EMPLOYMENT TRIBUNALS

Claimant: X

Respondent: Northern Care Alliance NHS Foundation Trust

Heard at: Manchester **On:** 21-22 March and 22 April 2022 (in Chambers)

Before: Employment Judge McDonald (sitting alone)

Representatives
For the claimant: Mr N Coleman (lay representative)
For the respondent: Mr A Gibson (solicitor)

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim of unfair dismissal succeeds.

2. The claimant's claim of wrongful dismissal succeeds.

3. By reason of the principle in **Polkey v A E Dayton Services Limited [1987] ICR 142**, there was a 25% chance that the claimant would have been fairly dismissed on the same date as his actual dismissal had a fair procedure been followed.

4. Any basic award or compensatory award is reduced by 25% for contributory fault on the part of the claimant.

5. This is not a case where an uplift in compensation for failure to follow the ACAS Code of Practice is appropriate.

REASONS

Introduction

1. The claimant in this case was dismissed by the respondent for gross misconduct. The respondent decided that allegations that he had entered the female toilets and used his mobile phone to attempt to film or record a female member of

staff who was using the adjacent cubicle were substantiated. The claimant denied the allegations.

2. I heard evidence and submissions on 21 and 22 March 2022. I considered matters in chambers on 22 April 2022. I apologise to the parties that absences from the Tribunal for various reasons and other judicial work have led to a delay in finalising this judgment so it could be sent to the parties.

3. A remedy hearing will be listed.

Preliminary Matters

Application for an anonymisation order

4. At the start of the hearing, I dealt with an application by the claimant for an anonymisation order. On 10 March 2022 Employment Judge Dunlop had made a Restricted Reporting Order prohibiting the identification of the claimant on the basis that the case involved an allegation of sexual misconduct. That order remains in place until both liability and remedy have been determined.

5. Having heard submissions from Mr Coleman and Mr Gibson I decided it was appropriate to make an anonymisation order under Employment Tribunal Rule 50(3)(b) in relation to the claimant and complainant A (who made the allegation of sexual misconduct against him). I gave oral reasons for doing so at the hearing. In order to preserve their anonymity I have limited the details of locations and job roles for complainant A and the claimant in this judgment and reasons.

The respondent's name

6. By consent, the respondent's name in these proceedings was amended to Northern Care Alliance NHS Foundation Trust.

The Issues

7. In his original claim form filed on 11 January 2021 the claimant brought claims of unfair dismissal, race discrimination, sex discrimination and a claim for notice pay. The notice pay claim was a claim for wrongful dismissal, i.e. that the claimant had been dismissed without notice in breach of his contract of employment.

8. On 12 August 2021, Mr Coleman on behalf of the claimant applied for permission to amend the claim. He confirmed that the claims of race and sex discrimination were withdrawn. He did not say that the wrongful dismissal claim was withdrawn but the amended claim form only referred to unfair dismissal.

9. The issues in the case were identified at the preliminary hearing held by Employment Judge Sharkett on 24 August 2021. They are:

(1) Did the respondent have a genuine belief in the alleged misconduct of the claimant?

(2) Was that belief based on reasonable grounds i.e. was the investigation that was carried out one that was within the range of reasonable

responses in accordance with **Sainsbury Stores v Hitt** and given the profession of the claimant, **Roldan v Salford NHS Trust**?

(3) Was the decision to dismiss the claimant for the reasons given within the band of reasonable responses open to a reasonable employer?

(4) Did the respondent follow a fair procedure? If not thus rendering the dismissal unfair, what would the outcome have been had a fair procedure been followed (having regard to the **Polkey** principle)?

(5) If the dismissal was unfair, did the claimant contribute to his own dismissal by culpable or blameworthy conduct?

(6) Should any award made be adjusted by reason of any parties' failure to follow the relevant ACAS Code?

(7) Was the respondent entitled to dismiss the claimant without notice or payment in lieu of notice?

10. The case management order from that preliminary hearing said that the only claim being brought was of ordinary unfair dismissal. Employment Judge Sharkett issued a judgment dismissing the claimant's claims of race and sex discrimination on withdrawal. There was no judgment dismissing the claim of wrongful dismissal and issue (7) in the list of issues seemed to me to relate to the wrongful dismissal claim. At the start of the hearing I checked with the parties and it was confirmed that the claimant was still bringing a claim of wrongful dismissal as well as a claim of unfair dismissal.

Relevant Law

Unfair Dismissal

11. S.94 Employment Rights Act 1996 ("ERA") gives an employee a right not to be unfairly dismissed by their employer. To qualify for that right an employee usually needs two years' continuous service at the time they are dismissed, which the claimant had in this case.

12. In determining whether a dismissal is unfair, it is for the employer to show that the reason (or if more than one the principal reason) for dismissal is one of the potentially fair reasons set out in s.98(2) of ERA or some other substantial reason justifying dismissal.

13. If the employer shows a potentially fair reason for dismissal then whether the dismissal is fair (having regard to that reason) will depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee. That "shall be determined in accordance with equity and substantial merits of the case" (s.98(4) ERA).

14. In this case the respondent said the reason for dismissal was conduct. Conduct is a potentially fair reason for dismissal under s.98(2).

Misconduct cases

15. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. Conduct dismissals can be analysed using the test which originated in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal which was subsequently approved in a number of decisions of the Court of Appeal. Since **Burchell** was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

16. The "Burchell test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?

17. If a genuine belief is established, the band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23**. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

18. The circumstances relevant to assessing whether an employer acted reasonably in its investigations include the gravity of the allegations, and the potential effect on the employee: **A v B [2003] IRLR 405**.

19. **Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721** confirms that it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as on the facts of that case, the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite.

20. Mr Coleman referred me to the case of **in re H [1996] AC 563** which makes the same point. He suggested in his written submissions that the case meant that the balance of probabilities test was not sufficient in cases involving serious accusation against a professional. I think that is a misunderstanding of what **in re H** says. It confirms that the balance of probabilities is still the relevant test. However, it makes the point that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.

21. Mr Coleman also referred me to the case of **Dutta v GMC [2020] EWHC 1974** which I accept which provides guidance in assessing a witness's credibility and, in particular, warns against the "fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth".

22. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

23. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613. Taylor** confirmed that there is no rule of law that only an appeal by way of rehearing is capable of curing earlier defects in disciplinary proceedings and that a mere review never was. The question whether the defects of a first hearing had been cured at a second hearing did not depend on how the appeal was categorised. If the first hearing is defective the appeal would have to be comprehensive if the whole process and the dismissal was to be found to be fair,

24. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee (instead of imposing a lesser sanction) was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

25. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer had reasonable grounds for treating the misconduct as gross misconduct: see paragraphs 29 and 30 of **Burdett v Aviva Employment Services Ltd UKEAT/0439/13**. Generally gross misconduct will require either deliberate wrongdoing or gross negligence. Even then the Tribunal must consider whether the employer acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854 (paragraph 38)**.

Compensation for unfair dismissal

26. In **Polkey v A E Dayton Services Ltd [1988] 1 AC 344, [1988] ICR 142** Lord Bridge said that "If an employer has failed to take the appropriate procedural steps in any particular case, the one question the [employment] tribunal is not permitted to ask in applying the test of reasonableness... is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under section [98(4)] may be satisfied."

27. S.118(1) ERA says that:

> **"Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—**
>
> **(a) a basic award (calculated in accordance with sections 119 to 122 and 126, and**
>
> **(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126)."**

28. The basic award is calculated based on a week's pay, length of service and the age of the claimant.

29. The compensatory award is "such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal" (s.123(1) ERA).

30. A just and equitable reduction can be made to the compensatory award where the unfairly dismissed employee could have been dismissed at a later date or if a proper procedure had been followed (the so-called **Polkey** reduction named after the House of Lords decision in **Polkey v AE Dayton Services Ltd** referred to above).

31. Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA).

32. The case law confirms that the question for the Tribunal is whether the claimant was culpable or blameworthy, by which is meant “deserving of blame”. That was confirmed most recently in the Employment Appeal Tribunal case of **Sanha v Facilicom Cleaning Services Limited UKEAT/0250/18/VP**. **Sanha** confirmed that that may potentially apply to conduct that is merely foolish, and at least to some conduct that is unreasonable and does not have to involve conduct in breach of the contract of employment.

33. If the Tribunal finds that the claimant did contribute to the dismissal then it must make a reduction to the compensatory award, although the amount of reduction is for it to decide on a just and equitable basis. The Employment Appeal Tribunal in the case of **Hollier v Plysu Limited [1983] IRLR 260** provided guidance, suggesting that broadly a reduction should be as follows:

- Where the claimant is wholly to blame there should be a 100% reduction in the compensatory award;
- Where they are largely to blame, a 75% reduction;
- Where the employer and the employee are equally to blame, a 50% reduction;
- Where the claimant is slightly to blame, a 25% reduction.

34. In **Dee v Suffolk County Council EAT 0180/18** the EAT confirmed that a Tribunal is permitted to make both a **Polkey** reduction to a compensatory award and a reduction for contributory conduct. It said that after deciding the appropriate reductions the tribunal should "stand back" and look at the matter as a whole, avoiding double counting and ensuring that the result is just and equitable.

35. Where the tribunal considers that any conduct of the claimant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly (s122(2) ERA). That also requires a finding of culpable or blameworthy conduct (**Sanha**). It is very likely, but not inevitable, that what a Tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have

the same or a similar effect in respect of the basic award, but it does not have to do so (**Steen v ASP Packaging Ltd [2014] ICR 56, EAT**).

Wrongful dismissal

36. When it comes to wrongful dismissal the Tribunal is not concerned with the reasonableness of the employer's decision to dismiss, but the factual question, was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract? (**Enable Care & Home Support Ltd v Mrs J A Pearson UKEAT/0366/09/SM).**

37. Although the Tribunal has to come to its own view about the claimant's conduct for the purposes of a wrongful dismissal claim, it must take care not to take those findings into account in deciding whether the dismissal was unfair. The Court of Appeal has suggested that, as a general rule, it might be better practice for a Tribunal to keep its findings of facts relevant to the employer's decision to dismiss separate from its findings of facts that are only relevant to other issues **(London Ambulance Service NHS Trust v Small 2009 IRLR 563, CA**). I have adopted that approach and set out my findings relevant to the wrongful dismissal claim separately at paras 175-185 below).

38. The burden of proving that the claimant was guilty of repudiatory conduct lies with the respondent. However, a Tribunal should only fall back on the burden of proof where it cannot on the evidence before it rationally decide one way or another on the evidence before it (the EAT in **Hovis Limited v Mr W Louton EA-2020-000973-LA** reviewed the authorities on this point).

39. I found **Hovis** particularly helpful because it was a case where the respondent did not call the witnesses to the alleged repudiatory conduct to give evidence at the Tribunal. That is similar to this case where I did not hear evidence in person from complainant A, who made the allegation against the claimant. There was, however, written evidence from her including the transcript of her sworn evidence at the Health and Care Professions Council's Fitness to Practice hearing relating to the claimant.

40. In **Hovis** the EAT held that the Tribunal had erred in law by deciding that it could not make a finding that the claimant in that case had been guilty of the alleged repudiatory conduct in the absence of evidence in person from one of the witnesses to the alleged conduct. Instead, the Tribunal should have assessed the written "hearsay" evidence from those witnesses before it and should also have assessed the claimant's credibility as a witness in deciding whether the alleged repudiatory conduct had occurred. It should have decided what weight to give to that "hearsay" evidence bearing in mind the witnesses were not available to be cross-examined at the Tribunal hearing. That might mean it should be given less weight than "live" evidence but such evidence should not automatically be discounted.

Uplift in compensation for failure to comply with the ACAS Code

41. S.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("s.207A"), states at subsection (2):

> **'If, in the case of proceedings to which this section applies, it appears to the employment tribunal that**
>
> **(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,**
>
> **(b) the employer has failed to comply with that Code in relation to that matter, and**
>
> **(c) that failure was unreasonable,**
>
> **the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent.'**

42. In **Acetrip v Dogra UKEAT/0016/20/VP (18 March 2019)** HHJ Auerbach in the EAT said at para 103:

> "There is, inevitably it seems to me, a punitive element to an adjustment award under these provisions, because the Tribunal is not simply compensating a claimant for some additional readily identifiable or quantifiable loss that he has suffered. The adjustment is bound, to a degree, to be reflective of what the Tribunal considers to be the seriousness and degree of the failure to comply with the ACAS Code on the employer's part."

43. In **Slade and anor v Biggs and ors 2022 IRLR 216, the EAT** confirmed that the discretion given to a Tribunal by s.207A is very broad, both as to whether there should be an uplift at all, and as to the amount of any uplift. While the top of the range of 25% should undoubtedly be applied only to the most serious cases, the statute does not state that such cases should necessarily have to be classified, additionally, as exceptional.

44. In **Slade**, the EAT suggested that a Tribunal in applying s.207A "might choose to apply a four-stage test:

- Is the case such as to make it just and equitable to award any ACAS uplift?
- If so, what does the Tribunal consider a just and equitable percentage, not exceeding although possibly equalling, 25%?
- Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings; and, if so, what in the Tribunal's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting?
- Applying a final sense-check, is the sum of money represented by the application of the percentage uplift arrived at by the Tribunal disproportionate in absolute terms and, if so, what further adjustment needs to be made?"

Evidence and submissions

45. The parties had agreed a bundle of documents for the final hearing consisting of 417 pages ("the Bundle"). References to page numbers in his judgment are to

page numbers in the Bundle. During the hearing a further documents was admitted by consent, namely the "Staff Side" written submissions presented by the claimant at the disciplinary hearing on 16 September 2020.

46. I heard evidence from 3 witnesses. They were the claimant, Victoria Thorne (the dismissing officer) and Victoria Dickens (who heard the appeal against dismissal). There was a written witness statement for each and they were cross examined and answered my questions.

47. At the end of the evidence I heard submissions from the parties. Mr Gibson made oral submissions. Mr Coleman relied primarily on the written submissions at pp.398-412 of the Bundle but made some supplemental oral submissions. I have taken those submissions into account in reaching my decision and referred to them where particularly relevant to a point in issue but have not set them out in full in my judgment.

Findings of Fact

Background Facts

48. The respondent is an NHS trust. The claimant was employed from June 2018. His role involved providing community health care services to patients. He was registered with and regulated by the Health and Care Professions Council ("HCPC").

49. The claimant was nominally based at an office ("the Office") which the respondent rented in a commercial storage unit facility. The claimant kept the equipment he needed to carry out his work at the Office building but in practice spent a considerable amount of his time "on the road" visiting patients at their homes or in care homes. That meant that on some days he might not be in the Office at all, or only for quick visits to pick up equipment. The claimant's line manager was based at Rochdale Infirmary and the claimant would attend team meetings there.

50. There were a small number of managerial and admin staff based at the Office. However, the majority of employees based at the Office were community based and in and out of the Office on a regular basis. This included complainant A.

The respondent's disciplinary process

51. The respondent's Conduct and Disciplinary Policy Guidelines (pp.103-123) sets out the process to be followed when there is an allegation of misconduct. An Investigating Officer ("IO") should be appointed. Their role is to enquire impartially into the circumstances of the alleged misconduct, giving the employee a chance to offer an explanation (para 3.4.1.1). After completing a thorough investigation the IO is required to compile an Investigation Report and present it to the respondent's Human Resources Advisory Service ("HRAS") for advice (para 3.6.6). The aim of the Investigation Report is to present the findings of a full and impartial investigation (para 3.13.2) and it should conclude with the IO's recommendation as to whether the investigation indicated that there is a prima facie case to answer or not (para 3.13.1). The recommendation should not include any supposition or opinion as that is not evidence (para 3.13.2). The Policy includes extensive guidance on the investigation process and a standard Investigation Report Template.

52. The Guidelines also sets out the process to be followed if it is decided that disciplinary action is appropriate. A disciplinary hearing will be held and the employee subject to investigation provided with the Investigation Report (para 3.15.2). The IO presents the management case and the employee or their representative are entitled to question any witnesses called (para 3.16.6). The Hearing Officer may give a decision at the hearing or may give the decision by telephone, that decision being confirmed in writing within 7 days (para 3.16.12).

53. The employee has the right to appeal against any disciplinary action taken within 14 days (para 3.16.13). The appeal is a "full re-run of the disciplinary hearing" (para 3.17.1). The employee and dismissing manager are asked to submit a written case to the nominated appeal hearing manager at least 10 calendar days before the appeal hearing (para 3.17.3).

54. The Guidelines stresses the importance of confidentiality in the process. It provides for the power to suspend an employee prior to, during or following an investigation (para 3.3.1). Para 3.3.2 provides guidelines on suspensions, including that they should be for as short a period as possible; that where possible and practicable a trade union rep or work colleague, if so requested by the employee, should be present when an employee is informed of suspension; and that written confirmation should be given stating the reasons for and expected duration of the suspension.

55. The Guidelines cross-refer to the respondent's Conduct and Disciplinary Policy. That was not included in the Bundle. The references to it in the Guidelines suggest it would set out the appropriate sanction for different types of misconduct. It was not disputed that if the claimant had attempted to film or record female colleagues in the toilet that would amount to gross misconduct entitling the respondent to summarily dismiss him.

The Layout of the Office

56. One of the issues arising in the case was the route taken by the claimant to the ladies' toilets where the incident which led to his dismissal took place. The location and layout of the Office is therefore relevant. There were floor plans in the Bundle (pp.163-164). The Office was on the first floor of the storage facility. It formed only a small part of the surface area of that first floor.

57. Access to the building was by a fob which was unique to the user. The "public" parts of the building were accessible to anyone who had the fob needed to access the building. That included members of the public who had storage units at the building. The first floor on which the Office was located was accessible to fob-holders.

58. There were stairs to the first floor immediately to the right of the ground floor reception area. The door to the main part of the Office was at the left at the top of those stairs. There was a key code to get into the main area of the Office. A door from that main office led to the kitchen. From the kitchen a door led out into the rest of the storage unit.

59. The first floor ladies' and gents' toilets were next door to each other. Both had cubicles and the gents' also had urinals. The toilets were on the same corridor and next door to the Office. That meant that they could be reached by going via the Office (in through the main office area using the key code and out via the kitchen door) or by going a longer way round through the storage units avoiding the Office altogether (without using the key code). There were also toilets on the ground floor of the storage facility. They were reached by turning left out of the ground floor reception area. A corridor then led past the toilets to another set of stairs up to the first floor at the far end of the first floor from the Office.

30 January 2020 – the incident giving rise to the claimant's dismissal and events immediately afterwards

60. The incident which resulted in the claimant's dismissal happened at the Office building around 12.45 p.m. on Thursday 30 January 2020. It was not disputed that at around that time the claimant was in one of the cubicles in the ladies' toilets on the first floor of the Office building. It was also not disputed that complainant A came in to use the adjoining cubicle while the claimant was still in the toilet. It was not disputed that at some point the claimant's rose gold iPhone was in his hand on or near the floor under the divider between the two cubicles. The claimant says that was because he was picking it up off the floor having dropped it while he was pulling up his trousers. He says he was using the ladies' toilet because of the dirty state of the first floor male toilets. The allegation which resulted in his dismissal was that he was using the phone to attempt to film and/or photograph the person in the adjoining cubicle (i.e. complainant A) while she was using the toilet.

61. It was not disputed that the claimant left the Office building immediately after the incident but returned around half an hour later. Because of CCTV evidence there was no dispute that he dropped off some equipment at the storage unit he used on the first floor and that he and complainant A had a brief conversation in the kitchen. It was not disputed that she told him to leave and he did. There is a dispute about whether the claimant had returned to the Office to explain what had happened to complainant A and about what exactly was said during that encounter.

62. In order to decide the wrongful dismissal, claim I have to, if I can, make findings of fact about what actually happened during that incident. I have set out those findings at paras 175-185. In this section I set out my findings of fact relevant to the unfair dismissal claim. The focus of that is what the respondent did in response to the incident and, in particular, the investigation and disciplinary process which followed. There is inevitably some cross over and therefore some repetition between those findings of fact and those relevant to the wrongful dismissal claim.

63. Immediately after the incident, complainant A phoned Ms Eckersley, team leader, to tell her that someone had tried to phone or film her in the toilet. She identified the claimant as the person who had done so. Ms Eckersley was on a patient visit and could not return to the Office immediately. She told complainant A to stay in the Office where there were other people. Complainant A telephoned Ms Eckersley again after her encounter with the claimant in the kitchen. She was distressed. Because she was still not able to return to the Office immediately, Ms Eckersley rang around to find someone who could. She managed to get hold of Mr

Wall, Cluster Lead. He advised Ms Eckersley to keep complainant A in the Office and call the police.

64. When Ms Eckersley got back to the Office she phoned the police because complainant A was too distressed to do so. When Mr Wall arrived (about 45 minutes after he was called by Ms Eckersley) they both spoke to complainant A and then went to check the ladies' toilets for any devices, finding none. Mr Wall and Ms Eckersley's evidence to the disciplinary investigation was that they checked the ladies' toilets for devices and then checked the male toilets. It is not clear why they checked the male toilets at that point because it does not seem that the respondent would by then have known the claimant's explanation for using the ladies' toilets. Complainant A then went home, having written a statement and spoken to the police.

65. The timeline of events is not entirely clear. However, at some point Ms Eckersley rang Ms Marshall, Directorate Manager, who had line management responsibilities for the claimant. Ms Eckersley told Ms Marshall what had happened. According to Ms Marshall's evidence to the Disciplinary Investigation she and Ms Darley, Service Lead of Boroughwide Teams, were told that the claimant had "run off". Ms Marshall and Ms Darley, then tried to phone the claimant.

66. In her evidence to the disciplinary investigation, Ms Marshall said they had tried to call him a number of times. It is not clear whether that was on his work phone or on his personal phone (the rose gold iPhone). She said that the first time the claimant did not answer. The next couple of times he answered, because the seconds started to count up on the call, but the claimant "did not speak". On the next occasion Ms Darley spoke to say she hoped the claimant could hear her and that they just needed to speak to him.

67. The claimant subsequently rang Ms Darley back. When he did so, he was told to come to Rochdale Infirmary to meet Ms Marshall and Ms Darley and did so. He was asked what had happened from his point of view and said he had used the ladies' toilets and shouldn't have done. I find he was not at that point told about the specific allegation against him but was aware from complainant A's reaction to him in the kitchen that she was angry and distressed by his being in the ladies' toilets.

68. I find that the claimant must have explained to Ms Marshall and Ms Darley that the reason he used the ladies' toilets was because the male toilets were dirty otherwise Ms Eckersley would not have been asked that later that afternoon by Sharon Hollister ("Ms Hollister"), Assistant Director of Nursing Services, to take the photos she took of the male first floor toilets. Ms Eckersley's photos were in the Bundle (pp.164-166). They show one cubicle as clean (the claimant says there was a puddle on the floor); one with a nearly full toilet roll in the toilet bowl; and the third with unflushed faeces in the bowl.

69. The claimant was then told that the police had been informed about the incident and was asked whether he would be willing to speak to the police if they rang them. He agreed to do so. He declined the offer of having a male manager present, saying that "the least people that knew about this the better because I'm embarrassed."

70. Ms Darley then left the room to phone the police. While she was out of the room, according to Ms Marshall's statement to the subsequent disciplinary investigation, the claimant "pulled out a rose gold iPhone out of his pocket to check something on it". Ms Marshall's evidence was that the claimant was carrying two other phones as well as his work phone. At the Tribunal, the claimant did not dispute that he carried multiple phones. He said he usually carried his work phone, his personal phone and a third phone on which he took calls relating to his family's business.

71. When Ms Darley returned, she confirmed the police were not able to attend so the claimant was told by Ms Marshall and Ms Darley to present himself at Middleton police station on his way home. That police station was not always manned but Ms Marshall and Ms Darley told the claimant that was a phone on the wall of the station which he could use to contact the police if the station was closed.

72. Ms Marshall then arranged with the claimant that they would meet the following morning at Rochdale Infirmary to discuss working arrangements. That was because it would be inappropriate for the claimant to return to work at the Office until matters were resolved. Ms Marshall then spoke to HR who advised that the claimant should be suspended with immediate effect while an investigation was undertaken. That same afternoon, Ruth Chamberlain ("Mrs Chamberlain"), a Directorate Manager, was appointed by Ms Marshall as Investigating Officer to look into the allegations against the claimant.

73. The claimant attended Middleton police station on his way home as instructed from the meeting. The station was unmanned. He used the phone on the wall but was told there was no record of anyone wanting to speak to him. He was advised to call 101. He did so and left his name and address. He had the rose gold iPhone with him when he attended that police station.

<u>31 January 2020 to 7 February 2020 – suspension and initial stages of the investigation</u>

Suspension

74. On the following morning, the claimant met Ms Marshall at Rochdale Infirmary. She was accompanied by Ms Hollister. The claimant attended the meeting by himself. There is no evidence that he was offered the opportunity to be accompanied, e.g. by a trade union rep as para 3.3.2 of the Conduct and Disciplinary Police Guidelines suggests should be the case.

75. Ms Marshall told the claimant he was suspended with immediate effect. She read out and handed to him his letter of suspension (p.378-379). That letter confirmed that the allegation was that on 30 January 2020, he was "in the female toilets at [the Office] where he attempted to film/record a female member of staff under the cubicle door of one of the toilets, via mobile phone." I find that was the first time that the respondent had told the claimant that the allegation against him was about filming/recording rather than just using the female toilets when he should not.

76. The claimant denied any wrongdoing and said he had not filmed anyone. Ms Marshall took his entry fob to the Office premises, his ID, laptop and his work phone.

She did not ask to see or ask him to hand over any other phones, such as the rose gold iPhone or other phones she had seen him carrying on the previous day.

77. The suspension letter said that the suspension would be for an initial 28 days; that suspension was not itself a form of disciplinary action nor a presumption of guilt; that the suspension could be lifted or extended; and enclosed a copy of the respondent's Conduct and Disciplinary Policy. The letter also confirmed that Mrs Chamberlain had been appointed as Investigating Officer and would be in touch with the claimant to arrange an investigatory meeting. It encouraged the claimant to be accompanied by a work colleague or trade union rep throughout the disciplinary process; stressed the importance of confidentiality; prohibited the claimant from contacting respondent employees or entering respondent premises without prior permission; and confirmed the claimant must remain contactable and be available to attend meetings, as requested, during normal working hours.

78. On Tuesday 4 February 2020, Mrs Chamberlain sent a letter by post to the claimant inviting him to attend an investigatory meeting on Friday 7 February 2020 (p.139). The letter repeated the allegation against him. It explained that if proven the allegation may constitute gross misconduct resulting in dismissal because it was a serious breach of the claimant's professional code of conduct and a serious breach of the respondent's Dignity at Work policy. It confirmed that the claimant had the right to be accompanied to the meeting and that it was for him to arrange that. Mrs Chamberlain confirmed that she would be supported at the meeting by Nicola Latham, a Human Resources Advisor.

The initial investigation - interview with complainant A

79. During the course of her investigation, Mrs Chamberlain interviewed 6 witnesses. As she explained in her evidence to the HCPC Fitness to Practice hearing (p.283), the first 5 witnesses, who were interviewed pre-lockdown, were interviewed face to face with Ms Latham taking notes. Mrs Chamberlain then took those notes and typed them up into statements using an interview record template. Mrs Chamberlain acknowledged that in some cases the statements were not signed by her or countersigned by the witnesses as being accurate until some time after the interviews took place. The version of the claimant's interview statement in the Bundle (pp.124-126) was not countersigned by the claimant at all. Other than in the case of the claimant's own interview, there was no suggestion that the investigatory statements were not accurate as records of those interviews. The evidence of the sixth witness, Leontia Cartwright, did not emerge until May 2020, i.e. post-lockdown. Mrs Chamberlain's contact with her was by phone and email.

80. The first witness interviewed was complainant A. That was on Wednesday 5 February 2020. Her evidence was that while on the toilet she looked down and saw the back (camera side) of a mobile phone pointed into the cubicle she was using. She could not see a hand but said that the "phone was off the ground and was angled towards the inside of [her cubicle]." Mrs Chamberlain asked specifically whether the phone was on the floor. Complainant A said it was definitely not and repeated that it was angled into her cubicle. Her evidence was that she said "excuse me, are you filming me" and started to get up from the toilet. She then heard the external toilet door open and thought maybe someone else had come in. She opened her cubicle door and saw a male figure leaving. She saw the male figure

"running down the corridor". She chased after him and when he was about to turn the corner of the corridor he looked back and she recognised the claimant.

81. Complainant A said she then contacted Ms Eckersley (para 63 above). About 20 minutes later, complainant A went into the kitchen. The claimant was talking to another member of staff. In her evidence complainant A noted that the claimant was no longer wearing his coat but was wearing his work T-shirt and a hat. Complainant A's evidence was that she asked the other member of staff to leave and after she had done so said to the claimant "you need to leave". Her evidence was that he responded "What?" in "a questioning manner" and she said, "don't act dumb, you need to leave now". She said the claimant had said "can I explain?" and she responded by saying "absolutely not, you need to leave". The claimant then left the kitchen as she requested.

82. After the claimant had left, complainant A confirmed she rang Ms Eckersley again, wrote a statement and rang the police. She confirmed that the police can to the Office on Monday 3 February 2020 and she gave them a statement.

83. Mrs Chamberlain asked complainant A about her previous dealings with the claimant. She confirmed that she had thought he was a really nice person and had put him in touch with a friend of hers as they were both single. She had been Facebook friends with the claimant, and she had given him her personal phone number which he had used for work related matters. She confirmed she had never felt uncomfortable around the claimant.

84. When asked by Mrs Chamberlain whether there was anything that was relevant, complainant A said that when the claimant's was asked him why he was in the ladies' toilets he had answered the male toilets had been filthy, so he had gone into the ladies' toilets instead. Complainant A advised Mrs Chamberlain that Ms Eckersley then went into the male toilets and "they had been clean and that she had taken photographs". I find that despite the emphasis on confidentiality in the investigative process, Ms Eckersley had clearly communicated what she had found to complainant A. I did not hear from Ms Eckersley but is not clear why she thought that was an appropriate thing to do.

85. Complainant A was not asked by Mrs Chamberlain about the colour of the phone involved in the incident and did not refer to it in her interview evidence.

Interview with the claimant

86. On or around 4-5 February 2020, the claimant threw the rose gold iPhone into a skip on his neighbour's drive. His evidence was that it had by then completely stopped working. It was not disputed that at the point he disposed of the phone the claimant had had no contact from the police. The claimant's case is that he had no reason to suppose there would be police involvement and so no need to retain the iPhone.

87. On Friday, 7 February, Mrs Chamberlain interviewed the claimant. He was not accompanied at that interview. His evidence was recorded as being that he called into the Office premises to use the toilet before going out on patient visits but the men's bathroom was soiled, with faeces on the toilet seat and a toilet roll on the

floor. His evidence was that he decided to use the ladies' toilets which, looking back "was inappropriate". While in the cubicle he heard someone come into the cubicle next door. His evidence was that he dropped his phone on the floor and whilst he was retrieving it, heard the person in the other cubicle say, "Excuse me, is that your phone". He said he felt uncomfortable and left the building urgently/quickly. He said that was because he realised that it looked inappropriate that he was in the female toilet. He confirmed that he left but came back "to explain to [complainant A]". His evidence was that he was in the kitchen with another member of staff who complainant A asked to leave. His evidence was that he asked complainant A if he could explain but that she was "very upset/emotional" and she asked him to leave the building which he did. He denied that she had said to him "don't be dumb" during that encounter.

88. Mrs Chamberlain asked the claimant whether, after he left the bathroom, he got changed. The claimant could not recall. I find that question was prompted by complainant A's comment in her interview that the claimant had changed from his coat and was wearing his T-shirt and a hat when they spoke in the kitchen. As reflected in her subsequent Investigation Report, I find that sems to have triggered the idea in Mrs Chamberlain's mind that the claimant was trying to disguise himself when he returned to the Office on 30 January 2020.

89. The claimant's evidence about his previous interactions with complainant A were consistent with hers, i.e. that they were not really friends out of work but she had tried to match him with one of her friends but he no longer spoke to that person.

90. At the end of the interview the claimant expressed his upset about the allegation against him, saying it made him sound like a predator. He asked what the next steps were. Mrs Chamberlain confirmed that the notes of the interview would be typed up and sent to him. She advised that unless he returned the interview notes within the required timescale with any amendments the notes would be taken to be an accurate record of the interview. She confirmed that when she completed her investigatory report it would be sent to Ms Marshall who would then decide whether there was a case to answer. Ms Latham reminded the claimant he could access Occupational Health ("OH") for support of he wished.

91. The claimant was not asked about the phone involved in the incident nor was he asked to produce it.

92. That same evening the claimant was arrested by the police. They seized electronic devices including multiple mobile phones, memory sticks, memory cards and tablets. The claimant provided them with all relevant passwords and PIN numbers. The claimant was interviewed by the police and released in the early hours of Saturday 8 February 2020.

93. The police confirmed the arrest in an email to complainant A early on 8 February 2020 which she forwarded to Mrs Chamberlain that same day. The email provides a brief summary of the claimant's evidence to the police. He accepted being in the ladies' toilets and having a rose gold iPhone. He said that he dropped the phone; was embarrassed which is why he left quickly; that the phone was damaged so he has since thrown it out. I find that reflect a pattern of complainant A being

actively involved in supplying information to the investigation, some of which was not known to and not directly put to the claimant during the investigation.

8 February 2020 to 5 March 2020 – investigations, arrest and attempts to arrange a second investigatory interview

94. On 10 February 2020 the claimant was notified by the HCPC that it was carrying out an investigation into the claimant's fitness to practice as a result of allegations made against him. The HCPC subsequently suspended its investigation pending the outcome of the police investigation.

Further investigatory interviews

95. On 13 February Mrs Chamberlain interviewed Ms Eckersley. I have set out what she said happened on 30 January at paras 63-68 above. When it comes to checking the male toilets, she doesn't explain why she and Mr Wall did so when Mr Wall arrived. She merely said "[Mr Wall] looked in the cubicles but there was nothing obvious. They weren't a mess". When asked whether there was anything else she thought was relevant she said that she did not know why the claimant would not have come through the Office to the toilet as that was the quickest way. She said that if he had come through the Office they would have known he was there. She said that had he said the men's toilets were a mess and could he use the ladies' toilets they would not have given it a second thought. She also questioned why the claimant did not use the male toilets on the ground floor.

96. On 14 February Mrs Chamberlain interviewed Mr Wall. I have set out what he said happened on 30 January at paras 63-64 above. When it came to his inspection of the male toilets, Mr Wall said that he and Ms Eckersley went to the male toilets together and that he "looked in two of the three cubicles and they were clean".

97. On the same day, Mrs Chamberlain interviewed Ms Marshall. I have set out what she said happened on 30 January at paras 65-72 above.

Attempts to set up a second interview with the claimant

98. On 19 February Mrs Chamberlain wrote to the claimant to invite him to a second investigatory interview on Monday the 24 February 2020 at Rochdale Infirmary. She explained that she had had the opportunity to interview other staff and wanted to clarify some information with the claimant. She acknowledged that it might be a difficult time for the claimant and provided details of the respondent's free and confidential counselling service.

99. The claimant responded by email on Saturday 22 February to say he would be unable to attend the meeting. That was because he had not yet received the transcript of their interview on 7 February 2020. He also explained that the invitation letter had not been received until the afternoon of Friday 21 February 2020 so there was no time for him to organise a trade union rep to accompany him. He confirmed that he was cooperating with the process and would be able to attend any rescheduled meeting.

100. Mrs Chamberlain responded by email on Monday 24 February suggesting some rescheduled dates for the second investigatory hearing. She confirmed that she had sent the notes of the first investigatory meeting by post on 10 February 2020 and offered to re-send them by email if the claimant was happy with that. He was, so Mrs Chamberlain sent the notes by email on Tuesday 25 February. She also asked the claimant to confirm the 2 March 2020 at 2 p.m. (the following Monday) as the date and time of the second investigatory meeting.

101. The claimant responded by email on the morning of 2 March 2020 saying he would be unable to attend the meeting planned for 2 p.m. that day. He pointed out in his email that he was now subject to 3 separate investigations (the respondent's, HCPC and the police). He said he had been advised that the police investigation took priority and that participating in parallel investigations could impeded or interfere with police investigations. He said he was unsure what to do next. He said he found the situation extremely distressing and confusing. He attached to his email a fit note from his GP dated 27 February 2020 signing him off work for 1 month with stress at work (copy at p.381).

102. Mrs Chamberlain responded by email the same day to say she had not been advised by either the police or HCPC to suspend her investigation. She invited the claimant to continue with the second investigatory interview and offered times to meet on Thursday and Friday of that same week. She said that given that the claimant had provided a fit note citing stress at work she had asked the claimant's line manager to refer him to OH. She concluded her email by asking the claimant to return the notes of their initial meeting with any amendments. Although she did initiate the OH referral, I find she ignored the claimant's sicknote in favour of seeking to press ahead with the investigation.

103. On Thursday 5 March 2020, the claimant responded to point out that he had provided a sick note and was unable to participate in the respondent's investigation while he was unwell. He repeated that he had also been advised that he should not be participating in parallel investigations while the police were still undertaking theirs. He confirmed he would review and amend the transcript of the first investigatory interview when he was well enough (he eventually did so in his statement of case for the Disciplinary Hearing). He confirmed he would attend the OH appointment when he received the information about that.

<u>6 March to 30 June 2020 – sickness absence, OH reports and Leonita Cartwright's evidence</u>

104. On 5 March 2020 Ms Darley referred the claimant to OH. Her referral form said it was for advice regarding work related stress (pp.67-68). However, most of the form was blank but Ms Darley gave the instructed OH to "**please expedite this appointment urgently** and advise whether he is able to attend formal meetings" (the bold text was hers). I find the focus of the referral was on progressing the investigation rather than, for example, seeking advice on the claimant's health or well-being more generally.

105. The claimant's OH appointment was originally set for 27 April 2020. With the claimant's agreement it was moved forward to 6 April 2020. There was then a further attempt by the respondent to organise an earlier appointment to take place the 18

March 2020 arising from a cancellation. The claimant had not seen the email about it sent to his work email because he was off sick so not checking his emails. This resulted in Ms Latham chasing him on 17 March 2020 by phone for confirmation he could attend the appointment at 8.a.m. the following morning. The claimant said he could not because he was having problems with his car, not having realised the appointment was a telephone one. The claimant was upset because he was, as he saw it, being chased by a member of the investigation team, Ms Latham having sat in to take notes at his interview on 7 February 2020. He was marked as not having attended that appointment.

106. The report from the telephone OH Assessment on 6 April was sent to Ms Darley on 17 April 2020 (p.72). It said the claimant was currently unfit to attend a disciplinary meeting as his cognitive ability may be diminished. The report noted the claimant was receiving some support via his GP which was beneficial but was finding the fact that there were parallel investigations upsetting and stressful. It advised that the respondent may wish to consider prioritising the investigations so the claimant only had to deal with one at a time. The case was to be reviewed by the OH Consultant on 27 April 2020.

107. The claimant provided a further fit note dated 27 March 2020 signing him off for a further 6 weeks because of stress at work. A third fit note dated 11 May 2020 signed him off for the same reason from 8 May to 19 June 2020 (pp.382-383).

108. The OH report from the consultant's review on 27 April 2020 was dated 28 April 2020 (p.380). It reported that during the telephone assessment the claimant had evidenced awareness of environment, could understand right and wrong and was able to contribute to conversations about his work-related situation. The consultant did not find any evidence of suicidal or self-harm risk associated with the investigation. The report concluded that the claimant was fit to attend meetings at work, provided he was given the opportunity to know the topics to be discussed in advance; was allowed to attend with a union rep or colleague; and was given time to privately discuss the topic with them during the meetings if he required it.

109. For reasons which were not explained, M Darley did not receive the second OH report until 11 May 2020 (p.83). She then provided it to Mrs Chamberlain. That prompted her to write to the claimant on 15 May 2020 to invite him to again to a second investigatory interview, this time on 26 May 2020 at 2 p.m. The invitation was in standard letter form. It did not refer to the second OH report or explain why Mrs Chamberlain was writing when she did, having last communicated with the claimant over 2 months previously. The claimant had, however, seen the OH report of 28 April 2020 so knew what it said about his fitness to participate in meetings at work. The claimant emailed at 12:58 on 26 May 2020 to say he would not be able to attend as he was still signed off sick until 19 June 2020. He said he had not received the letter of 15 May 2020 until that day.

110. Mrs Chamberlain responded with a letter that same day expressing her disappointment at the claimant's late notification that he would not be able to attend and setting a new date of 3 June 2020 for the second investigatory meeting. This time she quoted the second OH report confirming that the claimant was fit to attend meetings.

111. The claimant did not attend on 3 June 2020. He wrote to Mrs Chamberlain on the 4 June 2020 to say he had received two copies of her 26 May 2020 letter in the post on 4 June, i.e. after the meeting was due to take place. One was stated to be sent “to be signed for” but the claimant said he had not been asked to sign for it. He reported that he had been experiencing problems with delays in receiving post, presumably due to the impact of Covid 19 and lockdown. He reiterated his position, which was that he had been advised that he should refrain from participating in parallel investigations which could interfere with the police investigation. He reported that HCPC had suspended its investigation pending the outcome of the police investigation. He referred to the first OH report which said he was not fit to attend formal meetings. (Mrs Chamberlain confirmed in her evidence to the HCPC that she never seen that first OH report). The claimant also said that since the second OH report his GP had issued a further fit note confirming he was not fit to work because of stress at work. He said that as soon as it was felt (presumably by his GP) that he could make himself available to work again, he would inform his line manager. The claimant asked Mrs Chamberlain what she meant in her letter when she said that if he did not attend a second investigatory hearing she would “proceed to finalise the Investigation report based on the information available to [her]”.

112. Although it was not in the Bundle, Mrs Chamberlain’s Investigation Report confirmed that she emailed the claimant on the 10 June 2020 to advise that her report would be completed with the information available (final bullet point p.83). In other words, there would be no further attempt to set up a second investigatory interview with the claimant.

113. In the meantime, on 27 May 2020, Mrs Chamberlain had received an email statement from another witness who worked at the office, Ms Cartwright. That came about because on 28 April 2020, complainant A reported to Mrs Chamberlain, Ms Marshall and Ms Hollister by email that she had overheard a conversation between Ms Cartwright and a male colleague about men being caught in the ladies' toilets. Ms Cartwright had named the claimant. Complainant A reported that when they were alone, complainant A then asked Ms Cartwright what had happened. She said the claimant had been leaving one of the cubicles and when she challenged him, he said it was due to the men's toilets smelling. This was a further example of complainant A continuing to be involved in the investigation in a proactive way. It is not clear, for example, why she felt it was appropriate for her to ask Ms Cartwright what happened rather than, for example, merely pass on to Mrs Chamberlain what she had overheard and allow her to contact Ms Cartwright.

114. It seems from the emails at pages 75-76 that there was then a conversation between Ms Marshall and Ms Cartwright at some point before 6 May 2020 during which she agreed to provide evidence to the investigation. Mrs Chamberlain did not interview Ms Cartwright but emailed her on 26 May 2020 to ask her to provide a statement by email.

115. Ms Cartwright did so on 27 May 2929. Her email recorded an incident which she said happened approximately two weeks before the claimant "went off", i.e. presumably two weeks before he was suspended so around mid-January 2020. Ms Cartwright reported she had encountered the claimant coming out of one of the cubicles in the ladies' toilets. He had been very apologetic and said the men's cubicles were in a mess which was why he was using the ladies'. Ms Cartwright had

then seen the claimant in the kitchen and he was still very apologetic. Ms Cartwright had told him not to worry and that had been the end of it.

1 July 2020 - Mrs Chamberlain's Investigation Report

116. Mrs Chamberlain then wrote up her investigation Report, dated 1 July 2020. In addition to reporting on the witness evidence, she recorded her findings on viewing CCTV and the claimant's work schedule (provided by his line manager) for 30 January 2020.

117. The CCTV footage showed the claimant arriving at the building where the Office is at 12.36 wearing (as Mrs Chamberlain recorded in her report) no hat but a jacket and leaving at 12.51. It then showed him entering the building at 13.17 carrying a large box. He came out of the building at 13.18 and re-entered carrying a crutch. He came out at 13.18 then re-entered at 13.19 carrying 2 crutches. He came out for the last time at 13.23. Each time he came out he was empty handed. Mrs Chamberlain recorded in her report that for each entry or exit from 13.17 he was not wearing a jacket and had a hat on (apart from his last exit at 13.23).

118. Mrs Chamberlain recorded that the claimant's work schedule showed a "planned home visit" from 13.00-14.00 followed by a planned visit to a Care Home from 14.30-15.30. From 15.30-16.30 was planned clinical admin which his manager reported the claimant could have done from the Office or from home.

119. The report set out Mrs Chamberlain's "Statement of Findings". That section of the report set out the allegation and then a series of points which "supports" or "disproves" the allegation. I find that summary of factual findings accurately reflects the evidence gathered and what happened during the investigatory process. It omits the finding of the first OH report which said that the claimant was not fit enough to attend a disciplinary meeting. Based on her evidence to the HCPC Fitness to Practice hearing (p.313) I find that Mrs Chamberlain did not see that first OH report.

120. Mrs Chamberlain then set out a list of 12 "outstanding questions for [the claimant]". These included questions about the "indirect" route he had taken to the ladies' toilet; why he had removed his coat and put on a hat before re-entering the Office building; why he had "initially implied [he] did not know what complainant A was referring to" in the kitchen after the incident (a reference to his saying "what?" in a questioning manner according to complainant A); and for his comments on Mr Wall and Ms Eckersley's evidence that the male toilets were clean. There were also questions about apparent discrepancies in his account of what he did after the incident and where he had appointments that day,

121. Mrs Chamberlain then set out her "Evaluation of Findings". That section has a sub-heading "Corroborated" followed by a series of 14 bullet points. I find that some of the evaluation bullet points include a degree of speculation. Specifically, the point made that the claimant was able to leave the cubicle "immediately" and the speculation that he would not be able to do so if he was actually using the toilet; that there was some significance to the claimant removing his coat and putting on a hat before re-entering the building (seemingly based on speculation that the claimant was seeking to disguise himself); and that it was "unlikely" that all correspondence

had failed to reach the claimant and that he appeared to be "evading further meeting and questioning".

122. I find that the evaluation section does in two places misreport the evidence. The most significant is the last bullet point where it is suggested that Ms Marshall witnessed the claimant "using" the rose gold phone which he said had been broken. As Mrs Chamberlain acknowledged in her evidence to the HCPC, that is not what Ms Marshall's evidence was. She said the claimant had looked at his phone, not used it. That was a significant difference given that the claimant's explanation for throwing the phone away was that it had broken following his having dropped it in the ladies' toilet. Mrs Chamberlain also noted as a discrepancy that in the claimant's evidence he said he had re-entered the Office premises to speak to complainant A but that he "entered and left the building on several occasions immediately following the incident". That does not seem to me to adequately reflect the fact that the subsequent entries and exits were over the course of one visit over 6 minutes.

123. I also find that the evaluation section did not give equal prominence to those matters which tended to corroborate the claimant's version of events. It did refer to Ms Cartwright's evidence but did not make the point that reason the claimant gave her for using the ladies' toilets was consistent with his explanation of what happened on 30 January 2020. When it comes to the point made in the section that "the claimant's conduct has not been conducive to seeking resolution" there is no reference to the fact that the claimant was signed off sick by his GP due to stress at work for a significant period of time during the investigation; that the first OH report had confirmed he was not fit to be attend formal meetings; nor to the stress of being involved in the parallel police and HCPC proceedings. There is also no reference to the impact on postal deliveries of lockdown which the claimant had suggested as the reason for delays in his receiving post from the respondent.

124. I accept that to some extent Mrs Chamberlain had only one side of the story, not having the claimant's response to the "outstanding questions" because it had not been possible to arrange a second investigatory meeting with the claimant. Even taking that into account I find that the evaluation section in effect set out the "prosecution case" against the claimant rather than a neutral evaluation of the findings. That is reflected in some of the language used, e.g. referring to the claimant "fleeing the scene" or saying the claimant "had entered in a way in which his colleagues would not see him enter". That does not seem to me consistent with the neutral evaluation envisaged by the respondent's conduct and Disciplinary Policy Guidelines.

125. Mrs Chamberlain's conclusion was that overall the investigation had produced information which appeared to substantiate the allegation against the claimant.

126. Mrs Chamberlain annexed to her report the witness statements from February 2020; the email evidence from Ms Cartwright; relevant policies; and the correspondence between the respondent and claimant from 19 February 2020 relating to attempts to arrange a second investigatory interview. She did not annex the photographs taken by Ms Eckersley showing the male toilets. She did not annex either of the OH reports nor the claimant's fit notes.

<u>2 July to 23 September 2020 - Disciplinary Procedure and dismissal</u>

127. The Investigation Report was sent to Ms Marshall who decided that there was sufficient evidence for the matter to be heard at a disciplinary hearing. Victoria Thorne, Divisional Nursing Director ("Mrs Thorne") was appointed to hear the disciplinary hearing. On 20 July 2020 she invited the claimant to a hearing on Friday 7 August 2020 at Rochdale Infirmary. She confirmed she would hear the case and would be supported by Michelle Waite (Ms Waite), an HR Business Partner. Mrs Chamberlain would present management's case, supported by Ms Latham. A copy of Mrs Chamberlain's Investigation Report was sent with the invitation letter. The claimant was informed that if the allegation was substantiated, he could be summarily dismissed for gross misconduct and was informed of his right to be accompanied by a trade union rep or work colleague.

128. The hearing was postponed twice, first to 1 September 2020 and then to 16 September 2020. By this point the claimant was represented by Ms O'Dowd, his trade union rep. The hearing on 16 September 2020 took place by MS Teams.

129. The claimant had prepared a written statement of case headed "Staff-side Opposing Statements". which was sent to Mrs Thorne prior to the hearing. It set out corrections or clarifications to the Statement of Findings in the Investigation Report and the claimant's answers to the "outstanding questions" for him in that report. it criticised the "evaluation of findings" as being partial and biased against the claimant.

130. In that written statement the claimant explained why the route to the toilets avoiding the Office was not in fact slower even though more indirect, involving fewer doors and no key code doors; questioned the relevance of the claimant's supposed "change of clothes"; explained the circumstances of his return visit to the Office building at 13:17; and explained his movements subsequent to the incident.

131. The statement explained that the work schedule viewed by Mrs Chamberlain did not accurately reflect the claimant's calls that day. The claimant's evidence was that he used an iPad calendar to record his visits on any day. On 30 January 2020 he had an urgent referral that morning from the Rapid Response team to see a patient before they were discharged from a care home. He was due to see them at 14.30 but had thought he could go and see them before the patient's lunch hour because his morning meeting had finished early. He had gone to the care home which was 5-6 minutes away but that was the wrong care home so he returned to the Office. He explained that when he did so, he unloaded the equipment from his car into the Office building foyer and then took it all upstairs.

132. The claimant said he didn't know about the ground floor toilets and had never used them. He explained that he was already finished using the toilet and dressing himself when complainant A came in.

133. When it came to the attempts to contact him on the day of the incident, he said he was on his way to another patient when Ms Darley tried to call him. The claimant said this was on his personal phone, i.e. the rose gold iPhone. His evidence was that he could not hear a voice on the other end (because the phone was broken). He then called Ms Darley back on his work phone. He said there was only a short interval between Ms Darley ringing him and he ringing her back.

134. In the statement the claimant said he discarded the iPhone as it had stopped working completely. He said he told the police where he had discarded it. He was later asked for, and provided, his PIN number, so assumed the police had retrieved it. (It appears the police had not though the claimant was not to know this).

135. In the statement the claimant also denied that complainant A had said "are you filming me" and said she had said "is that your phone". He also denied that she had said "don't act dumb" to him in the kitchen after the incident. He confirmed the incident and conversation with Ms Cartwright but said that it happened approximately November 2019 but certainly before Christmas rather than January 2020.

136. The disciplinary hearing began with introductions, after which Mrs Chamberlain set out the salient points from the Investigation Report. She was asked questions by Ms O'Dowd for the claimant. In answer to Mrs Thorne's question, Mrs Chamberlain said she did not know if there was enough time for the claimant to visit the care home and return to the Office between 12:51 and 13;:17. She suggested Mr Wall might be better placed to answer that. When Mr Wall gave his evidence to the hearing he said he could not answer either because he was not familiar with the care home in question.

137. Complainant A then gave evidence. That evidence was consistent with her statement to the investigation. When questioned by Ms O'Dowd she said that the whole incident lasted about 30 seconds. She said it took 10-20 second from her opening the toilet door to seeing who had exited the toilet. Asked by Ms O'Dowd why she had not given the claimant a chance to explain in the kitchen, complainant A said that "the man had just been recording me in the toilet. I didn't want an explanation, I wanted him out". She denied there could be another explanation for what happened and was in absolutely no doubt that the phone was off the floor and angled into her toilet. Mrs Thorne had no questions for complainant A.

138. Mr Wall then gave evidence which was consistent with his interview statement. He was asked by Ms O'Dowd why he had gone into the male toilets. His answer was that he had gone in to check if there was anyone in there but also that Ms Eckersley had made an "off the cuff remark" that she had never been in the male toilet before. He said he had "popped his head in" to the cubicles but couldn't remember whether that was into 2 of them or all 3. It was pointed out to him that his version of events (i.e. the toilets being clean) did not match up with the photos taken by Ms Eckersley. His response was that there was some time between their first going in to check and the photos being taken. He suggested Ms Eckersley would have a record on her phone of the time the photos were taken. Ms Eckersley was not called to give evidence nor were her photos part of the evidence before Mrs Thorne at the disciplinary hearing. I saw no evidence to confirm the time when the phots were taken was ever established. In answer to Mrs Thorne's question, Mr Wall confirmed that when he checked the male toilets they were clean but when the photos were taken later they were not clean. He also confirmed he visited the Office on a monthly basis and was aware of the location of the toilets but was not aware of the ground floor male toilets. In answer to Ms Waite's question he confirmed he did not notice any aroma or smell in the male toilets, describing them as "very well kept".

139. Ms O 'Dowd then presented the claimant's case. She criticised the Investigation Report and the management case, reiterating a number of the points

made in the claimant's written statement of case. She said that there was no evidence of anyone in the investigation having had an "open mind" and suggested that the points said to "support" the allegation did nothing of the kind. This included the fact that the phone was "held off the floor" which she said would be the case if the claimant was picking it up off the floor. She submitted that it was not clear why the CCTV footage was relevant and asked whether the Investigation was suggesting that the claimant was attempting to disguise himself. She questioned the provenance of the evidence about the claimant's work schedule and pointed out the line manager who had supplied that information had not been called to give evidence. When it came to the evidence about the male toilets she pointed out that Ms Eckersley's photos corroborated the claimant's evidence about the state of the male toilets but Mr Wall's evidence did not. She queried whether the suggestion was that the claimant had snuck back in and soiled them himself, which she submitted would be ludicrous both in terms of timescale and the implicit suggestion that someone could "defecate on demand". She submitted that the evidence about the attempts by Ms Darley to call the claimant did not provide "support" to the central allegation.

140. When it came to the process followed, Ms O'Dowd submitted that it would be standard process to suspend an internal investigation where there was a police investigation ongoing. She submitted it was discourteous at best to suggest that the claimant was lying about the non-arrival or late arrival of post. She submitted that the claimant had not been treated with the dignity and respect required by the respondent's own policies.

141. Ms O'Dowd then called the claimant to give evidence which was consistent with his statement of case. He explained that he was using the phone in the toilet to try and check the number of the care home he wanted to visit before the patient's lunch hour. He denied he "ran" from the toilet. He said that the allegations against him had had an effect on his health. He said he had had no support from the respondent while he was off sick. He said that he was seen by OH solely to determine if he was able to attend interviews. He 100% denied the allegation against him.

142. Mrs Thorne acknowledged the lack of support from the respondent and apologised for it. Mrs Chamberlain asked the claimant questions about his diary and the location of the care home he visited that day. The claimant confirmed his evidence that he used an iPad for visits on the day; that he had received a rapid response referral that day; and that the care home he had visited in error was only 5-6 minutes away from the Office.

143. In answer to Mrs Thorne's question, the claimant acknowledged that in his statement of case he had said he may have dropped some equipment off when he visited the Office for the first time on 30 January 2020. However, he accepted that the CCTV showed he did not do so on this occasion, so he confirmed his sole purpose was to visit the toilet.

144. Asked by Mrs Thorne about toilets, he said he was not aware of the ground floor male toilets. He confirmed the male toilets were frequently in an unacceptable state but confirmed he had never reported the state of the toilets. He could not answer why he had not reported them. Questioned about how long it had taken him to leave the cubicle he confirmed he was not in mid use and that he did not wash his

hands when leaving the toilet. It was put to him that he would not have been able to get to the care home before lunch if he did not leave the Office premises until 12.51. The claimant said that he was trying to get there by 1 p.m. The claimant confirmed he had got his phone out to check the phone number for the care home but had not phoned the care home from the toilet.

145. Mrs Chamberlain and Ms O'Dowd were then given an opportunity to sum up. Mrs Chamberlain had nothing to add but Ms O'Dowd made further submissions. In summary, she said that the allegation was an accusation by one person. She did not suggest that complainant A was lying and accepted that she firmly believed what happened. However, she submitted that did not mean that she was correct and pointed out that complainant A had not, at any point, wanted to listen to any other explanation (as she had confirmed in her evidence at the hearing). She said that the investigation had not been carried out impartially and without bias (whether consciously or unconsciously) and that the "evidence in support" was "pure subjective supposition".

146. Mrs Thorne decided that there was too much evidence to go through to enable her to make a decision on the day. She adjourned the hearing which was reconvened on the 23 September 2020.

147. In the meantime, Mrs Thorne checked with the police and HCPC that they were content for the respondent's internal process to progress. Both confirmed they had no objection to the disciplinary process going ahead. Mrs Thorne also checked with the building manager what the cleaning rota was and whether there had been reports from the cleaners that the men's toilets had ever been in a dirty state. The building manger reported that the cleaners had never reported an issue with the state of the men's toilets.

148. At the resumed hearing (again held by MS Teams) Mrs Thorne confirmed her decision to summarily dismiss the claimant for gross misconduct. She gave her reasons at the hearing and then confirmed them in a letter on the same day. In summary the reasons were:

- that the claimant chose a less direct route to the toilet, rather than going through the Office, bringing into question the reason why he did so if his sole aim was to use the toilet;

- the only way complainant A could know the claimant's phone was rose gold was because his phone was camera side up under the cubicle wall because iPhones are completely black on the screen side (a point never put to the claimant at the hearing or during the investigation);

- complainant A was very clear and adamant in her evidence that the phone was off the ground and angled towards her cubicle;

- the evidence from Mr Wall and Ms Eckersley that the male toilets were clean contradicted the claimant's claim that he had used the ladies' toilets because the men's were dirty. Even though Mr Wall was unsure whether he had checked 2 or 3 cubicles he was clear that they were clean and there was no aroma;

- the building manager also confirmed that the toilets were cleaned 3 times a week, were inspected twice a day by a manager on site and signed off daily and the cleaners had not reported to the building manager that the men's toilets were dirty;

- if the toilets were dirty as the claimant suggested then he had a responsibility to report that and that was not a valid reason to use the ladies' toilets;

- it was unusual for the claimant to have used his mobile phone while in the ladies' toilet-it was not what would be expected of a heath care professional and not what Mrs Thorne would expect of a man using the ladies' toilets;

- if the claimant was on the toilet and using his mobile phone, he would not have been able to get up and leave the toilet as quickly as he admitted doing.

149. The letter advised the claimant of his right to appeal against the decision within 14 days.

<u>24 September 2020 to 16 December 2020 – the claimant's appeal against dismissal and HCPC Interim Order</u>

150. On 5 October 2020 the claimant appealed against his dismissal. The original appeal hearing date of 25 November 2020 was postponed by the respondent, so the appeal hearing took place on 7 December 2020. The HCPC had confirmed on 19 October 2020 that it intended to apply for an interim Order to restrict the claimant's practice.

151. The appeal hearing took place by Microsoft Teams. The appeal was heard by Victoria Dickens, Director of AHPs ("Mrs Dickens"). Rachel Graham provided HR support to Mrs Dickens. Mrs Thorne attended to explain her decision and was accompanied by Ms Waite from HR. The claimant attended with Ms O'Dowd. Management side had arranged for complainant A and Mr Wall to attend to give evidence if needed, but Ms O'Dowd confirmed that that was not required. During the hearing there was also a discussion about the need to call Ms Eckersley to give evidence. Ms O'Dowd agreed it was not necessary for her to be called.

The pre-hearing written submissions

152. The hearing was recorded and so the notes in the bundle (pages 247-266) amount to a transcription of the hearing. Prior to the hearing the claimant had submitted a written appeal document (pages 237-245) and Mrs Thorne had prepared and submitted an "appeal response" document (pages 193-198). Mrs Dickens had read both those documents prior to the appeal hearing.

153. The claimant's appeal document focussed on the reasons for dismissal given in Mrs Thorne's letter on 23 September 2020. In brief, he said:

- There was no discrepancy (as Mrs Thorne suggested) between his evidence that he had visited the Office Premises to use the toilets and

the statement in his written statement of case that he "may have used the opportunity to drop off some of my equipment". The claimant said the CCTV showed he had delivered equipment to the Office Premises on that day, albeit on his second visit not his first. He said it was a long time between the incident and providing his statement of case. He stated that he had been consistent throughout and that he had used the female toilets on the day in question because the male toilets were soiled.

- In response to Mrs Thorne's comment that complainant A could only know the colour of his phone if the camera side was up under the cubicle wall, he rejected Mrs Thorne's suggestion that the screen side of iPhones are "all black". He pointed out that they were trimmed with the colour of the phone. He said that in addition everyone in the Office knew the colour of his phone and he was often ribbed about that colour.

- In response to Mrs Thorne's comment that complainant A was very clear and adamant in her evidence, the claimant said that he had also been clear and adamant in his evidence. He queried why complainant A being adamant about her evidence gave her more credence than him being adamant about his evidence.

- In relation to the cleaning of the toilets, he submitted there seemed to be a bias in Mrs Thorne wanting there to be discrepancy in terms of the state of the toilet. He pointed out that the photographs taken by Mrs Eckersley showed the toilets were in the state that he described. He suggested either Mr Wall was mistaken or that the toilets had been cleaned then they were soiled again by the time Mrs Eckersley took her photographs. That, he said, supported his case.

- He pointed out that the information provided by the building manager about the cleaning rota and the lack of reports from the cleaners of the male toilets being in an unacceptable state had not been put to him prior to Mrs Thorne making her decision. He said that the state of the male toilets was something which had been discussed with staff and about which evidence could have been provided if required. He queried why Mr Wall's version about the cleanliness of the toilets was believed rather than his. He also queried why it was thought significant that he had not reported the state of the toilets. He questioned whether Mrs Eckersley had reported the state of the toilets after she took her photographs.

- In terms of his behaviour in the toilet cubicle, he queried how Mrs Thorne could decide what would be "normal" behaviour for a man using female toilets. He said that he was concerned that he would simply cause alarm if he identified himself when complainant A spoke to him in the cubicles. He said that he decided that rather than cause alarm he had "attempted to respectfully remove himself".

- As a general point, the claimants said that he believed that the process had been carried out in a way that was biased against him. He provided as evidence the fact that he was told to go and report himself to the

police before he was even made aware of the allegation against him (i.e. by Ms Darley and Ms Marshall on 30 January 2020). He also cited the respondent continuing the process while the police investigation was ongoing as evidence of unfairness. He pointed out that the dismissal summary letter did not contain one statement in support of his character and work record and highlighted the lack of support from the respondent when he was signed off sick due to stress at work.

154. In summary, Mrs Thorne in her appeal response:

- Confirmed she had checked with police and HCPC prior to making her decision and they had confirmed that the internal investigation could continue.

- Noted that the claimant's case was that he had not intentionally discarded the rose gold iPhone after the incident and believed the police had retrieved that phone because they requested his pin number to unlock it. Mrs Thorne had contacted the police who confirmed that the iPhone in question had not been retrieved.

- Reiterated the reasons for dismissal given in her letter of 23 September 2020 and denied that there was any bias in the investigation carried out by Mrs Chamberlain or her decision to dismiss.

155. At Appendix 5 to her appeal response document Mrs Thorne added a floorplan of the flexi space offices, showing three potential routes to the ladies' toilets on the first floor. The floorplan showed three routes. One was the route up the stairs and through the Office. The second was the route which the claimant had always agreed he had taken to the ladies' toilets, i.e. around the storage units rather than through the Office. The third route was one which the claimant had never suggested he had taken, namely along the corridor on the ground floor to the alternative stairs to the first floor at the other end of the building, the potential significance seeming to be that that route took him past the male toilets on the ground floor (which were marked with an "X" on the floorplan).

The hearing

156. At the appeal hearing Mrs Thorne confirmed her belief that the investigation in the case had been carried out without bias by Mrs Chamberlain. Mrs Chamberlain was not someone known to the complainant A or to the claimant and Mrs Thorne's belief was that the claimant had been treated with dignity and respect throughout.

157. She confirmed that she remained satisfied that the decision to dismiss was correct. She then took the panel through the floor plans to illustrate her view that the route through the Office to the ladies' toilet was the quickest and most direct. She pointed out that the claimant had in his original interview statement said he had returned to the Office solely to use the toilet but had in his statement of case for the disciplinary hearing said that he may have used the opportunity to drop off some equipment. At the dismissal hearing, however, the claimant had accepted that he had not dropped off equipment when he first visited the Office on 30 January. Mrs Thorne said that there was a discrepancy therefore between the explanation given by the claimant for his visit to Office in his original interview and his statement of

case. Mrs Thorne also maintained her position that complainant A would only have been able to see the colour of the claimant's phone if it was pointed camera side up. She confirmed that she had not submitted the pictures taken by Ms Eckersley but that they were available if needed.

158. She maintained that both Ms Eckersley and Mr Wall had entered the male toilets and found them to be clean and not smelly. She repeated the finding in her dismissal letter that in her view the claimant's behaviour in the ladies' toilet was unusual. He did not make his presence known, he spent time using his mobile phone while in the toilet and then left in a hurry without washing his hands. She did not think it unreasonable for the claimant to have made himself known and to stay long enough to have washed his hands. With regards to pausing the disciplinary proceedings in light of the police investigation and the HCPC proceedings, she confirmed that she had contacted both who had not objected to the respondent's disciplinary process continuing.

159. Ms O'Dowd then asked Mrs Thorne questions. She asked that the photographs taken by Ms Eckersley be produced for the panel (they subsequently were). Mrs Thorne asserted that Ms Eckersley and Mr Wall had gone into the toilets together. The claimant intervened to point out (correctly) that Ms Eckersley's evidence was that she had gone into the toilet but only Mr Wall had looked into the cubicles.

160. In response to Ms O'Dowd's question, Mrs Thorne confirmed that she had not sought clarification from the rapid response team that the claimant had received a referral on the morning of the incident. She said that the claimant had provided an explanation for that and so no further investigation was necessary. She confirmed her decision to dismiss was based on the balance of probability and that she had spoken to the police and to the building manager after the disciplinary hearing had taken place.

161. Ms O'Dowd then made verbal submissions. Core to those was a claim that there was no explanation as to why Mrs Thorne had preferred the evidence of complainant A and Mr Wall to that of the claimant. She suggested that the explanation for that was unconscious bias. In other words, Mrs Thorne as a white woman had preferred complainant A's evidence as she was also a white woman in contrast to the claimant who was a non-white male. This, Ms O'Dowd submitted, had led to Mrs Thorne dismissing the claimant's perfectly plausible explanations for his behaviour, i.e. his using the route which would not take them through the office because he was in a hurry; his using his phone in the cubicle to find the telephone number of the care home; and his leaving the toilet in a hurry because he thought that was preferably to identifying himself as being male in the female toilets. Ms O'Dowd also submitted that in her extensive experience, internal investigations would be suspended pending the outcome of HCPC or police investigations.

162. After a short adjournment for Mrs Dickens to consider the photographs, the claimant was questioned by Mrs Dickens. When asked by her about the route he took he confirmed that sometimes he used the non-Office route as a shortcut when he was just nipping into the building and didn't want to go through the Office where he might be given referrals and delayed. He also used that non-Office route when he was carrying equipment. Mrs Dickens asked Mrs Thorne to explain why the route

taken to the toilets was seen as significant because she was struggling to understand why it was such a big part of the management's case. Mrs Thorne explained that the significance was that if the claimant's sole purpose was to use the toilets the route he took was the long way round.

163. When asked by Mrs Dickens how often he used the female toilets the claimant said he had used them before, in total about three or four times. He confirmed that when he was using the ladies' toilets it was not a comfortable place to be, so he tended to rush in and rush out. He confirmed that he did not try and flush the male toilets when he found them soiled – he had simply gone straight into the female toilets. He confirmed that he had now learned that there were male toilets on the ground floor but that the staff in the Office did not use the ground floor. That ground floor area was a public area and he had never been to that ground floor area.

164. In answer to a question from Ms Graham, the claimant explained that he had not tried to get the broken iPhone repaired because it was clear that it was in such a bad condition as to be irreparable. Ms Graham then asked Ms O'Dowd for evidence in support of the assertion she had made in her submission that nine out of ten phones that are dropped land on their screen. Ms O'Dowd confirmed that she had not got evidence to back that up but said that mobile phone screen replacement was a massive industry which she said supported her assertion.

165. Ms Graham then asked Ms O'Dowd for the basis of her assertion in her submissions that if a phone is dropped it is likely to be picked up camera side up. Ms O'Dowd explained that if the phone was dropped screen side down then it would be picked up with the camera (or at least the main camera) facing upwards.

166. The claimant interjected to point out that everybody in the office knew the colour of his phone and there were cameras on both sides of the phone so to say that a phone is "camera side up" does not make much sense. He was then asked by Ms Graham whether there were colleagues who he specifically recalled having discussions with about the state of the male toilets. The claimant suggested that there were a few names, including Ms Cartwright and another colleague called Alison. In response to a question from Ms Graham he confirmed that he was not aware of anybody else raising formal complaints about the state of the toilets.

167. Ms O'Dowd was then asked for the evidence in support of her assertion that most adults have used their smartphone whilst on the toilet. Ms O'Dowd said that she had done so herself and that friends, family and colleagues that she had spoken to also did it. She confirmed she had not done a kind of poll but suggested that it was probably more common than not that people would at some point have used their mobile phone on the toilet.

168. The claimant was then asked some further questions about why he had used his mobile phone on the toilet if he was in such a hurry to leave. His answer was that he was on the toilet and had checked the number for the care home, so it had not added to the time in the cubicle. He also said he could not remember whether he had actually called the care home. He did know that he had not spoken to anybody at the care home but could not remember whether that was because he had not called them or because they had not answered.

169. There was also a discussion at the hearing of the appropriate legal test to be applied. Ms O'Dowd made reference to the case of **in re H** and Ms Waite replied by saying that the appropriate case law was **Burchell** (which is referred to in the respondent's Conduct and Disciplinary Policy guidelines).

170. Mrs Thorne and Ms O'Dowd then gave submissions in summing up. Again, Ms O'Dowd's focussed on the allegation of unconscious bias on the part of those involved in the investigatory and disciplinary process and the fact that any evidence in support of the claimant's case appeared to have been disregarded. Mrs Thorne reiterated that there was no bias on her part and asked that her decision be upheld. Mrs Dickens confirmed that she would be adjourning to make her decision.

171. She confirmed that decision by a letter of 16 December 2020. Although headed "Grievance Appeal" it clearly is in reference to the disciplinary appeal. It confirmed that the appeal was rejected and the original decision to dismiss upheld.

172. In her letter, Mrs Dickens gave her reasons for rejecting the appeal as follows:

- With regard to the route the claimant took to the toilets, she said she did not believe that the route played a significant material factor in the subsequent alleged incident.

- While accepting that an iPhone was trimmed in colour on both sides, she rejected Ms O'Dowd's assertion about the probability of a phone landing screen side down because it was not based on evidence from a reputable source. She also suggested the claimant had provided "conflicting evidence" saying it was irrelevant which side of the phone was facing up as it had a camera on both sides. She said that she did not "believe this evidence supports your case".

- She said she was inclined to believe the account of complainant A. Her reasoning on this is not easy to follow. She stated that "I'm inclined to believe [her] account in context of your account in point 1 of your appeal statement where you explained it was a long time between the incident and both submitting my statement of case and being asked at the hearing about the sole purpose of my visit to the Office". My understanding of that is that Mrs Dickens was saying that she accepted Mrs Thorne's view that there were inconsistencies in the claimant's account of why he had visited the Office on 30 January 2020.

- Mrs Dickens did not dispute that the toilets may not have been up to standard. She said from the evidence provided it was difficult to determine the exact state of the toilets. However, she said that led her to question why the claimant had used the female toilets on only three occasions if they were frequently dirty and why, if they had been unusable on a number of occasions, the claimant had not reported that to the domestic team or found the alternative male facility on the ground floor.

- She rejected the suggestion that there had been conscious or unconscious bias. She did not believe that a different outcome would have been reached had the panel been made up of individuals of

different genders or race. She said she was satisfied that a full and fair process had been followed.

- Mrs Dickens rejected Ms O'Dowd's assertion that it was common to use mobile phones whilst in the toilets because that was not from a "verified source". She said she "could not take this as factual evidence". She also said that she could not understand why the claimant would have used his mobile phone while in the female toilets when he also said that he was "in and out" of the toilets, i.e. that he wanted to get out of there as soon as possible.

17 December 2020 to 8 December 2021 - Post appeal events – outcome of HCPC Fitness to Practice and Police proceedings.

173. The claimant's fitness to practice hearing at the HCPC took place from Monday 6 December 2021 to 8 December 2021. Mrs Chamberlain, complainant A and the claimant all have evidence and were cross examined during that hearing. To the extent that it is relevant to my findings in relation to wrongful dismissal, I have set out their evidence in the next section of these findings of fact.

174. In brief, the HCPC concluded the case against the claimant was not well-founded. In relation to the criminal proceedings, it was confirmed on 13 January 2021 that the Crown Prosecution Service had decided that there was a lack of evidence to support the allegation so no further action would be taken against the claimant.

Findings of fact relevant to the wrongful dismissal claim and contributory conduct

175. I did not hear evidence from complainant A during the Tribunal hearing. When it comes to the claimant, I found him to be a credible witness. I found his explanation of what happened on 30 January 2020 to be plausible. It seemed to me entirely plausible, in particular, that having been "caught out" in the ladies' toilets he would have felt embarrassed and wanted to leave quickly rather than alarm the person using the cubicle next door by announcing the presence of a man in the toilet.

176. It did not seem to me that the surrounding circumstantial evidence which Mrs Chamberlain and Mrs Thorne had relied on heavily as indicating guilt on the part of the claimant did, viewed objectively, detract from the claimant's version of events. I accept his evidence that he was only popping into the Office to go to the toilet before attempting to see a patient at the care home before her lunch hour. I find it plausible that in those circumstances he would have taken a route which did not involve using a key code door and which reduced the risk of bumping into a colleague and being delayed by them or being given another referral (which would have further delayed him). Unlike Ms Thorne and Mrs Dickens, I do not find it implausible that the claimant was using his phone in the toilet cubicle. I do not attach the same significance as Mrs Thorne to the fact that complainant A was able to identify the colour of the claimant's phone. I note that she makes no reference to the colour of the phone in her statement to Mrs Chamberlain. There was no challenge to the claimant's evidence that the colour of his phone was known by colleagues in the office. More importantly, it seems to me that even if the phone was screen side

down, that again leaves open the central question in this case, which is whether the phone was merely being picked up or was being used to film or take photographs.

177. I also find that the photographs taken by Ms Eckersley of the toilets corroborate the claimant's version of events. The timeline of events is not clear, but I do find that the claimant had left the Office premises for the second time before Mr Wall and Ms Eckersley first inspected the cubicles. There was no suggestion in the evidence I heard or read that the claimant had returned to the Office Premises at any point after 13:23.

178. Given the timings, I do not accept that there was any opportunity for the claimant to have returned and created the mess in the male toilets, e.g. during his second visit to the Office Premises. It seems to me that his evidence about what he was doing on that second visit, i.e. returning equipment which he first took into the foyer and then took upstairs, is consistent with the timings on the CCTV footage.

179. I have considered the evidence from Mr Wall and Ms Eckersley that the toilets were clean when they first visited them. It seems to me that, as the claimant submitted at the appeal hearing, there are two potential explanations, both of which ultimately support the claimant's case. The first is that Mr Wall was mistaken in his evidence. By his own admission, he "popped his head" in to the cubicles and possibly into only 2 of the 3. Ms Eckersley did not look into the cubicles. I note that based on the timings as I understand them, Mr Wall was not on that first visit to the cubicles aware of the claimant's explanation for using the male toilets. He would not be focussing on their cleanliness. The alternative explanation is that Mr Wall is correct that the toilets were clean when he inspected them but they were dirty again by the time Ms Eckersley took her photographs. If that is the case then it again supports the claimant's case that the toilets were on occasion left in an unsatisfactory state.

180. I do take into account the information gleaned by Mrs Thorne from the building manager. There was no information, however, about whether the toilets had been cleaned after the claimant had made his first visit to the building. There was no evidence to contradict the claimant's statement that he had spoken to colleagues about the state of the male toilets. It seems to me that Mrs Thorne placed an undue importance on the claimant's failure to report officially the state of the toilets.

181. I accept, in light of the case of **Hovis** that I must not simply accept the claimant's evidence because complainant A was not at the Tribunal to give her version of events. I do however have the advantage of the transcript of the cross-examination of complainant A at the HCPC fitness to practice hearing.

182. Under cross-examination at the Fitness to Practice hearing, complainant A accepted that her observation of the claimant's mobile phone in the toilet cubicle had lasted a matter of seconds. She agreed that she had no evidence that the claimant was filming or attempting to film her and that this was an assumption on her part, based on her observation of the manner in which it was pointing into her cubicle. She disagreed that the claimant had dropped his mobile phone on the floor and had been in the process of picking it up. She said that she would have heard if it had fallen on the floor. However, she agreed that she had not heard any sound when the claimant opened his cubicle door to leave. I do find, based on her evidence at the disciplinary

hearing, that the claimant was unwilling to accept there was any possible explanation for what happened other than the claimant was attempting to film her.

183. I remind myself that what I must decide is whether, on the balance of probabilities, the claimant acted in the way alleged on the 30 January 2020. In doping so I take into account the evidence from complainant A that this was not behaviour that she expected of the claimant. It was out of character. Given the seriousness of the allegation and the nature of the behaviour alleged there would need to be compelling evidence that he acted as alleged. I do not find there is. I find his explanation that he was rushing to use the toilets before he went on a patient visit plausible as was his explanation for using the route which was longer in distance but not necessarily slower in practice to get to the toilets. I find that the toilets were soiled as he described and that he therefore used the ladies' toilets. I accept he dropped his phone at the point when he was pulling his trousers up having finished using the toilet and that when he bent over to pick it up complainant A saw his hand holding the phone. I do not doubt that complainant A's observation was sincere. However, I do find on balance that the claimant's version of events is to be preferred.

184. I have taken into account one action which the respondent suggested was indicative of guilt, namely the claimant's decision to dispose of the relevant iPhone As I have said, I accept the claimant's evidence as being reliable. I find that the phone was broken and that at the point when he threw it into his neighbour's skip he was not under the impression that there were police proceedings still pending. In any event, I find that if he was disposing of the phone to get rid of incriminating evidence, he would have done so earlier. In particular he would not have taken the phone with him to Middleton Police Station on 30 January 2020. Nor would he have taken it with him to the meetings with Ms Marshall and Ms Darley. I do not find the fact that he had kept other mobile phones to be inconsistent with this. It seems to me that there is a difference between keeping old phones which have been superseded but which are functioning and keeping a phone which is so broken that the screen is no longer working and is likely to be irreparable.

185. In summary, my finding is that the claimant did not act in such a way as to entitle the respondent to dismiss him without notice. For completeness I record that Mr Gibson accepted that the fact that the claimant had used the ladies; toilet was not without more an act of gross misconduct justifying dismissal without notice.

Discussion and Conclusions

(1) *Did the respondent have a genuine belief in the alleged misconduct of the claimant?*

186. I find that both Mrs Thorne and Mrs Dickens did have a genuine belief in the alleged misconduct of the claimant.

(2) *Was that belief based on reasonable grounds i.e. was the investigation that was carried out one that was within the range of reasonable responses in accordance with* ***Sainsbury Stores v Hitt*** *and given the profession of the claimant,* ***Roldan v Salford NHS Trust****?*

187. I deal first with Mrs Chamberlain's investigation. I do find that in terms of initial evidence gathering, her investigation fell within the range of reasonable responses.

She interviewed relevant witnesses, recorded their evidence in writing and gathered other relevant evidence such as the CCTV and the claimant's work schedule. The respondent also instructed Ms Eckersley to take photos of the male toilets to see whether that corroborated the claimant's explanation for using the female toilets.

188. I accept her investigation was hamstrung because she was not able to hold a second investigatory interview with the claimant. Instead, she recorded the questions she wanted to ask the claimant in her Investigation Report which gave the claimant the opportunity to provide replies in his statement of case for the disciplinary hearing.

189. It does seem to me that there were some omissions from the investigation Mrs Chamberlain carried out. There does not seem to have been any attempt to confirm the timeline of events on 30 January 2020 after the claimant left the Office building. That would have helped to clarify when Mr Wall and Ms Eckersley visited the male toilets and when Ms Eckersley took her photographs. There was also no attempt at that point to clarify how often the toilets were cleaned and when. That could have helped the respondent to resolve the apparent contradiction between Mr Wall's evidence about the state of the cubicles and the claimant's.

190. I do not find that in themselves those omissions would have been enough to take the investigation outside the range of what was reasonable. I do find, however, that Mrs Chamberlain's approach to evaluation of her findings took the investigation outside that range. As I stated at paragraphs 121-125 above, I find that Mrs Chamberlain's investigation report set out the "prosecution case" against the claimant. It did not include evidence which supported the claimant's case including, most significantly, the photographs taken by Ms Eckersley which corroborated the claimant's evidence about the state of the male toilets. It did not spell out the potential significance of Ms Cartwright's evidence which appeared to corroborate the claimant's explanation for using the ladies' toilet. It also included irrelevant matters such as the claimant removing his coat and putting on his hat on the second visit which Mrs Chamberlain adduced as evidence in support of the allegation. The claimant made the very valid point that given his ethnicity it would have been futile for him to try and disguise himself on the return visit by putting on a hat. In any event, there was no explanation of why the claimant would disguise himself on that second visit. There seemed to be an implication that the claimant had come back to the Office premises incognito for some purpose.

191. I accept that the investigation in this case was in some ways a difficult one. Ultimately, it came down to trying to establish whether, in the few seconds when the claimant's phone was underneath the divider between the two cubicles, he was using it to take photographs or film or was merely picking it up. Although it is understandable that in those circumstances attempts were made to look for corroborating evidence, it seems to me that in this case this led the investigation carried out by Mrs Chamberlain down some rabbit holes which were irrelevant and drew the focus away from the central issue which was the relative credibility of the claimant and complainant A. I agree also with Ms O'Dowd submissions at the disciplinary hearing and the appeal hearing (adopted by Mr Coleman for these proceedings) that the investigation report tended to minimise or ignore evidence that was supportive of the claimant's version of events when it came to the evaluation of findings.

192. I remind myself that in considering whether the investigation was a reasonable one the question is whether it was within the range of reasonable investigations. I accept that the process followed to some extent was a thorough one in that witnesses were interviewed and their statements captured in writing. However, it does seem to me that in this case there was a (perhaps unconscious) of lack of impartiality which meant that the investigation ended up looking for corroborating evidence rather than neutrally evaluating the evidence that was available. In some places the investigation report went further and made pejorative comments about the claimant for which the evidence was at best equivocal. That included suggesting that he had been seeking to "evade" the process while glossing over the fact he was signed off sick with stress for a significant length of time during the relevant period and suggesting he was lying about delays in the post during lockdown. I find that lack of impartiality in the investigation report means that Mrs Chamberlain's investigation was not within the range of reasonable investigations envisaged by **Hitt**.

193. I find that Mrs Thorne's decision-making at the disciplinary hearing did dispense with some of the speculative aspects of Mrs Chamberlain's evaluation. Mrs Thorne did not, for example, suggest that the claimant had somehow disguised himself on his return visit to the Office building. She did, however, make much of the route the claimant took to the ladies' toilets. Mrs Dickens in the appeal hearing was unclear why this fact had been given such prominence. I agree. It seems to me that the focus should have been on assessing the plausibility of the claimant's evidence about why he took that route rather than seeking to objectively identify the quickest route.

194. I also find that Mrs Thorne did not make clear findings about the implications of the photos of the male toilets taken by Ms Eckersley which appeared to corroborate the claimant's case. I accept that she did seek evidence from the building manager about the cleaning rota after the disciplinary hearing and checked whether complaints had been raised about the male toilets. However, her reasons for dismissing make no reference to the photos. Instead, without explaining why, she prefers Mr Wall's and Ms Eckersley's evidence that the toilets were clean. While I accept that the building manager's evidence appear to corroborate that it does not explain away the photos.

195. More fundamentally, it seems to me, Mrs Thorne did not seek at any point to question whether it was possible that complainant A had been mistaken in her interpretation of events. There was no consideration, as there was at the HCPC hearing, of how quickly the incident happened and whether there was any possibility that complainant A could be mistaken. It is clear from the reaction by complainant A to the claimant in the kitchen that she was not interested in hearing any explanation which might provide an alternative reason for the claimant's presence in the toilets. In her reasons for dismissal, Mrs Thorne cited the fact that that complainant A was clear and adamant in her evidence. There is no equivalent assessment of the claimant's evidence that he was picking up his phone from the floor. As the claimant submitted, there was no consideration, for example, of the extent to which the allegation made was out of character for the claimant. There was no recognition that he had been consistent and adamant throughout that he had dropped his phone when using the toilets because the male toilets were soiled.

196. I also find Mrs Thorne's conclusion that the only way complainant A would know the colour of the claimant's phone was if it was screen side up is problematic. Complainant A was not asked at the disciplinary hearing whether she knew the colour of the claimant's phone (the claimant's evidence to the appeal hearing was that it was common knowledge). There is also no reference to the claimant saying the phone was rose gold in her statement to the investigation. It is not clear where that evidence comes from. It does seem to me probable that it was derived from the police investigation. The claimant was not given an opportunity to respond to that evidence prior to the decision being made. In any event, all it did, even if correct, was to establish which way up the phone was not whether it was being used to film or take photos.

197. Taken together, I find that Mrs Thorne did not have reasonable grounds for her belief that the claimant was guilty of the alleged misconduct. Although to a lesser extent than Mrs Chamberlain's evaluation, I find that she tended to minimise or ignore the significance of the evidence which corroborated the claimant's case (his previous good character; the photos) and overstate those factors which seemed to her to undermine it (the "indirect route" to the toilets, Mr Wall's evidence).

198. I have considered whether the appeal hearing "cured" the defects I have identified in the investigation and in the basis for Mrs Thorne's decision to dismiss. I have decided it did not. Mrs Dickens did, as I have already noted, decide that the route used by the claimant to reach the toilets was not a significant material factor. She did set out grounds for preferring complainant A's evidence. As I understand it, they are the inconsistency in his evidence between his initial interview and his statement of case about why he visited the Office (i.e. whether it was solely to go to the toilet or to drop off equipment) and that although the toilets were "frequently" soiled he had only used the ladies' toilets 3-4 times. Although I accept it was legitimate to take those inconsistencies into account it does not seem to me that Mrs Dickens engaged with some of the central issues in the case any more than Mrs Thorne. She did not refer to the claimant's previous unblemished record and the extent to which the alleged behaviour was inconsistent with that. She said it was "difficult to determine the exact state of the toilets" when the photos seemed to provide clear evidence about their state which at least required addressing.

199. I do accept that some of the points made by Mrs Dickens in her reasons for refusing the appeal are valid ones. I also do not see the basis for Ms O'Dowd's assertion that most falling phones land screen side down. However, it seems to me that focussing on those points led to a lack of focus on the main issues in the case. The appeal rejected specific points made on appeal but did not carry out the sort of re-examination of the case which could cure the defects I have identified in the original investigatory and disciplinary process. It still, in essence, put the onus on the claimant to establish his innocence rather than consider whether there was the sort of cogent evidence required to establish the serious allegation being brought against a professional with a previously unblemished character.

(3) *Was the decision to dismiss the claimant for the reasons given within the band of reasonable responses open to a reasonable employer?*

200. I have said that in this case the investigation followed was not within the band of reasonable responses and that Mrs Thorne did not have reasonable grounds for

her belief in the claimant's guilt. I fully accept that had the respondent concluded after an investigation within the reasonable band process that complainant A's version of events was to be preferred that would have justified the respondent in dismissing the claimant for gross misconduct, i.e. for attempting to film a colleague in the ladies' toilets.

(4) *Did the respondent follow a fair procedure? If not thus rendering the dismissal unfair, what would the outcome have been had a fair procedure been followed (having regard to the **Polkey** principle)?*

201. I have found that the respondent did not carry out an investigation within the band of reasonableness. I have also explained why I believe Mrs Thorne's belief in the claimant's guilt was not based on reasonable grounds. There is an overlap between this issue and my findings under question (2). I have found that the investigation of this case was not impartial. In terms of the rest of the procedure, I acknowledge that the form the procedure took was a fair one. By that I mean that the claimant was allowed to be accompanied at the hearings, was allowed to state his case and give evidence. His representative was allowed to cross examine witnesses and to put his case forward. There is no suggestion that the claimant did not know the allegation against him. As I have already said, however, there were some notable omissions from the evidence at the disciplinary hearing, namely the photographs taken by Ms Eckersley. There was no real explanation as to why those had not been attached to the investigation report. There was also evidence not put to the claimant (e.g. that from the building manager and the evidence about complainant A knowing the colour of his phone). There was potentially relevant evidence not gathered after the disciplinary and appeal hearings, e.g. from colleagues who the claimant said had discussed the poor state of the male toilets. There was a suggestion at the appeal hearing that it would be for the claimant to call those witnesses but he had been told not to contact colleagues.

202. Ms O'Dowd made the point that Mrs Thorne's decision was unfair because it was based partly on evidence which she had gathered. I agree with that submission. I do not think it would have been unfair for Mrs Thorne to have spoken to the building manager to gather evidence if that evidence had then been put to the claimant and he had been given an opportunity to respond or to call evidence from others. In this case, the state of the toilets was central to the claimant's explanation for what happened. In those circumstances Mrs Thorne should have put to him the evidence gathered from the building manager. She did not do so before making her decision. I cannot escape the conclusion that throughout the onus had been put on the claimant to prove his innocence rather than the focus being on establishing on the balance of probabilities whether the events that occurred had happened. There was in particular, it seems to me, a failure to address the point made **in re H**, which is that the more serious the allegations the less likely they are to happen and so the more cogent the evidence required.

203. I do not think that in this case the failure to halt the respondent's internal processes pending the outcome of the police investigation or the HCPC investigation mean that the respondent failed to follow a fair procedure. I think that during the investigation Mrs Chamberlain had shown signs of wanting to proceed even in the face of evidence from the claimant's GP that he was suffering from stress. By the time of the decision to dismiss, however, I find that Mrs Thorne had contacted the

police and HCPC and established that they were content for the investigation to continue.

204. As I have said I considered whether the appeal remedied the flaws in the procedure. It seems to me that they did not. I note from the decision letter from Mrs Dickens that she put the onus again on the claimant to disprove the case being brought against him. That seems to me to be unfair in general terms but also to be contrary to the disciplinary and conduct guidance which states that an appeal should be a rehearing. Mrs Dickens' decision is a rebuttal of the points put forward by the claimant in the appeal rather than an evaluation of whether the allegation against the claimant was substantiated by the evidence.

205. Given the unfairness of the investigation and the lack of a fair procedure I have found that the dismissal in this case was unfair. I need to consider what the outcome would have been had a fair procedure been followed. i.e. the **Polkey** principle.

206. I consider that had a fair procedure been followed, equal consideration would have been given to the evidence supporting the claimant's version of events (in particular Ms Eckersley's photographs, his good character and Ms Cartwright's evidence), as to the evidence against him. It seems to me that a fair procedure would have disregarded the irrelevant matters included in the investigation report and Mrs Dickens' considerations, the "disguise" point, the "indirect route" point, and focussed instead on the relative credibility of the claimant and of complainant A. It does seem to me that it was legitimate for the respondent to take into account the apparent inconsistency between the claimant's evidence and his statement of case about why he attended the Office. The assessment of that inconsistency should, however, have taken into account the length of time between the incident and the hearing at which the case was produced, and also that the CCTV footage showed that the claimant had indeed on that day taken equipment to the Office.

207. A fair procedure would, it seems to me, also have involved establishing with the claimant's colleagues at the Office whether it was the case that the male toilets were often in an unacceptable state.

208. When matters are boiled down to their essence in this case, the fact remains that the claimant was in the ladies' toilets and that there was a mobile phone which, for a short period of time, was below the divider between the two cubicles, and that the claimant potentially left the scene without explaining to complainant A why he had been in the ladies' toilets.

209. Accepting that **in re H** makes clear the need for cogent evidence where the allegation is a serious one, the fact remains that in this case the respondent essentially had a choice between complainant A's evidence and the claimant's evidence. Complainant A was adamant throughout that the phone in question was angled up into the cubicle rather than just being picked up. The respondent should have taken into account the short period of time involved in assessing whether complainant A could be certain to the degree that she was that the camera had been filming her. I do think, however, that had a fair procedure been followed it was still open to the respondent to believe complainant A's version of events rather than the claimant's version of events. Even taking into account the photographs showing the male toilets being soiled, it seems to me that it would still be open to the respondent

to take the view that complainant A's version of events was the correct one. The corroborating evidence from the photographs means that this was not a 50/50 situation. It does seem to me, however, that there was a 25% chance that the respondent could have fairly decided to dismiss the claimant had a fair procedure been followed.

(5) *If the dismissal was unfair, did the claimant contribute to his own dismissal by culpable or blameworthy conduct?*

210. I take into account the fact that culpable and blameworthy conduct does not need to amount to conduct in breach of contract and can include conduct which is merely foolish. It does seem to me that the claimant's conduct in using the ladies' toilets without checking that was ok first was foolish and falls within the definition of being blameworthy. I find it did contribute to his dismissal because had he not been in the ladies' toilet the allegation which led to his dismissal could not have arisen. Having said that, I have found as a fact that he was not guilty of the conduct for which he was dismissed. I find this was a case where the claimant was slightly to blame and, applying the guidance in **Hollier**, decide that both the compensatory award and basic award should be reduced by 25%. I do not consider there are reasons for applying a different reduction to the 2 awards. I also do not think that reduction risks "double counting" with the Polkey reduction I have also decided is appropriate.

(6) *Should any award made be adjusted by reason of any parties' failure to follow the relevant ACAS Code?*

211. I accept Mr Gibson's submissions that the respondent did carry out a prompt investigation and that the form of the hearings complied with the Code.

212. Mr Coleman did not in his submissions highlight any specific aspects of the Code which had not been complied with. His submissions throughout were centred on the lack of impartiality in the process and the lack of fairness in the relative weight given to the matters supporting and undermining the claimant's case. Although I have found that there was substance to those submissions, the focus of the ACAS Code is on procedure. I do not find that the respondent unreasonably failed to comply with the Code such as to require an uplift in compensation.

(7) *Was the respondent entitled to dismiss the claimant without notice or payment in lieu of notice?*

213. Given my findings at paras 175-185 above the answer this question is no. The claimant did not act commit an act of gross misconduct entitling the respondent to dismiss him without notice.

Employment Judge McDonald
Date: 22 August 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON 23 AUGUST 2022

FOR THE TRIBUNAL OFFICE

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