bundle of documents was produced for the appeal hearing which included witness statements and notes of interviews which the respondent had previously told the claimant did not exist. Nevertheless, it had been decided that no witnesses would be called to the appeal hearing. Ms Baker's explained that this decision had been taken because the respondent considered it would be an ordeal for the witnesses concerned and because it was felt that HCA Neenan was "in awe" of the claimant. This was a highly subjective view, with no evidence to substantiate it. The respondent also failed to consider whether it might facilitate alternative ways for witnesses to give evidence in any event.

61. On 21 March 2019, the claimant was sent a letter informing her that her appeal had been turned down. The letter appears in the bundle at pages 571-576. Despite the appeal panel's unanimous decision to reject the appeal and to uphold the claimant's summary dismissal, in the penultimate page of the letter, Professor Eddleston offered the claimant an alternative to dismissal. This was a proposal for the claimant's return to work for the respondent, continuing as a Consultant conditional upon her acceptance of a 12 months' final written warning together with the following further sanctions:

    61.1 removal of the claimant's Clinical Excellence Award points - Professor Eddleston was challenged on this in cross-examination and she was unable to establish that it was in fact within the respondent's power to remove the CEA Award points. The relevant policy had changed but had not been ratified which meant that this particular sanction was put to the claimant at a time when the respondent had no authority to do so;

    61.2 compliance with the terms of a Behaviour Contract including a 360-degree peer review to involve the nurses and other medical and non-medical personnel who worked alongside the claimant;

    61.3 a reflective piece to be compiled by the claimant;

    61.4 the next 3 years' annual appraisals to include a 360-degree peer review; and

    61.5 the claimant to attend Leadership Development training in May 2019.

62. On 29 March 2019, the claimant wrote to the respondent to make counterproposals for her return to work. However, on 1 April 2019, the respondent replied saying that its terms were not negotiable.

63. The respondent contended that its proposals were not intended to be a financial punishment but they were. The sanctions amounted to a minimum loss to the claimant of £12,000 per annum with a consequent effect on her future pension entitlement. Indeed, Professor Eddleston described the removal of the claimant's CEA as "a punitive measure" in her reply to the claimant on 1 April 2019. In addition, in responding to the claimant's counterproposals, Professor Eddleston took the opportunity to add that any back pay due to the claimant would also not include the seniority pay increase which was otherwise due. This was estimated to be a loss to the claimant of a further £18,000. Given the applicability of nationally negotiated terms of service including such pay rises, it was apparent that Professor Eddleston was also acting beyond her authority in this regard.

64. As part of the respondent's proposals, which the claimant was told she had to accept in full, as "non-negotiable", the proposed Behaviour Contract was sent to the claimant. It includes a clause that the claimant "recognise the appeal panel's finding of bullying and [accept] that [the claimant] lacked insight into how [her] behaviour impacted on SN and also on junior team members, and that [the claimant] emphatically failed to acknowledge any other witness account of the events" – see bundle page 581. Further, it was proposed that that Mr Montague would be the primary monitor of the claimant's behaviour going forward – see bundle page 583. The Tribunal considered that that proposal to be completely inappropriate in light of Mr Montague's involvement in the disciplinary process and demonstrated a lack of judgment on the respondent's part. In the circumstances, the Tribunal considered the "non- negotiable" proposals to be reprehensible. They were specifically designed to penalise the claimant financially, to secure her humiliation in front of her colleagues and junior staff over several years going forward, and were laced with spite on the part of the respondent's management.

65. On 3 April 2019, the claimant requested 3 changes to the respondent's conditions but the respondent again refused to negotiate or make any changes.

66. On 5 April 2019, Professor Eddleston wrote to the claimant to say that she was "disappointed that [the claimant had] taken this decision and [had] not been prepared to accept [the respondent's] conditions relating to [the claimant's] proposed return", and commented that the claimant had "not responded in the spirit in which the conditions were put" to her. The claimant's summary dismissal was therefore confirmed – see bundle page 593. Professor Eddleston's reply was specifically and dishonestly couched in terms of the situation being the claimant's decision, when in fact the

respondent had behaved oppressively in its approach to the claimant's possible return to work and had presented her with terms which were effectively impossible to accept and then blamed the claimant for not accepting everything proposed.

The applicable law

67. A concise statement of the applicable law is as follows.

Unfair dismissal

68. Section 98 of the Employment Rights Act 1996 ("ERA") sets out a two-stage test to determine whether an employee has been unfairly dismissed. First, the employer must show the reason for dismissal or the principal reason and that reason must be a potentially fair reason for dismissal. The respondent contends that the reason for dismissal was the claimant's conduct. Conduct is a potentially fair reason for dismissal under Section 98 (2) (b) ERA.

69. If the employer shows a potentially fair reason in law, the Tribunal must then consider the test under section 98 (4) ERA, namely whether, in all the circumstances, including the size and administrative resources of the respondent's undertaking, the respondent acted reasonably or unreasonably in treating that reason, i.e. conduct, as a sufficient reason for dismissing the claimant and that the question of whether the dismissal is fair or unfair shall be determined in accordance with equity and the substantial merits of the case.

70. In considering the reasonableness of a dismissal for misconduct, the Tribunal must have regard to the test laid out in the case of *British Home Stores -v- Burchell* [1978] IRLR 379 and consider whether the respondent has established a reasonable suspicion amounting to a genuine belief in the claimant's guilt and reasonable grounds to sustain that belief and the Tribunal must also consider whether the respondent carried out as much investigation as was reasonable in the circumstances.

71. The issue of the reasonableness of the dismissal must be looked at in terms of the set of facts known to the employer at the time of the claimant's dismissal, although the dismissal itself can include the appeal; so, matters which come to light during the appeal process can also be taken into account: *West Midlands Co-operative Society Ltd -v- Tipton* [1986] IRLR 112.

72. The Tribunal must also consider whether the decision to dismiss fell within the band of reasonable responses open to a reasonable employer in the circumstances of the case: *Iceland frozen Foods Ltd -v- Jones* [1982] IRLR 439. The range of reasonable responses' test applies both to the decision to dismiss and to the procedure by which that decision is reached: *Sainsbury's Supermarkets Ltd –v- Hitt* [2003] IRLR 23.

73. In assessing compensation for unfair dismissal, a Tribunal can make reductions in certain circumstances (should compensation be the appropriate remedy). Compensation can be reduced pursuant to the principles set out in *Polkey v A E Dayton Services Limited* [1987] IRLR 503 if the Tribunal finds that there were procedural shortcomings and to reflect the likelihood that dismissal would have resulted in any event. The Tribunal can also reduce compensation if it finds there to have been contributory fault on the part of the claimant. This is relevant not only to the basic and compensatory awards (sections 122(2) and 123(6) respectively), but also to whether an order for reinstatement or re-engagement should be made (sections 116(1)(c) and 116(3)(c) respectively. As to what conduct may fall within these provisions, the decision of the Court of Appeal in *Nelson v BBC (No 2)* [1980] ICR 110 was to the effect that the statutory wording means that some reduction is only just and equitable if the conduct of the claimant was culpable or blameworthy, such as perverse, foolish or bloody-minded conduct.

74. The ACAS Code of Practice on Disciplinary and Grievance Procedures contains guidance on the procedures to be undertaken in relation to a dismissal for conduct. Although compliance with the ACAS Code is not a statutory requirement, a failure to follow the Code should be taken into account by a Tribunal when determining the reasonableness of a dismissal.

Breach of Contract - Notice Pay

75. Section 86 ERA provides that an employer is required to give minimum notice to an employee to terminate his or her contract of employment. The minimum period of notice required, where the employee has been continuously employed for one month or more, is one week's notice for each completed year of service up to a maximum of 12 weeks' notice. A contract of employment may provide for a greater period of notice.

76. An employer is entitled to terminate the contract of an employee without notice in circumstances of gross misconduct.

Sex discrimination

77. The complaint of sex discrimination was brought under the Equality Act 2010 ("EqA"). Sex is a relevant protected characteristic as set out in section 11 EqA.

78. Section 39(2) EqA prohibits discrimination by an employer against an employee by subjecting her to a detriment. By section 109(1) EqA an employer is liable for the actions of its employees in the course of employment.

79. The EqA provides for a shifting burden of proof. Section 136(2) and (3) so far as is material provides as follows:

> *(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

80. Consequently, it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the EqA. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

81. In *Hewage v Grampian Health Board* [2012] IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in *Igen Limited v Wong* [2005] ICR 931 and was supplemented in *Madarassy v Nomura International plc* [2007] ICR 867. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Direct discrimination

82. Section 13 EqA provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. The relevant protected characteristics include sex.

83. Section 23 EqA provides that on a comparison for the purposes of establishing less favourable treatment between B and others in a direct discrimination claim, there must be no material difference between the circumstances of B and of the comparator(s).

84. The effect of section 23 EqA as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person not of the claimant's sex. In analysing whether an act or decision is tainted by discrimination, an Employment Tribunal may avoid disputes about the appropriate comparator by concentrating primarily on why the claimant was treated as she was, known as the "reason why"

approach, in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11. Addressing the "reason why" involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator. If the protected characteristic (in this case, sex) had any material influence on the decision, the treatment is "because of" that characteristic.

85. Very little direct discrimination is overt or even deliberate. In *Anya v University of Oxford* [2001] IRLR 377 CA guidance was given that Tribunals shall look for indicators from a time before or after the particular act which may demonstrate that an ostensibly fair-minded decision was or was not tainted by bias, in *Anya* racial bias. Discriminatory factors will, in general, emerge not from the act in question but from the surrounding circumstances and the previous history.

86. In the course of submissions, the Tribunal was referred to a number of cases by Counsel for each party as follows:

- *Nelson v BBC (No. 2)* [1980] ICR 11
- *Diosynth Ltd v Thomson* [2006] IRLR 284
- *Airbus UK Ltd v Webb* [2008] IRLR 309
- *London Ambulance Service NHS Trust v Small* [2009] IRLR 563 CA
- *Regina (E) v Governing Body of JFS and another (United Synagogue and others intervening)* [2010] 2 AC
- *McMillan v Airedale NHS Foundation Trust* [2014] EWCA Civ 1031
- *Chhabra v West London Mental Health NHS Trust* [2014] ICR 94
- *Stratford v Auto Trail VR Ltd* [2016] UKEAT/0116/16
- *Yussuff v General Medical Council* [2018] EWHC 13
- *Burn v Alder Hey Children's NHS Foundation Trust* [2021] EWHC 1674 QB

87. The Tribunal took these cases as guidance but not in substitution for the statutory provisions.

Submissions

88. Counsel for the claimant tendered written submissions and made a number of detailed oral submissions which the Tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:- there were both procedural and substantive flaws in the respondent's approach to the allegations from the outset; the warning in 2013 was unreasonably relied upon by the respondent and influenced its decision makers, even though it had expired 5 years prior; the initial informal investigation had been documented but much of it was withheld from the claimant despite the

requirements of MHPS and also withheld from the disciplinary panel; Mr Montague's involvement went well beyond the remit of a case manager; the transcripts of meetings were inaccurate and unreliable; there was no witness statement taken from the victim, HCA Neenan, and her oral evidence had been misinterpreted by the respondent's decision-makers, who took no account of inconsistencies in the evidence where it did not accord with their view; the second allegation was used to feed into the first allegation and bolster the management case even though the investigation had found there was no refusal to see a patient; the respondent sought to justify its summary dismissal of the claimant by suggesting that the claimant had not demonstrated insight, and lacked empathy, confusing such with protesting her innocence; that the appeal failed to address the claimant's legitimate concerns; and the return to work was offered with punitive conditions which the respondent had no power to impose or insist on and was beyond the band of reasonable responses.

89. In addition, it was submitted that the claimant's dismissal was tainted by sex discrimination. It was submitted that the issue of sex discrimination was raised at the appeal stage but never properly addresses by the respondent; conclusions reached about the claimant's mitigation and lack of insight would not have been reached in relation to a male Consultant; and that the comparator evidence shows that male Consultants who had behaved in a worse manner than the claimant were not dismissed. The claimant also submitted that the respondent had called no direct evidence to show that the claimant acted in repudiatory breach of contract so as to support a summary dismissal for gross misconduct particularly in light of the claimant's account of events and her apologies.

90. Counsel for the respondent also tendered outline closing submissions and made a number of detailed oral submissions which the Tribunal has also considered with care but does not rehearse in full here. In essence it was asserted that:- the claimant was dismissed for a permissible reason; the investigation was conducted in accordance with procedures and provided a sound basis for convening a disciplinary hearing to consider a complaint of gross misconduct; dismissal was withing the range of available outcomes; the offer of a final written warning as the appeal outcome was appropriate; the claimant's culpable or blameworthy conduct was the sole cause of her dismissal which would have resulted regardless of any procedural shortcomings, which the respondent denies; the evidence supports the decision to dismiss the claimant summarily and the complaint of wrongful dismissal should be rejected; there was no evidence to suggest the thought processes of the decision makers were infected by considerations of gender; and the named comparators were, in each case, materially different in character from the claimant.

Conclusions (including where appropriate any additional findings of fact)

91. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

Unfair dismissal

Reason for dismissal

92. First, the Tribunal considered that the respondent has shown that the reason for the claimant's dismissal related to her conduct, namely the first allegation (numbered A) set out in the termination letter at page 467 of the bundle. In essence the claimant was dismissed for the allegation of shouting at HCA Neenan in the presence of staff and patients, slamming a door and acting in a manner that distressed staff and patients. The respondent did not uphold the second allegation, of refusing to see a patient. Misconduct is a fair reason for dismissal in law and there was no suggestion of any other reason.

Reasonable grounds to believe in misconduct

93. The Tribunal then considered whether the respondent had a genuine belief, on reasonable grounds, in the claimant's misconduct alleged in allegation A and concluded that it did not.

94. The Tribunal considered that the initial fact-find, conducted by Mr Butcher, amounted to a fishing expedition and that the material against the claimant grew in the telling – see paragraph 32 above. The Tribunal noted that nobody involved in the alleged incident on 4 April 2018, whether staff or patients, had reported anything untoward at the time. The first mention came later in the day from a third party who had not been present and who reported hearsay, amounting to a serious allegation of a physical altercation, namely that HCA Neenan had been "knocked off balance". However, the claimant was never suspended and the report was not acted upon for a week, whereupon Mr Butcher held a number of informal interviews which were not relied upon until the appeal stage. Nevertheless, by 18 April 2018, Mr Butcher was seeking evidence of the claimant's behaviour, having already decided that it was not acceptable and he proceeded to conduct the fact-find with that view in mind. There was no attempt to ascertain who was in fact present in the clinic and to seek their views nor any evidence of a balanced approach to these initial enquiries. This was even though facts were in dispute, including whether there had in fact been shouting or raised voices, and whether the door had been slammed or closed firmly. This approach to evidence gathering set the course of the disciplinary process thereafter. The fact-find was conducted by speaking to certain staff about the claimant and asking those who had commented adversely to commit their views to writing.

95. The allegation of distress to patients was introduced some 2 weeks after the event and no question was raised as to why such a serious matter was

raised so much later nor why it had not been raised by that individual, or any other, at the time. In any event, there was no attempt to verify the allegation by discreet enquiries of patients attending the clinic or otherwise. Instead the uncorroborated word of one individual was accepted without more.

96. The respondent's appointed HR manager wrote a "background document" which was not neutral; it was highly prejudicial to the claimant. Over half the document was a detailed analysis of a single incident concerning the claimant in 2013, some 5 years beforehand, with no attempt to balance this or to report on the intervening period; for example, there was no mention of the claimant's work to address matters in the interim, her good appraisals and the awards she had gained thereafter – see paragraph 33 above. The respondent called no evidence from HR to explain why the background document had been compiled in such a manner and, in the circumstances, the Tribunal considered that the underlying message of the background document was intended to be that the claimant had been disciplined 5 years ago and so might well be guilty of the current allegations. Indeed, the Tribunal considered that the evidence demonstrated that this underlying message tainted the respondent's approach to the claimant and was adopted by the respondent's managers. Throughout the respondent's evidence, its witnesses made significant efforts to explain why, in their view, the previous disciplinary matter was relevant and that it was appropriate to take it into account, displaying a consistent failure to consider the fact that the disciplinary sanction was spent and it related to a single incident which had occurred long ago. When questioned, Mr Montague said that the 2013 warning did not influence his decision to progress matters to a disciplinary hearing. However, it features in the management statement of case which he presented to the disciplinary panel and he sought to explain this as being "for context". When asked about what he meant by context, he said it gave insight into what happened. The Tribunal considered this evidence carefully and concluded that Mr Montague had in fact treated the 2013 warning as relevant and that he had held it against the claimant. He added it into the management statement of case for good measure.

97. The Tribunal also considered that the contents of the respondent's investigation report served to harden attitudes against the claimant and operated to close the minds of the disciplinary hearing panel to any other outcome than guilt and gross misconduct. Dr Bentley went beyond his remit to set out the investigation and its factual findings. He proceeded to make recommendations and signposted the conclusions that the disciplinary panel should come to, using phrases such as "I am satisfied on a balance of probabilities …" despite that this was not his remit and he had not been invited to do so. To make matters worse, Mr Montague signed off the report and its recommendations without question, giving the matter little, if any thought – see paragraphs 48 and 50 above. A comment was included that witnesses had "reflected on a past history of rather dismissive behaviour towards nursing and ancillary staff". This was unsubstantiated and the respondent's witnesses were unable to explain to the Tribunal what was

meant by such a highly prejudicial statement beyond a reference to the previous warning which the claimant received 5 years ago, which was spent. The Tribunal considered that one warning does not make "a past history", a phrase suggestive of a regular and repeated pattern of such behaviour, and the Tribunal therefore concluded that the respondent's witnesses had unreasonably relied on the previous warning (information having been fed to them by HR in the "background document") to form a view of the claimant's behaviour that was not reflected in the evidence before the disciplinary panel nor on reasonable grounds.

98. The fact that the claimant was told, at the meeting on 4 December 2018, that she was being dismissed for bullying and harassment of a junior colleague, rather than the precise allegations notified to her, and that Ms Baker sought to suggest, in her termination letter and in evidence to the Tribunal that she considered the claimant to be guilty of bullying, added to the overall unfairness of the dismissal, both substantively and procedurally.

99. The respondent's reasoning for the claimant's dismissal is summarised in the termination letter on pages 466 - 472 of the bundle. The letter reads as Ms Baker's account of the disciplinary hearing and a summary of the evidence against the claimant. In evidence to the Tribunal, Ms Baker described the panel's approach to its decision as of "triangulating and calibrating the evidence" but when asked to expand on this, she was unable to articulate what she meant by those words nor to give an example to illustrate them. Ms Baker agreed that allegation B was not proven and did not happen. Despite this, she proceeded to say that it was "indicative of a range of behaviours" and provided "context", effectively holding the second allegation against the claimant regardless of the fact that it was not proven. Other matters that might provide context to explain the events of the clinic and put the claimant in a positive light were ignored.

100. Allegation A did not include any allegation of assault or pushing. Nevertheless the claimant's "failure" to acknowledge or accept a statement that she "inappropriately pushed" HCA Neenan, is mentioned in the termination letter and held against the claimant. The word "shove" was incorrectly transcribed by HR into the record of the interview with HCA Neenan. That error followed through into the investigation report and was put to HCA Neenan at the disciplinary hearing where HCA Neenan described things differently. However, the statement "inappropriately pushed" was nevertheless repeated in the termination letter. In those circumstances, the Tribunal considered that the inaccurate recording of "shove" was adopted by the respondent's personnel and clouded their judgment of the claimant. The view was repeated by witnesses even though it was not part of allegation A, and even though witnesses were aware that HCA Neenan had not described her treatment as such or used that word. In particular, at the appeal, Ms Baker stated that she had asked the question "Did [the claimant] shove HCA Neenan?" thereby turning allegation A, in her

mind, into an allegation of assault, which it was not, and thereby demonstrating that the disciplinary panel were acting upon a false premise.

101. Although Allegation A relates to a single incident on 4 April 2018, the respondent's witnesses suggested, without foundation, that they could not be confident that such behaviour would not be repeated. This was despite that there was no evidence of any pattern of such behaviour in the claimant's 19 years' service beyond the single previous incident, 5 years beforehand. The Tribunal considered that, if the respondent actually thought there was a risk of repetition, it should have and would have suspended the claimant but at no point did it seek to do so. In evidence about the appeal, Professor Eddleston also alluded to a risk of bullying in future and sought to characterise the "shove" as being part of a sequence of events, without any justification.

102. The Tribunal considered that the evidence of the respondent's witnesses, notably Ms Baker and Mr Montague, demonstrated a closed mindset that was inclined to draw negative conclusions about the claimant at every possible opportunity. For example, Ms Baker said that the disciplinary panel formed the view that Ms Neenan was frightened of the claimant. Ms Baker sought to justify this view by describing Ms Neenan as "short" in height and quietly spoken, and she referred to Ms Neenan's body language during the disciplinary hearing, without considering that such could be indicative of a range of emotions, and despite ample evidence to the contrary. When evidence was put to Ms Baker that Ms Neenan and the claimant had in fact met, talked, and resolved matters between themselves, Ms Baker continued to seek to diminish their relationship. The claimant was not given the benefit of any doubt nor any credit for her apology. Instead, the claimant's apology was held against her with Ms Baker contending that it showed that the claimant knew she had done wrong. In addition, the claimant's use of a smiley face emoji, in an email to staff, was said by Ms Baker to be somehow "indicative of a hierarchical attitude to junior staff".

103. The termination letter of 4 December 2018 includes a statement that the claimant "offered no mitigation". This was plainly incorrect. Ms Baker accepted under cross-examination that the claimant had in fact provided personal mitigation and had sought to explain the professional stresses of the clinic on 4 April 2018. The Tribunal considered that the disciplinary panel simply ignored the claimant's mitigation and downplayed the actions of the claimant in seeking to apologise and resolve matters with HCA Neenan promptly, ignoring the fact that the claimant and HCA Neenan had worked together successfully in a team for over 15 years, treating each other with dignity and respect.

104. The Tribunal noted that Ms Baker and Mr Montague were on the same level of management, they worked in close proximity to each other and had at least weekly meetings in the 8 months prior to the disciplinary hearing. Ms Baker's antipathy towards the claimant was mirrored by Mr Montague who

gave evidence of the claimant's apparent lack of remorse or insight and provided an unsubstantiated view of the claimant in terms of her being "very fixed in the way she runs her clinic … [and] exerts power and control over junior staff". The Tribunal considered that the witnesses' comments about a lack of insight arose from a narrow view of the claimant and the focus on her guilt whilst failing to appreciate that it was legitimate for the claimant to challenge the evidence against her particularly where there were inconsistencies.

105. In light of all the above, the Tribunal was satisfied that the respondent did not have reasonable grounds to believe that the claimant had committed the misconduct as alleged.

The investigation

106. The degree of appropriate investigation depends on a number of factors, including the complexity of the case, the nature of the offence, the size and administrative resources of the respondent. Where the consequences for the employee are particularly serious, as in this case, it is important to carry out a conscientious investigation.

107. The Tribunal took account of the size and administrative resources of the respondent, which is a very large NHS Trust with significant numbers of HR managers devoted to specific areas of the Trust. The respondent therefore has a greater obligation, and greater capability, than most employers to operate proper disciplinary procedures. In those circumstances, the Tribunal found the respondent's failings to be all the more concerning.

108. At the start of the disciplinary investigation, the claimant was given misleading information by Dr Briggs to the effect that the individuals concerned had made management aware of the incident. The Tribunal considered this was the opposite of what had happened. Individuals were invited to give accounts after Mr Butcher sought them out – see paragraph 36. In particular, Mr Butcher did not obtain a statement from HCA Neenan, the very individual who was the subject of the incident on 4 April 2018, and his note of her informal interview on 10 April 2018, was inexplicably withheld.

109. The ACAS Guide stresses the need to keep an open mind when carrying out an investigation, to look for evidence that supports as well as weakens the employee's case, and MHPS provides that in all cases the purpose of the investigation must be to ascertain the facts in an unbiased manner. The respondent failed to do so in its conduct of this investigation, so much so that the Tribunal concluded on a balance of probabilities that the evidence showed that the respondent's personnel had effectively pre-judged the outcome - a prejudicial view was adopted early on, which filtered through the process, tainting the approach of the investigation and the manner of the

disciplinary hearing which followed – see paragraphs 28, 32, 33, 36, 42, 43, 44, 50, 51, 52, 60, 99, 101 and 102 above.

110. Dr Bentley was the case investigator. His task was to gather the evidence in a balanced way. Dr Bentley's approach had been to look for evidence of bad behaviour by the claimant, despite that HCA Neenan, who had worked with the claimant for a long time in clinics, had specifically told him that the claimant's behaviour on the day in question was unusual and "out of the ordinary". Dr Bentley looked for anecdotal evidence. He can be seen, in the interview records, prompting witnesses for "anything else recently? Or in the past?" and when the witness says, "Not since that interview" he follows up with "Anything like that before?" (bundle page 378). At the end of that particular interview, the witness is asked for "a bit more" and responds with "Do you want me to do it a bit better?". In the same interview, the witness' supporter also provides information against the claimant to Dr Bentley, which he describes as helpful. The information gathered about previous interactions with the claimant, which ae nothing to do with the allegations, are nevertheless included in the investigation report, and lead to Mr Montague commenting on such in his statement of case to the disciplinary hearing.

111. Dr Bentley did not check the transcripts prepared by HR which contained significant and serious flaws in their accuracy and in the way certain matters were highlighted – see paragraph 45 – nor did he ensure that the interview subjects were asked to check them either. He went beyond his remit to investigate, and made a number of conclusions, which he stated were "on the balance of probabilities" thereby seeking to resolve disputed issues of fact, rather than simply recording the conflicting accounts and imbuing the investigation report with a presumption of the claimant's guilt. In respect of the second allegation, although Dr Bentley reported that it was not proven, he went on to state his view that the patient was not seen in part because of the earlier events which constituted allegation A. The Tribunal found no evidence to suggest that was the case and considered that Dr Bentley had improperly drawn such a conclusion which then fed into the thinking of the disciplinary panel. In addition, despite the fact that Dr Bentley, as case investigator, had found the second allegation to be not proven, Mr Montague as case manager did not withdraw it but unreasonably persisted with it, even in the face of a challenge from the claimant's BMA representative. In those circumstances, the Tribunal considered that Mr Montague was either negligent of his duty, as case manager, to proceed only with the allegation for which there was a case to answer, or he was acting with a closed mind. In any event, as the termination letter shows, at page 471 of the bundle, the suggestion that the claimant had "refused to see a patient" was regarded by the disciplinary panel as misconduct and Ms Baker confirmed that it was taken into account in the decision to dismiss.

112. The Tribunal considered that the investigation itself was tainted by the actions of Dr Bentley, Mr Montague and the HR officer involved who

proceeded to compile the background document, and interview transcripts which were wrong in places. Mr Montague was involved in matters from an early stage, liaising with HR throughout. Whilst Mr Montague was not the case investigator, he adopted the investigation report without scrutiny and presented the management case in such a way that the Tribunal considered that, together with the actions of Dr Bentley and HR, the impartiality of the investigation and its report was compromised.

Procedural matters

113. It is important that relevant procedures are followed. Here again, the respondent failed to do so and witnesses were at times unable to identify which were the relevant policies or which policy they were following – see paragraphs 19, 37 and 51 above.

114. The claimant was a Consultant, a long-serving and senior professional. She was entitled to expect that the respondent would have regard to the MHPS which includes important safeguards for Doctors in circumstances such as those faced by the claimant. The Tribunal found little evidence of adherence to the MHPS. There was no apparent reference of what the Tribunal was told were very serious concerns, to the respondent's Chief Executive, which is required, and a complete failure to share correspondence relating to the case with the claimant or to provide her with a list of those individuals to be interviewed even though she was entitled to these. Indeed, the Tribunal found that key documents were simply not given to the claimant and there was no evidence that any thought had been given to this aspect. The decision to proceed to a formal investigation was also taken in an opaque way, before a case manager was appointed when such should have been the decision of the case manager once appointed. It remained unclear precisely who at the respondent had taken the decision to proceed or on what authority. In addition the claimant was not informed promptly of the move to a formal investigation as MHPS expects.

115. The Tribunal considered that Mr Montague appointing himself as case manager was in contradiction of MHPS and raised a conflict of interest that he did not appreciate at the time. Mr Montague continued to demonstrate a lack of insight into his position when reflecting on a number of matters in evidence to the Tribunal. He did not for example see any problem with his appointment as case manager, despite an involvement in the early stages of the informal investigation, his familiarity with the 2013 disciplinary matter and liaison with HR over the 'background document'. Mr Montague also did not seem to understand that the proposal for his appointment as the primary monitor of the claimant's behaviour, upon the claimant's return to work, post-appeal, might also be inappropriate. Professor Eddleston suggested that Mr Montague was best placed for this role and that she was not prepared to consider others, even though it was put to her, and she agreed that the respondent, as a large NHS trust, had numerous managers who could fulfil such a role without issue.

116. NCAS were contacted as appropriate. However, the information given to it by the respondent was at best misleading. In a letter from NCAS to the respondent, dated 29 May 2018, NCAS reflects what it has been told about the claimant, namely that she was someone "… about whom there are long-standing concerns" and that the incident on 4 April 2018 included the claimant having "… poked the NCA in the head" which was simply not true. None of the NCAS correspondence was provided to the claimant until these proceedings. This was contrary to MHPS. Bizarrely, when asked for an explanation as to why not, Professor Eddleston suggested that because the wording of MHPS referred to the involvement of NCAS, the claimant should have realised that NCAS would have been contacted and asked for the correspondence herself.

117. NCAS advice to the respondent was to refer the claimant to occupational health. This was not followed even though the respondent was well aware of the claimant's history of stress. Mr Montague sought to suggest in evidence that an occupational health referral was unnecessary because it was not clear what additional support the respondent could offer to the claimant and he also unreasonably suggested that the circumstances of 4 April 2018 pointed to the conclusion that the claimant had not learnt from her previous warning in 2013.

118. There was no evidence of any regard to the respondent's Dignity at Work policy which encourages informal resolution at an early stage with support for the employees concerned. The Tribunal noted that the claimant had emailed Mr Butcher and her line manager, on 13 April 2018, seeking support for just such an early resolution but her request went unanswered and, instead, the claimant was criticised for it. The Tribunal was concerned to hear from the respondent's witnesses that they took the view that such action by the claimant served only to demonstrate her guilt and was an attempt by the claimant to bury the matter by somehow imposing her influence on junior staff.

119. HCA Neenan was the victim in relation to allegation A. The respondent's policies suggest that the victim's views should be taken into account but the respondent's investigators and disciplinary panel paid no regard to such and there was no evidence that HCA Neenan had been asked for her view. Contemporaneous text messages between the claimant and HCA Neenan show that matters were resolved between them but these were ignored by the respondent. Mr Butcher's draft email to the claimant suggests that he was aware that the claimant and Ms Neenan were resolving matters.

120. In respect of alternatives to dismissal, the Tribunal considered that alternative sanctions were not given any real consideration by the disciplinary panel. The position was explained by Ms Baker as being that they did not believe any alternatives would lead to change because, in Ms Baker's view, the claimant had showed no insight. At the appeal hearing, Ms Baker had been asked about alternatives to dismissal and she is recorded

as saying that alternatives were discussed “for probably a limited amount of time” but were discounted following the intervention of the disciplinary panel’s external medical adviser. He had posed the question, “Do you want this individual, with this behaviour, working in this organisation?” Ms Baker described that question as a ‘tipping point’ in terms of the deliberations – bundle page 563. There was no evidence that actual alternatives had been given any or any serious consideration.

121. The Tribunal considered that the appeal did not cure the defects in the disciplinary process. It was conducted as a review of the disciplinary decision but did not spot or repair the flaws in the investigation nor address the contradictions in the evidence presented. Professor Eddleston sought to persuade the Tribunal that the appeal panel had approached the case on the basis that the claimant had raised her voice but not shouted and had used “physical touch” unnecessarily and inappropriately. However, it was apparent to the Tribunal from the Professor’s evidence under cross-examination that the appeal had adopted the same prejudicial views as had its predecessors in the disciplinary process: Professor Eddleston alluded to the risk of bullying in future and sought to characterise the “shove” as not amounting to physical force but still being part of a sequence of events, without any justification. She contended that these matters were gross misconduct and that the claimant’s behaviour constituted bullying and harassment. In her witness statement, Professor Eddleston described the claimant’s behaviour as a “wholly inappropriate display of power and control”. In addition, she confirmed that the 2013 incident was taken into account because of what she considered to be “similarities” and because it was “on record”, suggesting that the previous warning was not considered ‘spent’ in the respondent’s mind, without regard to how long ago it happened. The Tribunal considered that such an approach and conclusions went beyond the ambit of allegation A and indeed beyond the disciplinary panel’s reasons for dismissal. In addition, Professor Eddleston chose to discount the claimant’s personal mitigation, her demonstration of insight and her character references, and said that she was satisfied that the disciplinary panel had taken account of the claimant’s mitigation even though the letter of termination states clearly, albeit incorrectly, that the claimant had offered no mitigation, from which the Tribunal understood that the disciplinary panel could not have taken account of such. The Tribunal therefore accepted the submissions of Counsel for the claimant to the effect that the appeal panel failed to address a number of the claimant’s concerns in any meaningful way.

122. Whilst upholding a summary dismissal for gross misconduct, the appeal resulted in the respondent nevertheless offering the claimant the possibility of a return to work. However, this was to be with punitive conditions, many of which the respondent had no authority to impose and so was, of itself, outside of the band of reasonable responses. Professor Eddleston’s evidence on the proposed alternative to dismissal was vague. When challenged, she sought to persuade the Tribunal that the appeal panel had

authority to do whatever it liked, regardless of for example policies on Clinical Excellence awards, the pay structures of the NHS and/or national collective bargaining. When asked in cross-examination about the conditions being 'punitive', she sought to suggest that she had not meant to punish the claimant (even though this was the precise word used by her in correspondence) and that she merely sought a change in behaviour. The Tribunal did not accept this interpretation, which it considered was in effect an attempt to re-write history, and it considered the terms of the 'Behaviour Contract' offered to be oppressive, including provisions requiring the claimant to accept or admit to things which she had not done or for which there was no evidence. The Tribunal was further concerned at the intransigence displayed by Professor Eddleston when the appointment of Mr Montague as the monitor of the claimant's future behaviour was questioned as inappropriate.

123. In the circumstances, the Tribunal considered the respondent's actions following the appeal to be incredible: The respondent had sacked the claimant for gross misconduct; The disciplinary panel had a discussion and agreed that it did not want individuals such as the claimant, with her behaviour, working in the respondent's organisation; the appeal panel upheld the claimant's summary dismissal; and then Professor Eddleston, on behalf of the respondent, invited the claimant to return to work under non-negotiable and wholly unreasonable conditions. The claimant's counter proposals led to additional financial penalties being introduced. It was as if the respondent's personnel did not really want the claimant to return. To cap it all, the fact that the claimant chose not to accept everything which was to be imposed upon her, was turned against her and she was blamed for the situation – see paragraph 66 above. The claimant could do nothing right.

Band of reasonable responses

124. The Tribunal has found that the respondent did not have reasonable grounds for its belief in the misconduct alleged and that it did not carry out a reasonable investigation. In those circumstances, given the considerable failings of the respondent, the Tribunal considered that the sanction of dismissal was outside of the band of reasonable responses in the circumstances of the case.

125. It was clear from the evidence that the claimant's previous warning, over 5 years ago and long expired, had a material influence on the conduct of the investigation, how the disciplinary case was presented and upon the decision to dismiss – see paragraphs 33, 50, 51, 95, 96, 116 and 120 above.

126. In all the circumstances, the Tribunal considered that a reasonable employer would not have investigated in the limited way the respondent did nor with such a closed mindset – see paragraphs101 and 110 above - and would not have proceeded with the second allegation when its own

investigation had concluded that there was no case to answer on that allegation – see paragraphs 50, 98 and 110 above.

127. Further, the Tribunal considered that a reasonable employer would not have gathered and/or presented the evidence which the respondent did or in the manner of its investigation, to the disciplinary panel/appeal. A reasonable employer would not have considered such to be sufficient, given all the contradictions, the considerable doubt about the basis for the second allegation and the failure to acknowledge or take account of the views of the victim, HCA Neenan who had not complained, who had worked with the claimant for many years and who described the claimant's behaviour as being out of the ordinary and who had effectively refuted any suggestion of physical assault – see paragraphs 24, 31, 43, 45, 54, 99, 109 and 118 above.

128. The claimant was dismissed on the basis of allegation A which related to a single incident on 4 April 2018. The evidence was that this was an isolated matter, it was not complained about at the time nor by the subject of the alleged treatment and in circumstances where there was significant professional and personal mitigation. In dismissing the claimant, the respondent's disciplinary panel gave little or no consideration to any alternatives to dismissal despite the fact that a dismissal for gross misconduct would have very serious implications for the claimant's career and the possibility of future employment in the NHS. The test suggested to the disciplinary panel, by its external medical adviser, involved a consideration of the "type of person" the claimant was presumed to be, with an assumption that the conduct in question merited summary dismissal. This was a wholly inappropriate approach, outside of the band of reasonable responses, and which ignored the circumstances surrounding the conduct in question, the claimant's mitigation and the claimant's wider record. In addition, the Tribunal was concerned about the comment by Ms Baker, in her witness statement at paragraph 57, to the effect that the sanction of dismissal was being used as a deterrent to send a message to other staff about how behaviour would be dealt with, which again was inappropriate and unreasonable.

129. The Tribunal therefore considered the respondent's whole approach to the disciplinary process and the claimant's dismissal to be unreasonable in all the circumstances of this case. The decision to dismiss fell outside of the band of reasonable responses.

Contributory fault and Polkey

130. The Tribunal has found the claimant to have been unfairly dismissed. The respondent has argued that the claimant's conduct was culpable or blameworthy conduct and was the sole cause of her dismissal. The Tribunal did not agree with this contention and declined to make any reduction for contributory fault. The Tribunal considered that the evidence presented by

the respondent did not reveal proven conduct by the claimant which could be said to have caused or contributed to her dismissal. There remained, for example, significant disputes between the witnesses at the disciplinary hearing as to what happened on 4 April 2018 and how, and several agreed that it had been a stressful working environment.

131. Even if the claimant's dismissal had not been found to be procedurally unfair, the Tribunal considered that the claimant would not have been dismissed in any event if a fair procedure had been followed. This conclusion was reached having regard to the prejudicial views adopted by a number of key witnesses and the fact that the Tribunal considered the respondent's personnel had gone about the disciplinary process with closed mindset. The Tribunal therefore concluded that a different approach, whereby matters had been addressed properly and fairly, with open minds, would likely have led to an entirely different outcome.

132. Except in cases of gross misconduct, the ACAS Code of Practice provides that employees should not be dismissed for a first disciplinary offence or one to which previous incidents do not relate or where warnings are spent. In ***Polkey***, the House of Lords held that an exception might be permitted where an employer had formed a reasonable view that a warning would be utterly useless or futile. In this case, the Tribunal considered that, at best, it could be said that the claimant's actions which led to allegation A were the result of frustration, a passing emotion and not a persistent attitude. Indeed, despite all the professed concerns of the respondent's witnesses, and their suggestions of a risk of bullying in future, at the end of the process Professor Eddleston was prepared to allow the claimant to return to work, continuing as a Consultant, albeit under onerous conditions. It could not therefore in any sense be said that the respondent had formed the view that a warning would have been futile. No reduction under ***Polkey*** principles is appropriate in the circumstances of this case.

133. In light of all the above conclusions and in the circumstances of the case, the Tribunal has determined that the claimant's claim of unfair dismissal is well-founded.

Wrongful dismissal

134. The claimant was dismissed summarily for gross misconduct. To be gross misconduct, the conduct in question must fundamentally undermine the employment contract. It must be repudiatory conduct; a deliberate and wilful contradiction of the contractual terms amounting to gross negligence. In the circumstances of the case, having regard to the difficulties encountered with IT on 4 April 2018, the miscommunications, the fact that the clinic list had been overloaded without reference to the claimant, the frustration that was engendered by such obstacles during a busy clinic running late, and the fact that the respondent's view of the claimant was tainted by the background document and the investigation report, together with the views propounded

by Mr Montague and adopted by Ms Baker, the Tribunal considered that the respondent had not shown that the conduct relied upon amounted to gross misconduct. In the context of the clinic on 4 April 2018, and the inconsistencies in the witness accounts, the Tribunal did not consider that the claimant's actions amounted to repudiatory conduct.

135. In light of the above, the Tribunal determined that the claimant was wrongfully dismissed and is entitled to her notice pay.

Sex discrimination

136. A complaint of direct sex discrimination requires the claimant to establish less favourable treatment, in relation to a comparator who was in the same or not materially different circumstances to the claimant, and that the reason for the less favourable treatment was because of sex.

137. The claimant's case was that she was treated less favourably when she was dismissed for gross misconduct. Dismissal is not inherently discriminatory. The burden of proof is on the claimant to show facts from which the Tribunal could reasonably conclude, in the absence of an explanation from the respondent, that unlawful sex discrimination has occurred. The claimant's case was that she was a Consultant, as were the comparators, and that she was dismissed for gross misconduct while they were not. The Tribunal considered that the very limited evidence available did not meet the test propounded in ***Madarassy***, that there needs to be something from which the Tribunal could infer that the claimant's treatment was because of the protected characteristic of sex.

138. In the circumstances of this case, the Tribunal considered that it was not apparent that the reason for the less favourable treatment contended for, the claimant's dismissal, was because of sex. The Tribunal looked at the mental processes of the alleged discriminators. The Tribunal found that Ms Baker and Mr Montague were, as the claimant submitted, "gunning for her". Their views amounted to personal animosity but there was no evidence from which to conclude that this arose because of sex; rather the Tribunal considered that other factors were at play including the 2013 warning which had impacted the respondent's managers' view of the claimant – see paragraphs 96 and 97 above. In addition, the Tribunal found no indicators from before or after the claimant's dismissal nor from the surrounding circumstances, from which it could infer that the alleged discriminators had dismissed the claimant in any sense because of sex.

139. The claimant produced a list of comparators, comprising of a number of male Consultants who had committed misconduct, some of which was more serious than that for which the claimant was dismissed. The most striking of these was of 2 male Consultants who were seen fighting on the respondent's premises by staff and patients and who were said to have brought the respondent into disrepute through reports appearing in the

press. Neither were dismissed. In one sense, the claimant could be said to have been treated differently because she was dismissed. However, to make a comparison for the purposes of establishing less favourable treatment, there must be no material difference between the circumstances of the claimant and of the comparator – the situations must be genuinely comparable. The Tribunal considered that none of the comparator situations presented to it were exactly comparable to those of the claimant who brought little if any evidence to assist or to confirm the details of each comparator's case. The respondent had produced a witness statement of Professor Clarke, outlining details of the comparators, but it had not called him to give evidence. In any event, the Tribunal noted that Professor Clarke's statement was to the effect that he had not personally been involved in any of the comparator cases, and was unable to comment beyond reporting what he had discovered from a search of the respondent's files or from hearsay. The Tribunal found it was therefore difficult to compare matters accurately as there was insufficient information as to the conduct concerned and/or the circumstances of the comparator cases, and not all characteristics relevant to the claimant's situation were found in any of the comparators. These included: the 2 Consultants who had been fighting, who were each given final written warnings and training, and one was demoted, having reflected and accepted that their conduct fell below the standards expected of them; 2 comparators had resigned or retired in the face of potential disciplinary action such that it was impossible to say, from the few details whether either would have been treated the same or differently to the claimant; another comparator's case had been resolved informally; and a further comparator was not the subject of any complaint, including from the claimant at the time, when she had been aware of his actions. There was also a comparator whose case occurred in or about 2003/2004 and for whom the Tribunal were given no details of the disciplinary process, if any, nor the outcome. The claimant did not pursue either in evidence or in submissions a comparison with a hypothetical comparator not of the claimant's sex.

140. In light of all the above, the Tribunal considered that the claimant had not discharged the first limb of the burden of proof and so did not succeed in her complaint that her dismissal was an act of sex discrimination.

Remedy

141. In light of the Tribunal's findings that the claimant has been unfairly and wrongfully dismissed, the claim will proceed to a remedy hearing on a date to be notified separately.

_____
Employment Judge Batten
25 July 2022

JUDGMENT SENT TO THE PARTIES ON:

2 August 2022

FOR THE TRIBUNAL OFFICE