Case Number: 3305801/2021

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr Steven Johnson **v** James Paget University Hospitals NHS Foundation Trust

Heard at: Norwich (Face to face) **On:** 20, 21 & 22 July 2022

Before: Employment Judge R Wood

Appearances
For the Claimant: In Person
For the Respondent: Miss E Skinner, Counsel

RESERVED JUDGMENT

1. The claimant was unfairly dismissed.

2. Were the tribunal to make an award of compensation, it would do so on the following basis: had the respondent acted fairly, a decision on whether or not to dismiss the claimant may well have been made at a later date. There is an 20% chance that a decision would have been made to dismiss the claimant;

3. It would be just and equitable to reduce the basic and compensatory award of compensation by 20% to reflect the claimant's contributory conduct.

CASE MANAGEMENT ORDER

1. The case will be listed for a hearing to determine remedy with an allocated time of 1 day. A separate notice of hearing will follow.

2. If either party considers the time allocation to be too long or too short, that party must notify the tribunal immediately in writing.

3. If either party considers that further case management orders are required for the purpose of the remedy hearing, that party must deliver its proposed case management orders to the tribunal no later than 4pm on 30 September 2022.

FULL REASONS

Claims and Issues

1. This is a claim which involves an allegation of unfair dismissal presented on 12 April 2021. The claim initially included additional allegations of disability discrimination and non-payment of money. These were resolved prior to the hearing, and I am not required to make a decision about them.

2. In relation to the unfair dismissal claim, it is alleged by the claimant that his dismissal for misconduct was an excessive sanction in the circumstances. The claimant also raises certain criticisms of the procedure adopted by the respondent. For its part, the respondent ("the trust") avers that the dismissal, and the procedure adopted by it in arriving at the decision to dismiss, all fell within a range of reasonable decisions open to an employer in the circumstances of this case.

3. At the start of the hearing we clarified the issues that I would have to determine:

> (i) Could the respondent prove that the sole or principal reason for the dismissal was one which related to the claimant's conduct?
>
> (ii) Did the respondent act reasonably or unreasonably in treating that reason as sufficient to dismiss the claimant?

4. The parties agreed that, at the same time as fairness, I should determine two questions in the event that I found the dismissal to be unfair. These were:

> (i) Should any award of compensation be reduced on the ground that, had the respondent acted fairly, the claimant would or might have been dismissed in any event?
>
> (ii) Assuming that the tribunal awarded compensation, would it be just and equitable to reduce the claimant's basic and/or compensatory awards to reflect the claimant's contributory conduct?

Procedure, Documents and Evidence Heard

5. The Hearing took place on 20, 21 and 22 July 2022. The claim was heard at a face to face hearing in Norwich. From the respondent, I heard evidence from Ms Rebecca Piggott (Staff Nurse), Mr Jonathan Harrowven (Deputy Divisional Director of Operations), and Ms Helen Cruess (Workforce Business Partner). I also heard from the claimant, Mr Steven Johnson. Each of the aforesaid witnesses adopted their witness statements and confirmed that the contents were true. I also had an agreed bundle of documents which comprises 846 pages (pages 792-846 were copies of downloaded information of job vacancies within the Trust during the relevant period, exhibited by Ms Cruess). During the course of his final submissions, the claimant handed out a written document which to some extent summarised the issues he wished to raise before me.

6. At the outset of the hearing, the claimant indicated that he wished to cross examine witnesses as the the manner in which they had asked questions during the investigation meeting. It was common ground that the audio recording of the disciplinary hearing was poor, and that consequently, the transcript was incomplete. The claimant had drawn up a list of extracts of the recording he wanted me to listen to, and I was sent an audio recording by email for this purpose. However, having listened to the file, it was quite impossible to me to discern anything of importance. I indicated to the claimant that he should put whatever questions he wanted to put, and that I would take a view as to the necessity of returning to the audio recording. As it transpired, the claimant did not ask many questions at all on this issue, and I was not required to consult the audio recording.

7. The claimant also indicated that he wanted to play extracts of war feature films (e.g. ‘Schindler’s List’) to witnesses as a means of impressing upon them that he would never make comments about such serious issues. His main point was that he had family who had been involved in the war, and that he would never make facetious comments about the war, or the holocaust. I ruled that he could not play the extracts, but that he could make the points in his own evidence and in submissions.

8. At the conclusion of the hearing, I reserved my decision.

Legal Framework

9. Section 98 of the Employment Rights Act 1996 (“the Act”) is the statutory basis for unfair dismissal and reads as follows,

> ‘‘General
>
> (1) In determining for the purpose of this part whether the dismissal of an employee is fair or unfair it is for the employer to show–

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

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

(a) relates to the capability of qualifications of the employee for performing work of the kind which he was employed to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

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

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

……"

10. In applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere. This proposition is just as true when it comes to examining the employer's investigation as it is for the assessment of the decision itself.

11. When examining the fairness of the investigation the tribunal must look at the whole procedure in the round, including the appeal: *Taylor v. OCS Group Ltd [2006] EWCA Civ 702*.

12. Where a dismissal is unfair, it is open to the tribunal to reduce the award of compensation if it finds that, had the employer acted fairly, the employee would, or might, have been fairly dismissed in any event. Consideration of

this issue inevitably involves a degree of speculation about what would or might have happened. The tribunal must attempt to speculate about these possibilities unless the evidence in support of them is so scant that It can effectively been ignored. Authority for these propositions is to be found in *Polkey v. A E Dayton Services Ltd [1987] UKHL 8* and *Software 2000 Ltd v. Andrews [2007] IRLR 568* .

13. Where a tribunal has already reduced compensation under the principle in *Polkey*, it must have regard to that reduction when deciding by how much, if at all, the award should be further reduced for contributory fault: *Rao v. Civil Aviation Authority [1994] ICR 495*.

Findings of Fact

14. The claimant worked as a plaster technician/orthopaedic practitioner for the trust since September 2009. His duties involved x-ray reading, casting fractures, providing advice to patients, and fitting supports and braces. About 25% of of the claimant's duties required him to attend the A & E department. The significance of this will become apparent.

15. In 2013, the claimant sustained a knee injury and underwent surgery at the trust. He maintains that this treatment was not carried out satisfactorily and that he was consequently referred to the Norfolk and Norwich University Hospital for follow up treatment. He made some criticism of the treatment he had received at the trust. It is part of the claimant's case that he was treated differently by colleagues afterwards. I can deal with this aspect of the case briefly, These are matters which occurred a very long time ago, some 7 years before the dismissal with which I am concerned. I find that there is insufficient evidence that anyone within the trust took a unfavourable view of the claimant as a result of these matters. I am satisfied that it had no impact on the investigation and disciplinary process which resulted in the termination of the claimant's employment in December 2020. There was no suggest that it was an issue which either Ms Piggott or Mr Harrowven had in their minds when they were considering their decisions.

16. I turn then to matters which might more credibly be said to have a bearing on the matters relevant to this case. In or about November 2018, the claimant had a relationship with a member of staff called Claire McNamara. I find that this was a relatively short relationship. On 13 March 2019, she made a complaint to the trust, against the claimant, of sexual harassment. She also reported the matter to the police. Whilst the complaint was investigated by the trust,, the claimant was placed on restrictions at work, which severely limited his access to the A & E department, where Miss McNamara primarily worked [232]. The claimant submits that he should have been suspend under the terms of the trust's own policy, and that he was treated differently to others as a consequence. I do not accept this. The trust was permitted to keep the claimant at work, if it was prudent to do for operational reasons. In any event, it is difficult to see how not suspended someone could be perceived as treating them less favourably, if that it what the claimant was suggesting.

17. The initial restrictions on the claimant were lifted in April/May 2019. The claimant agreed this in cross examination. Restrictions were reimposed in July 2019 as a result of concerns about the claimant going to A & E when it was not necessary [250]. He was instructed not to go to that department unless there was a patient issue and his assistance had been requested. It was stressed that restrictions were for his own protection. They are set out in full at [254].

18. On or about 7 August 2019, the police informed the trust that no further action would be taken against the claimant [258]. I find that the trust did conduct there own internal investigation into Miss McNamara's complaint. It is clear from what they told PC Six on 29 April that they did so [263] At some point, it is indicated to the claimant verbally that the trust would not be taking action against him. However, this was never expressed in written terms. There was no explanation provided for this.

19. On 23 August 2019 the claimant was asked to attend a meeting with trust managers. Miss McNamara had made a further compliant of harassment in relation to the claimant. There was also a suggestion that he had been seen in the A & E department without good cause [278]. The claimant signed off work due to sickness from 27 August 2019, citing vulnerability and stress as the reason. He issued a grievance which is at [272] of the bundle. I find that again there appears to have been no satisfactory resolution of the further complain made by Miss McNamara, or the claimant's grievance. There was insufficient evidence that either was resolved in a manner which was fair to the claimant, or which was compliant with the trust's relevant procedures.

20. The claimant was off work until 14 October 2019. When he returned, he was subject to another set out restrictions which are summarised at page 279 of the bundle, which again significant limited his ability to attend the A & E department. There is a risk assessment at page 280 of the bundle. At the bottom of that page, it refers to an "ongoing allegation". I find that this was a reference to the complaint(s) made by Miss McNamara, and that it is evident that the trust was treating the claimant as still under suspicion, even though there appeared to be no investigation in progress, either by the trust itself, or the police. I note that there were no restrictions placed on Miss McNamara.

21. I have spent a little time on these issues because I take the view that they do, to some extent, set the 'mood music' for what happens next. I accept that the claimant was fearful of the potential implications of carrying out his duties, particularly those that might taken him to the A &E department.

22. On 1 November 2019, he claimant was informed that he was the subject of a disciplinary investigation and suspension from duty. A number of allegations had been made by a Miss Jessica Dua. In general terms, there were three allegations:

(i) Not adhering to Trust values and behaviours by demonstrating discriminative attitudes and behaviours in his interactions with staff and colleagues;

(ii) Not adhering to Trust values and behaviours by demonstrating behaviours that do not uphold the expected values and behaviours in front of patients. These behaviours could be described as being discriminatory and could bring the Trust into disrepute; and

(iii) During his delivery of patient care, not demonstrating consideration of the expected professional standards pertinent to the needs of specific patent groups (such as a minor and a patient with dementia).

23. The allegations were investigated over a 5 month period. Several people were interviewed by the investigation officer, Miss Morris. Her report is at page 419-453 of the bundle. In most respects, I find that the investigation was detailed and thorough. There was very little criticism made of the investigation during the hearing. There are lengthy transcripts of those people interviewed in the bundle. The claimant submits that two of his supportive witnesses, namely Tammy George and Antony Slade, were deprived of the opportunity to change what they had said in their original statements to Miss Morris. It was difficult to get to the bottom of this allegation, which was vague. Doing the best that I could, it seemed to amount to this. Both of the witnesses had said something different in the disciplinary meeting, compared to their written statements. The claimant did not not understand that it was a element of any fact finding exercise that it was necessary to have regard to inconsistent statements and to decide (if necessary), which of the statements should be given most weight. The claimant had understood that the latter comment took precedence. If I may say, this was an understandable confusion as to the process on the part of a lay person. However, it clearly did not give rise to a ground of criticism of the trust.

24. After some delays, there was a disciplinary hearing held on 3rd September 2020. The claimant was invited to this meeting by letter dated 24 July 2020 [476]. I find that this letter clearly set out the nature of the allegations against the claimant and the witnesses to be called. He was also clearly notified that if he wished other witnesses to be called, that he should advise the trust of this. The letter also stresses that the allegations were capable of constituting gross misconduct and that summary dismissal was a potential outcome. The claimant attended, supported by Ms Millican, of his trade union.

25. Immediately prior to the hearing, Ms Piggott was provided with copies of the claimant's additional documents. These included two character references [page 471 and 472] and a statement from his ex-partner [479]. I find that these were properly considered by Ms Piggott. I am satisfied that the hearing itself was otherwise conducted in a fair manner. The stated witness were all called, save for Miss Thurtle and Jeanette Taylor, who for practical

reasons were able to come to the meeting. I find that this had no material impact on the fairness of the process. No issue was raised at the time by the claimant.

26. I am also satisfied that the claimant was not deprived the opportunity to call witnesses himself. He was represented. I find it likely that he was advised by Ms Millican as to the requirement for him to arrange for his witnesses to attend a disciplinary meeting. There had been no attempt to discuss other witnesses with Ms Piggott, even though the letter of 24 July had been quite specific about this. The claimant suggested that he had expressed a wish to call Anna Hills and Colin Parvel. I can find insufficient evidence that he was prevented from calling these or any other witnesses at the disciplinary by the trust, or on any other occasion for that matter. I note the email on page 553 of the bundle, from Ms Millican to Sarah Gooch (Interim Head of Workforce Operations) dated 22 October 2020, by which she confirms that she had (by that date at least) notified the claimant of his obligation to invite his own witnesses. Of course, this was in advance of the appeal hearing.

27. On the whole, the disciplinary hearing was a fair and thorough process, which gave the claimant ample opportunity to put his case and challenge the trust's, which had been set out in writing in some detail prior to the meeting.

28. In terms of the outcome, Ms Piggott made a variety of different findings. The three main general allegations were particularised by reference to 14 specific allegations, which all related to a period between 22 October and 29 October 2020, when Miss Dua worked in the plaster department with the claimant as a bank member of staff. She arrived at mixed findings in relation to the 12 incidents. I do not go into detail about them because they are superseded by the findings at the appeal. It suffices to say that in large part, the process adopted by Ms Piggott, and her findings in relation to the misconduct, fell within a range of reasonable decisions that an employer might make.

29. She found the three general allegations either proven or partly proved. In terms of sanction, she imposed a final written warning, which was to remain on his record for a period of three years, and that he should be redeployed to another post within the trust. She wrote to the claimant on 14 September 2020 communicating this outcome [510-515]. In it, he was told that he would be contacted by a member of HR, who would provide him with advice about applying for suitable posts. Indeed, I find that Ms Cruess sent him such a letter dated the same day [516].

30. The claimant was also told that he would remain on the register for a period of 11 weeks from the date of the letter, which would have taken him to 30 November 2020. This was in line with his contractual notice period. If he was unsuccessful in obtaining alternative employment, then it was made quite clear that his employment would be terminated.

31. Pausing there for a moment, there is something of an anomaly contained within Miss Piggott's decision. She told me in the clearest terms that the misconduct itself, as she had found it, was not serious enough to have justified dismissal. Yet she had deemed it appropriate to place the claimant into a position which, as matters transpired, resulted in his dismissal. When asked by me, she stated that she had appreciated that dismissal was a possibility but that she had anticipated that the claimant would be able to find alternative work within the trust. It might be said that there is an internal tension within the trust's decision here, even at this stage, which is not without its potential implications for fairness. I will return to this issue shortly.

32. Returning to the chronology of the case, the claimant appealed the outcome of the disciplinary hearing on 17 September 2020 [522]. There were no grounds as such. He was sent a letter inviting him to an appeal hearing on 29 October 2020 [525]. He was again notified of his right to call witnesses, and to notify Miss Gooch of his intention to do so. After lengthy written discussions, the claimant submitted written accounts from Miss George [562] Dr Garg [555], which I find were received and considered by Mr Harrowven and his colleague, Miss Nicholls, on the appeal panel.

33. In relation to the procedure adopted by the appeal panel, again there was limited criticism from the claimant at the hearing. I find that the panel permitted the claimant to challenge each aspect of the findings made against him in relation to the allegations. He was allowed to ask questions, and to make any submissions that he thought appropriate. He was again accompanied by Ms Millican, his union representative. I suspect that, consistent with the hearing before me, that the claimant found this a challenging process. However, this cannot be a criticism of the trust, who in my judgment had done all that they could reasonably have been expected to do to facilitate a fair hearing.

34. Again, having looked carefully at the written evidence, and the evidence contained in the transcripts of the disciplinary and appeal hearing, I find that the panel's conclusions as to the specific allegations were fair. The panel found against the claimant in relation to the following allegations: 1, 2, 3, 4, 9 and 13. It is appropriate to dwell for a moment on the precise nature of the panel's findings in respect of each fo these allegations.

Allegation 1

35. The allegation was that he had used, on several occasions, a combination of racist, misogynistic, homophobic and/or transphobic language which showed complete disrespect to other patients and professionals. However, in the outcome letter at page 576 of the bundle, it was accepted that the claimant had not used racist, misogynistic, homophobic and/or transphobic language, but found that there was evidence of that his values and behaviours were not aligned with the trust's. In his witness statement, Mr Harrowven noted that the claimant had used "inappropriate and unprofessional language" which was not specified.

Allegation 2

36. The panel found that he had, on a single occasion, made a comparison between the conditions in the hospital, and those within a concentration camp during the holocaust in WWII, when speaking to a patient. However, the panel found that his was not an anti-Semitic or racist comment, and was not intended to be. Understandably, the panel found that this was nonetheless a distressing, and clearly inappropriate and unacceptable.

Allegation 3

37. The panel concluded that the claimant had made repeated comments about management, and was critical of the A & E department and the quality of the plaster they applied to patients. He also moaned about other departments within the trust, his workload, the restriction on overtime, and lack of support. On one occasion, he had commented about the fact that patients "had no idea of the horrors that awaited them in clinic". Patients had been present during some of these observations by the claimant.

Allegation 4

38. It was concluded that the claimant had on a number of occasions, used derogatory nicknames for colleagues such as "Mr Blobby", "fatty", and "lady boy", although not to colleagues faces. There were other occasions when the claimant spoke in a derogatory fashion about other staff.

Allegation 9

39. On this occasion, when dealing with a patient who had punched a wall with his hand, he advised that they should adopt the method used by many women and girls, namely to pick something up and throw it, or jump up and down. This was viewed as being discriminatory.

Allegation 13

40. It was found that the claimant has joked inappropriately with a patient with dementia. There had been a small bag attached to his notes. He had joked that there was something "dodgy" about it, and joked that if the police asked him, he should say he knew nothing about it. The patent was deaf and had therefore been unable to hear the comments, and was therefore not upset by them. This, and the other allegations, were deemed not to be consistent with the trust's values behaviours in relation to either patients and/or other staff.

41. I find that the the panel's approach to the fact ending exercise relating the alleged misconduct was fair. In my judgment, the panel's analysis of the evidence was robust and open-minded. This is demonstrated by the significantly reduced findings that they made against the claimant, as compared to the original allegations, and the findings of the disciplinary panel.

42. To quote the appeal letter at page 577 of the bundle, the panel then went on to state that " *….In taking into account all of the above matters, the panel concluded that the action short of dismissal of redeployment would remain and the first written warning would be reduced to two years, with effect from the date of the disciplinary appeal meeting and you will be redeployed to another post within the trust."*. The letter went on the state that redeployment in this context meant being put onto the Trust's redeployment register.

43. Furthermore, it was stated that "*….As part of the redeployment process, due to the findings of the appeal panel, non-clinical, non-patient facing roles will be sought and any additional training required will be reviewed…..You will remain on the redeployment register for a minimum period of 8 weeks (from the date of this letter)(in line with your contractual notice period). Notice of dismissal for some other substantial reason will run in parallel wont being on the redeployment register. Should you be unsuccessful at securing a suitable alternative post prior to the end of the notice period, your employment will be terminated.*". This took him to Christmas day 2020. In other words, the appeal upheld the original outcome, save that it narrowed the scope of any redeployment, and reduced the period that the final written warning would remain on the claimant's record.

44. In relation to redeployment, I heard evidence from Ms Cruess, which was largely uncontroversial. She again sent correspondence to the claimant, an email on 20th November 2020, reminding him that he had not filled out his redeployment form, sent to him immediately after the outcome of the disciplinary hearing. It was stressed that it would be needed in order to allow him to apply for other roles. As Ms Cruess put it at the hearing, she knew little about the claimant's skills and experience outside of his current post, and needed to know more to be able to match him with existing vacancies. It was common ground that he never filled out the form. She also added that his exclusion from clinical roles was a significant issue in terms of the likelihood of redeployment. There were no on-clinical positions available. The claimant agreed that he had not applied for any jobs whilst in the redeployment register, and had not contacted HR, although he had looked at posts online. He said he had lost faith in hospital and knew the end was coming. He did not believe the trust would help him. I accept the evidence given by Ms Cruess and the claimant in relation to the attempts to redeploy.

45. Miss Cruess said she had applied paragraph 5.3.2 and 5.3.3 of the trust's 'Change Management, Redeployment, and Redundancy Policy'. She did not consider extending the deadline for redeployment beyond 25th December 2020. The claimant's employment was terminated with effect from 25th December 2020. He brought his claim to the Employment Tribunal on 12 April 2021.

Findings and Reason

41. I listened very carefully to the oral testimony from all of the witnesses. It was my impression that they were all trying to do their best. I acknowledge that

it was difficult situation for all of those who gave evidence during the hearing. Matters relating to employment and the dismissal of an employee are invariable emotive. We were also dealing with events dating back to 2020 (or earlier), which was many months ago. This clearly creates barriers to the good recollection. I had regard to all of these matters when assessing the quality of the evidence I heard.

46. I remind myself that where the reason for dismissal is the employee's misconduct, it is helpful to ask whether the employer had a genuine belief that the employee had committed misconduct, whether that belief was based on reasonable grounds, whether the employer carried out a reasonable investigation and whether the sanction of dismissal was within the range of reasonable responses: *British Home Stores Ltd v. Burchell [1978] IRLR 379* , *Iceland Frozen Foods Ltd v, Jones [1983] ICR 17* . The ultimate test is, however, that posed by section 98(4) itself.

47. I am satisfied that the reason for this dismissal was misconduct. At times, the trust has sought to 'edge it bets' on the issue. Both the disciplinary hearing letter, and the appeal letter, both state that the reason was 'some other substantial reason'. The reason the author's had in mind was the possible failure to redeploy. Miss Skinner argued that the reason was 'misconduct, or in the alternative, 'some other substantial reason'. In my view, lack of clarity on this issue is symptomatic of an underlying confusion on the part of the trust as to the nature of the process it had undertaken. It is my judgment that the reason was misconduct. It was the reason for investigation and disciplinary process. Moreover, it is the reason why the claimant became the subject of redeployment. In the context of this case, redeployment was treated as a 'sanction' by the trust, imposed as a result of the proven misconduct.

48. I am also satisfied that the trust had a genuine belief in the misconduct, and that such belief was based on a reasonable investigation. There was, on any view, a very thorough investigation, which was the subject of only limited criticism. To the extent that criticism was made, I have found that it was not well made, or that it did not have a material impact on the fairness of the overall process. A large number of people were spoken to; their evidence was methodically recorded in witness statements and/or interview transcripts. The documents generated by the investigation were voluminous, and the resulting report detailed. In my judgment, the allegations were inflated to some extent. However, what unfairness this might have caused was neutralised by the careful consideration that both panels gave to the evidence. It is clear to me that both the disciplinary panel, and the appeal panel, acted on this information in good faith. They gave the claimant ample opportunity to present his case, and to test the trust's evidence. The claimant was represented throughout by his union representative. For all of the reasons set out above, I find that this aspect of the case has been successfully established by the trust.

49. What this case is about is whether the sanction of dismissal was within a range of reasonable responses in the circumstances of the case. The

problem as I see it for the trust is that both Ms Piggott and Mr Harrowven both told me that the misconduct was not sufficiently serious to justify dismissal. Yet, the claimant was dismissed, as I have concluded, on the grounds of misconduct.

50. Analysis of the fairness of the decision requires reference to the trust's disciplinary procedure in order to put it into it's appropriate context. The policy is to be found at page 99 of the bundle. The relevant parts are those relating to a 'final written warning' (paragraph 7.3); 'action as alternative to dismissal' (paragraph 7.4); 'dismissal' (paragraph 7.5; and 'dismissal with notice (paragraph 7.6).

51. Looking at those paragraphs in turn, and the policy as a whole, it is clear that a final written warning is appropriate where the misconduct does not justify dismissal. Paragraph 7.4 reads:

> "*Should the panel believe that dismissal is an appropriate sanction, it may be possible to substitute action short of dismissal where there are significant mitigating circumstances, or the panel feels it appropriate after considering the employment history. This action could take the form of:*
>
> - *Redeployment*
> - *Demotion (without protection)*
> - *Withholding incremental progression*
> - *Retraining*
> - *Extension to warning periods (maximum of 6 months*
>
> *(This is not an exhaustive list and may include any other reasonable alternative short of dismissal)."*

52. There are a number of concerns that arise out of the trust's application of this aspect of the policy. Firstly, it imposed two different sanctions i.e. a final written warning from 7.3, and redeployment under 7.4.. Miss Skinner agreed that the policy does not expressly allow for this approach, although she went on to submit that it would be a surprising outcome if an action was imposed under paragraph 7.4, without some other form of sanction. It may well be surprising, but it is not something which is expressly permitted under the trust's own policy. It also overlooks the fact that in this context, the matters listed in para.7.4 are to be treated as sanctions.

53. Moreover, redeployment is specifically stated to be an alternative to dismissal, i.e. in circumstances where dismissal was an appropriate sanction. Looked at in the context of this case, and applying a construction to the policy adopting the plain meaning of the words used, I find that redeployment was an option only where the misconduct was sufficiently serious to justify dismissal. I asked both Ms Piggott and Mr Harrowven about this aspect of the policy, and their application of it. It was my judgment that neither had given proper consideration to the limitations on redeployment as a sanction. It was my impression that both had, understandably, taken advice from their respective HR panel members to the effect that

redeployment was available as an option regardless of their view as to the seriousness of the misconduct found. In my opinion, wherever this advice came from, it was wrong.

54. Consequently, I find that the trust's own policy did not permit the imposition of a final written warning and redeployment as a sanction, in the circumstances of this case. This clearly has an adverse effect on the fairness of the decision made.

55. It seems to me that there is another problem with the trust's approach. "Redeployment" is not defined by the policy. The policy does not mention the trusts redeployment register. In my judgment, applying the common meaning to the words, there is potentially a large gap in outcome between being 'redeployed', and being put onto the 'redeployment register'. The former leaves you with a post (albeit a different one), and the latter potentially unemployed if matters do not go well (as in this case). On the trust's application of its policy, one of the alternatives to dismissal is not in fact necessarily an alternative to dismissal, but rather a stay of execution. In my view, all these matters provide the trust with some problems in relation to the overall fairness of the dismissal in that the sanction was poorly defined by the policy, and was likely to result in dismissal in the claimant's case.

56. There could be no issue with the imposition of a final written warning in this case. It is an outcome which would clearly have fallen within a band of reasonable decisions. As stated, it is redeployment which gives cause for concern. The primary difficulty for the trust is that there appears to have been very little discussion of the possibility of redeployment. It is not mentioned in any of the pre-disciplinary hearing correspondence, or during the investigation or disciplinary hearing itself. By the time of the appeal, the claimant is on notice that redeployment is an option for the panel, but there is still very little consultation. It is difficult to identify any meaningly discussion about the possibility of further restricting the scope of redeployment. Both disciplinary and appeal hearings concentrate almost exclusively on the allegations, which is understandable in many ways.

57. Only at the very end of the appeal hearing transcript is there a reference to redeployment. It is raised by the claimant himself. In fairness, he states that he does not contest redeployment. However, it is clear that he is seeking redeployment to the Ambulance Service i.e. a patient facing role [572]. Mr Harrowven makes no response to these comments and simply adjourns the hearing. He makes no mention of any consideration of a narrowing of the scope of redeployment. This is important because, in effect, it represented an increase in the severity of the sanction. At the very least in my view, fairness required Mr Harrowven to mention that the panel was considering restricting redeployment to non-clinical roles, to explain why, and then give the claimant the chance to comment. This was not done.

58. Even when the decision is announced at the hearing, there is still no mention of the change to the decision on redeployment [574]. It is mentioned in the letter dated the following day [576]. I find that the claimant was given little,

if any notice, of this potential outcome, and no real opportunity to make representations about it.

59. I then turn to consider the justification for redeployment leading to dismissal. In the first instance, and by reference to the disciplinary letter, I find that Miss Piggott took into account the misconduct she had found; the restrictions that existed limiting the circumstances in which the claimant could visit to the A & E department; the personal mitigation that was put forward; and the fact that the claimant himself had expressed a wish not to go into the A & E department in the future.

60. Miss Piggott also stated that she had regard to advice from the plaster room senior nurse, Miss Burroughes who, according to the letter, had concluded that it was not possible for the claimant to return to his job without having significant impact on the provision of care to the patients, and if a major incident or staffing shortages, it would not be possible to observe such a restriction (see the letter of dismissal at page 510 of the bundle).

61. During her testimony at the hearing, Miss Piggott confirmed that she had based this aspect of her decision in part on advice from the senior nurse, Miss Burroughes. There is an exchange of emails, which concludes on page 509 of the bundle, and which post date the disciplinary hearing. The claimant was not included in, or consulted about these discussions, or the conclusions drawn. As these concern the viability of his role in the context of any restrictions, I view this as a significant and surprising omission by the trust.

62. Moreover, the email from Miss Burroughes dated 4 September 2020, does not state (as suggested in the dismissal letter) that it would not be possible for the claimant to return with restrictions. It simply states that there would be a risk of lone working in the future, and that this "*would have an impact on service development".* It doesn't specify what impact. Miss Piggott told me that she had had a face to face discussion with Miss Burroughes during which she expanded on her thoughts, but confirmed that this meeting was not minuted.

63. Furthermore, the decision to redeploy appears to have been made without challenging the premise that restrictions (or the same restrictions as those set out at page 514) were necessary or proportionate upon the claimant's return. They were a legacy of concerns arising out of the relationship between the the claimant and Miss McNamara, and the complaint(s) the latter had made. However, the last time there had been an active issue was in August 2019. At the time of the disciplinary hearing, this was over a year ago. So far as I can tell, no-one had returned to Miss McNamara to ascertain her views about the claimant's return, with or without restrictions. I find that there there had been no meaningful consultation with the claimant on this issue.

64. In fairness, the claimant accepted that he had expressed a reluctance to go back to the A & E department. It is not clear when he made this statement.

It would have been desirable if it had been properly documented and put into some kind of context by the trust. When I asked the claimant about this at the hearing, he explained that he would have been prepared to return to his old job, even if it involved going to the A & E department, so long as the issues were dealt with. By this, he was referring to Miss McNamara. The claimant went on to state that it was his view that he shouldn't have been subject of restrictions, and wanted to "get on with his duties". Had matters not been dealt with, he would have felt fearful. I accept this evidence.

65. I went on to ask the claimant what the trust might have done. He used an example from his military career. He stated that if two people on a ship disagreed, then they would be brought together into a cabin, they would be told enough is enough, to go about their duties, and to ignore each other. The claimant stated that he could have done this, "100%". Whilst I concede that the claimant has a slightly over-simplified view of how the matter might have been resolved with Miss McNamara, I am satisfied that the evidence demonstrates a lack of active consideration and/or intervention on the part of the trust on this issue. It was a problem which might have been capable of mitigation, if not complete resolution.

42. When asked why she had made a decision to redeploy, Ms Piggott stated that she had applied paragraph 7.4, but that there were also "additional factors" which included the restrictions on the claimant entering the A & E department at the time. She stated that she was not aware of the current status of the complaints by Miss McNamara which she made her decision. In my view, in opting for redeployment, the disciplinary and appeal panels both made unchallenged assumptions about the current situation, which I find was erroneous and unfair.

43. I find that its was the restrictions, and the claimant's history with Miss McNamara, which caused Ms Piggott to opt for redeployment. I reject her suggestion that she also had in mind that there were broken relationships between the claimant and his colleagues in the plaster room due to comments made during the investigation. She provided no further details as to which colleagues she was referring, or the nature of the issues. She made no mention of this during the hearing, in the letter, or in her witness statement. Ms Piggott told me that she had been keen to allow the claimant the chance to reflect and improve his values and behaviour within the context of a clinical role.

44. I then turn to the appeal decision. I note that Mr Harrowven, in common with Ms Piggott, had never chaired a disciplinary/appeal hearing before. The appeal letter at page 577, simply refers to the misconduct as a reason for redeployment. In his witness statement [para.27], Mr Harrowven comments that the panel would likely have dismissed the claimant if it had found the allegations fully upheld. As it was, the panel made lesser findings, and took into account the claimant's mitigation in deciding that dismissal as a sanction was not appropriate. He confirmed this to me at the hearing. The statement goes onto to explain [paragraph 28] that it was not appropriate for the the claimant to continue in his role, or in any patient facing

environment. I was struck by the lack of any reason for this aspect of the decision in his witness statement.

45. When asked about the decision at the hearing, Mr Harrowven suggested that the panel had thought that 3 years was too long for any employee to have a sanction remain on his record. He asserted that he had read paragraph 7.4 of the disciplinary policy, but it was my impression that he had not fully understood its proper construction. He understood redeployment to be managed as a separate policy. He went on to explain that both he and his colleagues had been concerned about the claimant's quality of patient care in the light of their findings. He identified a perceived risk to patents. Mr Harrowven confirmed that they had had regard to the original reasons for redeployment, and had concerns about the practicalities of the claimant working in his current role. I took this to be a reference to the 'McNamara' issue.

46. Mr Harrowven was asked if he had given any consideration to the alternatives to restrictions on the claimant entering the A & E department. He stated that some consideration had been given to a health care assistant 'supporting' the claimant if he had to attend. However, Mr Harrowven had said it was not his decision. The nurse manager had taken the view that the cost was prohibitive.There was no further detail of these discussions. I find that there was no consultation with the claimant on these issues. There appears to have been no mention of them at the appeal stage.

47. It is here that the obvious internal inconsistencies of the decision can be seen most clearly. The appeal panel decided that the misconduct did not justify dismissal because they had not fully upheld the allegations. Yet on Mr Harrowven's evidence, they then made findings that the claimant was not safe to return to a clinical role on the grounds of patient safeguarding. It is inconsistent and difficult to reconcile. If the panel had, at the time, taken the view that the matters found proved gave rise to such serious safeguarding issues, then why would the panel not have dismissed him. As it is, there was no express mention of safeguarding issues, or risk to patents, until the hearing. It might be suggested that such concerns can be implied into the matters set out in Mr Harrowven's witness statement. However, concerns about patient safety must be regarded as very important. If they were genuinely held by the panel, then why not expressly state such concerns as the reason at the appeal meeting and/or in the decision letter and/or Mr Harrowven's witness statement.

48. Accordingly, I find that the panel were not concerned about a risk to patients at the time of the decision. I find that what motivated the decision to redeploy was a concern about Miss McNamara, and the practicalities associated with the restrictions in place. In my view, these are matters which fell outside the scope of this disciplinary process. Once a decision had been made about the gravity of the misconduct, the appropriate sanction i.e. final written warning, that should have been the end of the matter. In my judgment, what both panels went on to do was to conflate two separate matters: a disciplinary process; and a capability issue i.e. whether the claimant could

do his job in the light of any necessary restrictions to his access to the A & E department. I find that this was likely instigated by the workforce business department, namely Miss Cruess and/or Miss Gooch. In my view, subsequent attempts to link the redeployment to either broken colleague relationships and/or a risk to patient safety, have been inconsistent, and an attempt to place a misleading gloss on the process quite some time after the event. I do not accept this evidence.

49. If the trust had wished to consider the ongoing issue of Miss McNamara, and the restrictions in place on the claimant's visits to the A & E department, then it should have done so pursuant to a separate process. To treat is as part of the disciplinary process was unfair for a number of reasons. Firstly, and as stated above, it was not part of the investigation, or the hearings, and the claimant was not properly consulted about it. Secondly, so far as I could ascertain, no findings has been made against the claimant re. Miss McNamara, either by the trust or the police. Therefore, to have regard to them as a type of aggravating feature of this process was grossly unfair.

50. Thirdly, the claimant had been assured that the restrictions had been put in place, at least in part, to protect him. What they had actually achieved was to render him vulnerable to deployment and dismissal in the eyes of the trust. It is very difficult to see how this could property be regarded as a range of reasonable responses by the trust.

51. Finally, there had been no proper consideration of whether the restrictions were still necessary. Neither Ms Piggott or Mr Harrowven were aware of anyone having consulted Miss McNamara as to her current views, or what safeguards she might require. Her last complaint about him was in August 2019. It is reasonable to assume that her views might have changed in the intervening period. Of course, I say again that no findings had been made against the claimant in respect of any complaints made by Miss McNamara.

52. Therefore, for all of the above reasons, I find that the process adopted by the trust in relation to this matter was unfair. In my view, the matters I have outlined are so serious, and so far ranging, that they cannot be regarded as simply procedural errors. They go to the very substance of the fairness of the decision making.

53. In addition, I would also add that even if the trust did genuinely have patient safety as its reason for redeployment, it is my view that it would not have been been within a band of reasonable responses to have dismissed on that ground. The appeal panel, as stated in Mr Harrowven's own witness statement, had made significantly reduced findings, such that the seriousness of the misconduct found was much less than the original allegations. What remained were a limited number of examples of clumsy, thoughtless and inappropriate comments. The appeal panel went to some lengths to stress that all of the allegations of racism, misogyny, homophobia, and transphobia, had been found unproven. In my judgment, the panel had been right to take this view. There were proper concerns about the credibility

of the complainant, and the original allegations seem to have been 'overcharged'.

54. It was suggested to me by Miss Skinner that dismissal on the grounds of the misconduct would have been within a band of reasonable responses. I am of course cautious about not being seen to substitute my own view for that of the employer in such matters. However, it is my view that dismissal was not within a band of reasonable responses. The misconduct is simply not serious enough. In coming to that conclusion, I find support in the evidence of both Ms Piggott and Mr Harowven, who clearly took the same view. This is notwithstanding the previous matters which appear on his record, albeit dealt with informally.

55. I therefore find that the claimant was unfairly dismissed.

56. Of course, that is not the end of the matter. I have been asked to consider whether it is appropriate for the tribunal to reduce the award of compensation on the basis it finds that, had the employer acted fairly, the employee would, or might, have been fairly dismissed in any event.

57. I find that there should be a reduction in compensation on this basis. In arriving at this finding, there is inevitably a lot of speculation involved as to possible future events. However, the factors to which I have regard are as follows.

58. Firstly, there is the possibility that the trust could have gone through a separate redeployment process, and come to the conclusion that it was impracticable for him to have returned to, or continued with his role as plaster technician. It is at least a possibility that after proper consultation with those concerned, that the need for restrictions remained, and/or that the claimant would remain fearful of returning to the A & E department to carry out his duties. I take account to the fact that the claimant had expressed some reluctance in this regard. There may have been solutions which allowed him to continue in role. I have very limited information about this, which is part of my criticism of the fairness of the decision in the first place.

59. I also take the view that if the claimant had, at some point in the future, been properly and fairly placed on the redeployment register, then he may well have had difficulties finding an alternative post. I take into account that he engaged poorly with the process in 2020. Also that he may well have had limited skills which would not make him suitable for a wide range of trust roles. He would clearly be unsuitable for administrative posts, which so far as I could tell, represented a large proportion of available posts at any one time.

60. The claimant is also a man who would have been vulnerable to further disciplinary action. I saw for my self that he does not always listen, or take criticism, very well. He has a tendency to miss the point. Put another way, for reasons touched upon below, he would have been a member of staff

who was vulnerable to further allegations of the same type in the future. Of course, with a final written warning on his record for 2 years, he would have been in a very precarious situation.

61. Taking all these matters in the round, I take the view that it would be appropriate to reduce the claimant's compensation by 20%.

66. Where a tribunal has already reduced compensation under the principle in *Polkey*, it must have regard to that reduction when deciding by how much, if at all, the award should be further reduced for contributory fault: *Rao v. Civil Aviation Authority [1994] ICR 495*.

62. I also have regard to the fact that the claimant has demonstrated a pattern of behaviour during his employment with the trust. In addition to the current allegations, I refer to the previous matters at page 442 of the bundle. They are not very serious, which is reflected in the fact that they were dealt with by way of a 'conversation of concern'. However, taken together, it demonstrates that the claimant does have issues with communicating with colleagues and patients. It seems to me that there is conduct which has contributed to his dismissal. I therefore reduced his compensation by a further 20%.

63. The claim is therefore allowed.

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Employment Judge R Wood

Date: 15 August 2022

Sent to the parties on:

13 September 2022

For the Tribunal Office