



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4101715/2022**

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**Hearing held in Glasgow by Cloud Video Platform (CVP)  
on 1,4,5 & 12 July 2022**

**Employment Judge: R Sorrell**

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**Mr S Mullen**

**Claimant  
In Person**

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**Greater Glasgow Health Board**

**Respondent  
Represented by:  
Mr C Reeve -  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Tribunal is that the claim for unfair dismissal is well founded and upheld.

The respondent is ordered to pay to the claimant:

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(i) The sum of **£4,031.10** (Four Thousand and Thirty One Pounds and Ten Pence).

This is made up of a Basic Award of **£2,312.50** (Two Thousand, Three Hundred and Twelve Pounds and Fifty Pence) and a Compensatory Award of **£1,718.60** (One Thousand, Seven Hundred and Eighteen Pounds and Sixty Pence).

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(ii) Notice Payment of **£4,925.16** (Four Thousand, Nine Hundred and Twenty Five Pounds and Sixteen Pence).

## REASONS

### Introduction

1. The claimant lodged a claim for unfair dismissal on 1 April 2022. He confirmed that he sought compensation only.
- 5 2. This hearing was scheduled to determine the claim. It was a virtual hearing held by way of the Cloud Video Platform.
3. As the claimant was a party litigant, I explained the purpose and procedure for the hearing and that I was required to adhere to the Overriding Objective under Rule 2 of the Employment Tribunals (Constitution and Rules of  
10 Procedure) Regulations 2013 of dealing with cases justly and fairly and to ensure that parties were on an equal footing.
4. A joint bundle of productions was lodged prior to the hearing. Further documents were lodged during the course of the hearing.
5. The claimant did not call any witnesses. The respondent called Mrs P Watt,  
15 Investigating Officer, Mr W Hunter, Dismissing Manager and Grievance Hearer, Mr T Steele, Appeal Chair and Mr T Quinn, Appeal Hearer.

### Preliminary Issues

6. At the outset of the hearing the claimant accepted that the correct designation of the respondent was Greater Glasgow Health Board.
- 20 7. The claimant confirmed that he was no longer insisting on his claim for unlawful deductions.

### Findings in Fact

The following facts have been admitted or found by the Tribunal to be proven:

8. The claimant's date of birth is 18 February 1979.
- 25 9. The respondent is the provider of NHS health care services for the Greater Glasgow area.

10. The claimant commenced employment with the respondent in 2002 as a Technician and was based at Glasgow Royal Infirmary. In 2008 he was promoted to Production Supervisor and transferred to the Central Decontamination Unit at Cowlares. (D180-1)
- 5 11. In May 2018 he was transferred to Glasgow Royal infirmary ('GRI') and appointed to the role of Supervisor in the Endoscopy Decontamination Unit. ('EDU') (D193-5) He was one of two supervisors at the Unit and his role involved overseeing the day to day running of the department and the supervision of 3-5 staff in 2 different rooms. His line manager was Ms T Ward, 10 GRI EDU Assistant Manager. He worked in this role at the GRI EDU until his dismissal.
12. The claimant was a full-time employee of the respondent and worked 37.5 hours per week. At the date of his dismissal, his salary was £26,000 gross per annum.
- 15 13. In 2017, the claimant raised a concern that his line manager, Ms Newton, Assistant Production Manager had failed to follow procedure in respect to the cleaning of instruments as stated in the work instruction. On 6 September 2017, Mr Stewart, Head of Decontamination, informed the claimant that following an investigation about the matter, he had concluded there was no 20 case to answer and recommendations were made for future practice within the service. (D182-3)
14. Ms Newton subsequently raised a complaint against the claimant that on 16 November 2017 he had failed to comply with a management request and that during a discussion with Ms Newton on the same date, the claimant had 25 raised his voice in an aggressive manner which she found intimidating. A disciplinary hearing was held on 22 October 2018 regarding these allegations.
15. On 25 October 2018, the Chair of the disciplinary hearing, Ms Maclean, Service Support Manager, informed the claimant that whilst she had concluded the case did not warrant disciplinary action, there was a need for 30 improvement in some areas in relation to attitude and behaviours he had displayed. She therefore recommended that a 'supported improvement action

plan' be put in place for the claimant which would cover the subjects of 'conflict and challenging behaviour' and 'dignity at work' and that this plan would be discussed in more detail with him by Mr McIvor, Decontamination Site Manager. (D199-203) On 26 March 2019, Ms Ladjaj, Customer Services Manager, wrote to the claimant to seek a suitable time to meet and discuss the 'supported improvement action plan,' in Mr McIvor's absence. (D210)

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16. On 11 March 2021, Mr Hutchison, Assistant Technician Officer, spoke to Ms Ward about an incident that happened between him and the claimant on that day. On the same date, Mr Hutchison provided a statement to Ms Ward. In summary, he stated that the claimant, who was his supervisor, was agitated about someone using a cup belonging to him. In trying to calm him down, the claimant had repeatedly sworn at him and made apparent threats later on. (D213)

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17. Later on that day, Ms Ward asked the claimant about the incident with Mr Hutchison. She did not tell the claimant that Mr Hutchison had made allegations that he had shouted and sworn at him and that he felt threatened.

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18. At the request of Mr Gracie, Head of Decontamination, on 17 March 2021 the claimant provided a statement to Ms Ward regarding the incident of 11 March 2021. At that stage he was still unaware of the allegations made by Mr Hutchison. In his statement he said that he was angry and disappointed to find that someone had used his cup and left an identifiable liquid in it which had covered him after he grabbed it. He had previously contracted Covid 19 and was concerned for his health and the safety of others. He asked everyone in his changing room, including Mr Hutchison, if they had used his cup and no one knew anything about it. Mr Hutchison then approached the claimant in the wash area in an aggressive manner, without using the correct 'PPE' or washing his hands, saying that the cup belonged to someone else who had retired. The exchange between them became heated as Mr Hutchison would not leave the area when asked to by the claimant several times. The claimant told him if he wanted to talk about it privately, that would not be a problem. Mr Hutchison then went back to his place of work. A few hours later, the claimant was told by another technician that Mr Hutchison was thinking about putting

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in a complaint about him. The claimant shouted to Mr Hutchison to speak to him and to see the line manager if he had any issues so they could sort it out, but Mr Hutchison ignored him. (D214-5)

- 5 19. On 22 March 2021 Ms Ward provided Mr Gracie with a statement of her account of her conversations with both Mr Hutchison and the claimant regarding the incident on 11 March 2021. (D216-8)
- 10 20. On 24 March 2021, Mr Hutchison provided a further statement to Ms Ward. In summary, he described the anxiety and fear that he felt at the claimant's behaviour towards him and the hanging threat of action at a later time that another staff member had also heard, which was impacting on his mental health. (D219)
- 15 21. On 29 March 2021, Mr McIvor Central Decontamination Unit/EDU Service Manager Glasgow, attended the claimant's place of work and told the claimant that Mr Hutchison had raised a grievance against him and that he had commissioned a formal investigation. He also advised the claimant not to contact his line manager, Ms Ward as she was a witness in the investigation. This was the first occasion the claimant had been informed of the allegations Mr Hutchison had made against him. It was also not explained that the early resolution process would not take place or the reasons for that.
- 20 22. In a letter to the claimant dated 25 March 2021, Mr McIvor confirmed that following receipt of a grievance raised by a member of staff in GRI EDU regarding an alleged incident which took place on 11 March 2021, he had commissioned a formal investigation to be conducted in accordance with NHS Scotland Workforce Policies. He advised that the purpose of the investigation was to explore further and establish the facts surrounding the following allegations: *"In that you acted in a rude and threatening behaviour towards an ATO. Continually shouting and swearing above the ATO and not allowing a calm productive conversation"* and that he had appointed Phyllis Watt, CDU/EDU Service Manager Clyde, as Investigating Officer who would write to the claimant with further details of the investigatory meeting. He also provided the claimant with contact details for the respondent's Occupational
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Health Service and advised he may find it beneficial to seek support from his Trade Union/Professional Organisation representative. (D220-1)

23. In 2017, Mrs Watt was the Investigation Officer for the investigation that took place in respect of the allegations made by Ms Newton against the claimant.

5 24. In a letter dated 29 March 2021, Mr McIvor wrote to the claimant to confirm that his temporary place of work would be Stobhill EDU, pending a formal investigation into the allegations made against him. He advised the claimant that his independent point of contact would be Stephen Boyd and provided his contact details. He also gave his own contact details if the claimant had  
10 any questions about the letter. (D222-223)

25. After the meeting with Mr McIvor on 29 March 2021, the claimant requested and was granted two week's annual leave. He was thereafter on sickness absence due to work related stress. He did not return to work until 4 October 2021, at which point he was temporarily relocated to the Dental hospital  
15 instead of Stobhill EDU.

26. In an undated letter, Mrs Watt wrote to the claimant to introduce herself and Mrs Wilson, HR Assistant who was supporting her with the investigation, to offer him the opportunity to attend an initial meeting into the following allegation: *"It is alleged on the 11<sup>th</sup> March in the GRI EDU washroom that Stephen Mullen shouted and threatened a technician."* She explained that the  
20 purpose of the meeting was to allow the claimant the opportunity to meet the investigation team, to understand how the investigation will progress and for him to provide any comment he may wish to make. She also made it clear that she would be unable to provide him with detailed information regarding  
25 the investigation which was yet to be progressed. Further, that he was under no obligation to attend and that if he decided not to, he would be invited to a formal investigation meeting once all the necessary information was gathered. (D224-225)

27. The claimant called Mrs Watt to speak to her about the letter but was unable  
30 to make contact with her and an initial meeting did not take place.

28. On 29 April 2021 Mrs Watt wrote to the claimant to ask him to attend an investigatory meeting on 21 May 2021 and advised him of his right to be represented by an accredited trade union representative or a workplace colleague. She also enclosed statements which would be discussed at the meeting and advised the claimant to provide his written statement by 17 May 2021 for consideration at the meeting. Mrs Wilson's contact details were also given if the claimant had any questions about the letter or the investigatory meeting. (D230-231)
29. The claimant attended the investigatory meeting on 21 May 2021. He was accompanied by his trade union representative, Rose Anderson. Mrs Watt led the meeting and Mrs Wilson was the note taker. The claimant was asked questions by Mrs Watt about the incident of 11 March 2021 and his alleged misconduct. A record of the meeting was subsequently sent to the claimant to confirm the accuracy of it. (D248-252)
30. Mrs Watt held separate investigatory Meetings with Ms Ward on 7 May 2021, Mr Hutchison on 21 May 2021, Mr Rankin, Endoscopy Decontamination Technician on 1 July 2021 and Ms Bond, Endoscopy Decontamination Technician on 1 July 2021. Mr Rankin and Ms Bond were also supervised by the claimant.
31. Each of these meetings followed the same procedure as the claimant's meeting. At their meetings, Mr Rankin and Ms Bond corroborated Mr Hutchison's account that the claimant had sworn at him. Mr Rankin also corroborated Mr Hutchison's account that the claimant had threatened him. (D232-35, D238-42, 243-47 & 255-58)
32. Following the claimant's investigatory meeting with Mrs Watt on 21 May 2021, he heard nothing further about the progress and timeline of the investigation process. He tried to contact Mr Mclvor to find out what was happening, but he was on sick leave. He was also unable to contact his point of contact, Mr Boyd. The claimant became increasingly anxious and stressed at the lack of communication. On 21 June 2021 he contacted Mrs Watt who advised that she had just returned from leave and that the investigation was ongoing as

there were still meetings to be held with witnesses which were scheduled in July.

33. On the same date, the claimant emailed Mr Boyd for an update on the investigation and to express his concerns regarding the delays in the process. (D261-2) In his response, Mr Boyd explained that there had been a number of cancellations of witnesses that were required to attend due to a number of different reasons which were unfortunately out-with the respondent's control and that the investigation would be concluded shortly after the outstanding meetings that were scheduled for the start of July. Mr Boyd further advised that he should continue to submit his sick notes to Ms Ward for pay purposes and proposed a weekly contact meeting with Ms Ward in order to maintain relationships and keep updated. (D263-4)
34. On 28 June 2021 the respondent occupational health service wrote to the claimant confirming that he had been referred to the service by Ms Ward and that a member of their team would contact him by 16 July 2021. (D265) On 16 July 2021 the claimant had a telephone consultation with an occupational health clinician. In her report the clinician was of the opinion that as the claimant's sickness was work related stress, the most relevant factor that would facilitate his return to work would be timely resolution of work related issues. (D271-3)
35. On 30 July 2021, Ms Ward wrote to the claimant to confirm the outcome of their discussions at his long term attendance telephone meeting on 20 July 2021. This included the claimant declining to take up the suggestions made in the occupational health report of counselling and a meeting with management, union and HR to resolve any ongoing issues. (D274-6)
36. The claimant did not feel comfortable meeting with Ms Ward due to her being a respondent witness in the conduct process.
37. Following all the investigatory meetings, the claimant and the other respondent staff who made statements were provided with a copy of their interview notes of their meeting and asked to confirm the accuracy of them. (D253)



38. The investigation report was completed on 29 July 2021 and submitted by Mrs Watt to Mr Mclvor on 11 August 2021. (D277-283) This set out the misconduct allegations made by Mr Hutchison against the claimant, a summary of the main points from each of the investigatory meetings, the claimant's mitigation and Mrs Watt's conclusions and recommendations. It also attached all the witness statements and notes from the investigatory meetings.

39. Mrs Watt set out her conclusions and recommendations as follows:

*"Based on the interviews conducted and the documentary evidence, the following conclusions were reached.*

*Both Ms Bond and Mr Rankin stated that Mr Mullen was angry and/or dismissive towards Mr Hutchison and that he did use foul language. Mr Rankin confirmed that he was the only one present when Mr Mullen made threats towards Mr Hutchison. Ms Ward was not present at the time of the incident but has stated that during her discussion with Mr Mullen later that day he stated that he had used foul language towards Mr Hutchison. Mr Mullen confirmed this stating the following: When asked if he had told Mr Hutchison that he was "talking shite" he responded that he may have said words to this effect however he could not remember exactly what was said.*

*It is important to note that all employees have a responsibility to contribute to a dignified working environment. Taking into consideration the evidence collated and reviewed as part of the investigatory process it is clear Mr Mullen's conduct falls below the standard expected of any employee but especially from one in a Supervisory/first line management role.*

*Finally, on the 21<sup>st</sup> June 2021 I received a phone call from Mr Stephen Mullen, EDU Supervisor. I had been asked to undertake the role of investigating manager into an alleged incident at GRI EDU, where an EDU Technician had submitted a complaint against Mr Mullen, regarding his behaviour towards him.*

*During this phone call Mr Mullen complained about how long the process was taking and how no one was keeping him in the loop about what was*

happening. I explained to him that at his meeting I had explained the process to him and during the investigation we had to speak to some witnesses and the meetings were arranged for the 1<sup>st</sup> July 2021. He became very irate and raised his voice at this point and stated the process was taking too long. I tried with little success to explain again to him the stages of the process, as I was doing this he just spoke over me with the same irate and louder than necessary tone. I also explained that unfortunately that during the timescale of the investigation both myself and Mrs Jan Wilson, HR Assistant had periods of planned annual leave during the month of June 2021. Unfortunately, this made Mr Mullen even more irate and he implied that annual leave of the Investigation Team should not be slowing down the Investigation. At this point I stated that I felt he should speak to the Commissioning Manager and if he had any issue with my handling of the process he should submit a complaint.

I do not feel it is appropriate that as an employee of the Board participating in the Boards policies and procedures I should be subject to this level of intimidation and abuse from an employee under investigation. My role as appointed investigating manager is simply to collate information regarding the allegations in an independent and objective manner and on occasion there may be unavoidable delays which are out with the control of the appointed investigation team.

On the basis of the above findings and conclusions, it is recommended that the case is referred to a formal hearing under the Conduct policy.” (D282-3)

40. On the same date Mrs Watt emailed Mr Mclvor to ask that he confirm if he wished to progress the case based on the recommendations. Mr Mclvor replied: “Based on the evidence I would request that this go to formal hearing, at General manager level as this behaviour could be construed as violent bullying.” (D284)

41. Mrs Wilson emailed Mr Mclvor later that day to ask that he confirm who would be hearing the case. (D284) Mr Mclvor had originally intended to sit on the conduct panel, but he was not available on the date first scheduled for the conduct hearing.

42. On 26 August 2021, Mr William Hunter wrote to the claimant to invite him to attend a conduct hearing on 16 September 2021. He advised that the conduct panel would comprise of himself as the Chair, Mrs McCabe, Human Resources Manager and Mr Mackenzie, Head of FM Operations. He explained that whilst the panel would consider all the information at the hearing, the decision reached would ultimately be his responsibility. He set out the procedure for the hearing in that Mrs Watt would present the findings from the investigation, the claimant would have an opportunity to ask questions about that and put forward any further details regarding his position. Further, that Mrs Watt intended to call all the staff she had met with and taken statements from at the investigatory meetings and that due to the ongoing Covid 19 pandemic, Mrs Watt and the witnesses would be participating via teleconference call. He then informed the claimant of his rights to provide a written case prior to the conduct hearing, to be represented by a trade union representative or work colleague and that he could call any witnesses to support his case. He also advised the claimant of the potential outcomes from the hearing and that occupational health service advice was available if he required support. (D286-7)
43. Mr Hunter enclosed a copy of the investigation report and all associated appendices with his letter. This was the first occasion the claimant had seen the investigation report and the witness statements taken at the investigatory meetings.
44. Due to witness unavailability, the conduct hearing required to be rescheduled to 14 October 2021. Although he was advised by his trade union representative, Mr Kirkpatrick about the change of date, the claimant did not receive Mr Hunter's letter dated 16 September 2021 confirming that and which also advised Mr McIvor would be on the conduct panel instead of Mr Mackenzie. (D295-6)
45. On 4 October 2021, Mr Kirkpatrick emailed the claimant's statement to Mrs McCabe in response to the investigation report. (D299-302) In summary, the claimant stated that he admitted he may have raised his voice and used harsh language when speaking to Mr Hutchison but could not remember the exact

words. However, he was certain that he did not threaten him. He knew he could have handled the situation better and that this was not his usual behaviour. The witness statements did not fully corroborate the alleged incident and the only mention of any threat came from Mr Rankin. He did not think Mr Hutchison could have heard anything being said in the wash room from where he was working in the clean room due to the distance and machinery noise. Ms Ward did not witness the incident and was unsure what her statement added to the investigation. He admitted that he was venting during his conversation with Ms Ward after the alleged incident on 11 March 2021 and thought he was doing so in a safe space. None of what he said was meant literally and he assumed this was understood by Ms Ward. She did not say that Mr Hutchison had raised an issue, or that she or anyone else had any concerns.

46. He further stated that he understood that his behaviour had fallen below the expected standard and apologised for his unprofessional behaviour. He would have apologised to Mr Hutchison if he had been allowed the opportunity and if he was willing. He asked the panel to take account of his length of service, mitigation and that he had no previous conduct issues or warnings. He was still unaware of any specific issue or concern raised when Ms Ward asked him to provide a statement for Mr Gracie. He was not afforded the opportunity for early resolution or mediation and felt this was unfair when compared to other grievances recently raised in similar circumstances within the department. Although he accepted the reasons given for the delay, he felt there had still been unnecessary delays in the investigation process and that he had been ostracised during it. He was sorry for any upset caused to Mrs Watt when speaking to her and explained that he was off sick due to stress and anxiously awaiting news of the progress of the investigation. He also felt that there were other ongoing work issues that were still to be resolved that affected his mood sometimes. He sought an amenable solution and to be able to return to work as soon as possible.

47. The conduct hearing took place on 14 October 2021 in accordance with Mr Hunter's letter of 16 September 2021. The claimant was accompanied by Mr Kirkpatrick. A hand written minute of the hearing was taken. (D304-323)

48. In an undated letter, Mr Hunter wrote to the claimant to inform him of the outcome of the Conduct Hearing as follows:

5 *"I am writing further to the conduct hearing which was held on Thursday the 14<sup>th</sup> of October 2021 at the Central Decontamination Unit, Cowllairs. I confirm that the hearing was held in accordance with the NHS Scotland Conduct Policy. The purpose of the hearing was to consider the following allegation: On the 11<sup>th</sup> March 2021 whilst in Glasgow Royal Infirmary Endoscopy Decontamination Unit, you shouted and threatened a technician.*

10 *I chaired the hearing, supported by Ian McIvor, Decontamination Site Manager and Sarah McCabe, H.R. Manager. Phyllis Watt, CDU/EDU Service Manager presented the findings from the investigation supported by Jan Wilson, H.R. Assistant. You were represented by James Kirkpatrick, Unison. Mrs Watt called the following witnesses to attend the hearing:- Paul Hutchison, Assistant Technical Officer, Sandra Bond, Endoscopy Decontamination Technician, Shaun Rankin, Endoscopy Decontamination Technician, Tracey Ward, EDU Assistant Manager.*

15 *Due to the current Covid 19 pandemic and to adhere to social distancing requirements, it was only myself and Sarah McCabe who were physically present when meeting with yourself and Mr Kirkpatrick. All other panel members actively participated via conference call facilities to limit the number of people present in the room.*

20 *Mrs Watt presented a summary of the management case which gave detail that on the 11 of March 2021 you had been questioning colleagues about who had used your cup. Mr Hutchison alleged that as he entered the wash room he heard you shouting. You then verbally berated Mr Hutchison and continued to shout and use foul language towards him. Mr Hutchison had stated that you had attempted to goad him into a physical fight and threatened action at a later date by stating that you knew where he parked his car and that you would get him outside.*

25 *Mr Hutchison attended the hearing supported by Sam Mullin, GMB. Mrs Watt asked Mr Hutchison to explain how the discussion between you had started.*

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Mr Hutchison confirmed that there had been an earlier incident about someone using your cup. Mr Hutchison stated that he had not used your cup and when he entered the wash room later that day he heard you shouting. Mr Hutchison stated that you continued as he entered the room and described it as a tirade. Mr Hutchison said that you were shouting and swearing at him and had told him to 'fuck off home.' Mr Hutchison believed that you were goading him into a fight and then had threatened him by saying you knew where he parked his car and you would get him outside. Mr Hutchison believed that this was a genuine threat and that he was fearful for his safety.

Mr Hutchison stated that this had a major impact on his life and that he has been moved to a different department to work. Mr Hutchison confirmed that you had been friends and colleagues prior to this incident but that your reaction that day has left him feeling fearful and anxious.

You responded by stating that you had lost your temper that day but you were not given an opportunity to rectify the situation. Mr Hutchison replied that your behaviour that day was unpredictable and frightening.

Ms Bond attended the hearing and confirmed that she heard you shouting at Mr Hutchison and telling him to 'fuck off.' Ms Bond stated that you were not happy that day but she said that she had no prior issues working with you. I asked Ms Bond if this was normal behaviour in the Department she replied that whilst everyone can have a joke she did feel that this was not said in a joking manner.

Mr Rankin attended the hearing and also confirmed that you were angry and were shouting and swearing at Mr Hutchison and told him to 'fuck off.' Mr Rankin also stated that he heard you threaten Mr Hutchison by stating that you knew where he parked his car. I asked Mr Rankin if Mr Hutchison reacted to this behaviour and he replied that he remained calm throughout despite you being aggressive towards him. I asked Mr Rankin if this was normal behaviour within the Unit and he replied that it was not. He said that you can on occasion be sharp with people but on that day the situation escalated.

*You asked Mr Rankin to confirm that you were regularly excluded from management team meetings. Mr Rankin replied that he could not answer this question but was aware that you did not get along with Ms Ward and Ms O'Neill.*

5 *Ms Ward attended the hearing and confirmed that she did not witness the exchange between yourself and Mr Hutchison but had spoken to you later that day. Ms Ward had been advised by Margaret O'Neill, EDU Supervisor that Mr Hutchison had been upset following an incident with yourself. Ms Ward then spoke with Mr Hutchison who advised her that he felt threatened and*  
10 *upset and left work to go home.*

*Ms Ward then spoke with you in her office and asked you to explain what had occurred earlier that day. Ms Ward said that you had explained that someone had used your cup and that you appeared quite angry. You admitted to Ms Ward that you had sworn at Mr Hutchison and had there not been a barrier*  
15 *between you in the wash room it would have led to an actual fight. Ms Ward said that she had informed you that your language was inappropriate during the conversation as you had said to Ms Ward that you want to 'rip his fucking beard off his fucking face.' I asked Ms Ward how your working relationship was with each other. Ms Ward said that whilst you had issues with each other*  
20 *previously your relationship had improved.*

*I asked Ms Ward how Mr Hutchison appeared during their conversation and she replied that he was in shock. Mrs McCabe asked if early resolution was explored but Ms Ward replied that Mr Hutchison said that he could not stay at work due to the threatening behaviour and that he was not willing to*  
25 *participate in mediation.*

*You asked Ms Ward why it had taken so long for you to raise the issue with him after speaking with Mr Hutchison at 12.20. Ms Ward said that Mr Hutchison stayed until 2.00pm to cover a lunch break and it was nearer 3.30pm before she got an opportunity to speak with you. You said that you*  
30 *were not asked for a formal statement and were not aware that an official complaint had been submitted until sometime later.*

5 You presented your case by stating that you were not denying that you had used bad language but that you did not directly threaten Mr Hutchison. You said that there had been a previous issue at Cowlairs which had been caused by your raising a concern about another manager and this had led to people not liking you for it. You said that you had been trained differently at Cowlairs and that you know better than the staff at the EDU and that you had been moved there at your own request. You said that you arrived at the EDU with a stigma and that you are not aggressive or a bully. You said that Mr Hutchison had caught you on a bad day and that you had let yourself down by losing your temper. You acknowledged that you have had previous issues with Ms Ward and Ms O'Neill but that you pride yourself on being able to build bridges. You felt that your colleagues all think you are a hard working and genuine guy and that you have received no complaints from service users.

10 I reminded you that this was a conduct issue and your capability was not being questioned. You said that you had previously contracted Covid 19 and had been upset that someone had used your cup. You approached everyone that day and knew that it was not Mr Hutchison that had used it. You said that you and Mr Hutchison had been friends and you were willing to apologise to him.

15 You said that your friend had committed suicide and your other friend had recently lost his wife which had upset you greatly. This may have been a contributing factor to your behaviour that day. I asked you if there was a pattern of behaviour since you appear to have issues with several colleagues. You said that you transferred from Cowlairs as nobody would deal with issues. You said that a manager had put out a dirty kit and that you had raised it. You felt that you have been ostracised as a result and resented as a perceived whistle blower. You said that the issues come from management and not yourself. You said that there had been 2 previous incidents from 4 years ago but that was all in your 22 years employment.

20 Mrs Watt summed up by saying that the witnesses confirmed that you were angry and had used foul language which you had admitted. Mr Rankin confirmed that he had heard you threaten Mr Hutchison and that this was perceived as a genuine threat which had left Mr Hutchison scared and fearful.



*You had disputed threatening Mr Hutchison. Mrs Watt said that all employees have a responsibility to contribute to a dignified working environment and that as a Supervisor, you should lead by example.*

5 *Mrs Watt also wished to raise that you had contacted her during the investigatory process in which you raised your voice and became irate. Mrs Watt felt that she should not have been subjected to this intimidation and abuse as an employee of the Board.*

*Mr Kirkpatrick said that you had nothing more to add at this juncture.*

10 *Following an adjournment, I informed you that I was unable to make a decision as I wished more time to consider the evidence presented. I also wanted to look at your file to ascertain the reasons you were relocated as per your statement made during the hearing. Everyone was happy that my outcome may be slightly out-with the 5 working days as detailed within the policy.*

15 *I note from your file that there had been two allegations made against you on the 16<sup>th</sup> of November 2017 about your inappropriate behaviour towards a manager and that you raised your voice in an aggressive manner which was perceived to be intimidating. You subsequently went off sick with work related stress on the 24<sup>th</sup> November 2017. During a long term sickness absence you did request not to return to Cowlairs and you returned to Glasgow Royal*  
20 *Infirmery on the 14<sup>th</sup> May 2018. A disciplinary hearing was arranged for the 22<sup>nd</sup> of October 2018. Whilst no formal action was taken due to lack of evidence a supported improvement plan was put in place. It recommended that you undertake training in 'conflict and challenging behaviours' and 'dignity*  
25 *at work' which was conducted by Christine Ladjadj, Production Manager.*

*There were also complaints in July and August 2019 from other colleagues about your inappropriate and aggressive behaviour towards them and you were spoken to by Ms Ward and reminded about the importance of working and communicating in a professional manner.*

30 *Having taking into consideration all of the information that was presented to me, please find below my findings relating to the allegation:*

Mr Hutchison raised an issue regarding the behaviour depicted towards him from you when he entered the wash room on the 11<sup>th</sup> of March 2021. The situation escalated from concerns you raised with colleagues about someone using your cup. You confirmed that you did not believe that it was Mr Hutchison who had used the cup, however, you shouted and swore at him by your own admission.

Mr Hutchison stated that you had then threatened him by saying you knew where he parked his car and that you would see him after work. This was also corroborated by Mr Rankin who had heard you make this threat. Mr Hutchison and Mr Rankin both believed that this was a genuine threat and Mr Hutchison was clear on how fearful and anxious this had made him feel. Mr Hutchison also felt that he would not be able to work with you again following this incident.

Whilst you denied that you threatened Mr Hutchison there was no reason to disbelieve either of these witnesses. Mr Hutchison also confirmed that you had been friends prior to this with no previous history of a poor working relationship. Mr Hutchison felt that your behaviour that day was made more frightening as he had not experienced this from you before.

It was apparent during the hearing that you appear to have issues with several colleagues and have a pattern of inappropriate behaviour. I took the opportunity to review your file as detailed above. You were issued with a supportive improvement plan to address your behaviour, however despite the additional training, you have displayed this type of inappropriate and intimidating behaviour once again.

Whilst you stated that you were not offered the opportunity to apologise to Mr Hutchison, I was not convinced that you were aware of the impact that your behaviour had on that day towards a fellow colleague. As a Supervisor, I would expect your behaviour to be beyond reproach.

In mitigation, you explained that you had recently suffered bereavement of close friends. Whilst I am sympathetic to the difficult and sometimes trying

*personal circumstances that most of our employees will have, this in itself does not lower my expectations of their personal behaviour.*

5 *NHS Greater Glasgow and Clyde operate a Zero Tolerance approach to verbal and physical aggression towards our staff and we are often held to account for failing to uphold these standards. In this instance, I am absolutely clear that this type of behaviour was unwelcome, unwarranted and could not be mitigated for. Quite simply, I do believe that your colleagues should not have been subjected to your behaviour and I do not intend to tolerate such behaviour in the workplace.*

10 *Accordingly, I believe that your actions on this day constitute gross misconduct and as such I informed you that it was my decision to dismiss you from your post as a Supervisor within the Endoscopy Decontamination Unit. This will be effective from the date in which you receive this letter which should be Thursday the 28<sup>th</sup> of October 2021.*

15 *As your employment has been terminated by reason of your gross misconduct, you have been summarily dismissed without notice. You will be paid for any outstanding annual leave entitlement which you have not used within the current leave year. The Payroll Department has been notified and will arrange for payment of any outstanding monies due to you and will issue your P45.*

20

*You should arrange to return any NHS Greater Glasgow and Clyde property including your ID badge, uniform and any keys to Ian McIvor, Site Manager, Central Decontamination Unit no later than the 5<sup>th</sup> November 2021.*

25 *You have the right to appeal against this decision, which will be your only right of appeal. If you wish to do so, you must write within 10 working days of receipt of this letter. Your letter must state the grounds for appeal and sent to Mrs Ann MacPherson, Director of Human Resources, JB Russell House, Gartnavel Royal Hospital, Great Western Road, Glasgow. Receipt is presumed to be three working days after mailing.” (D324-28)*

49. On 28 October 2021, Mr Mclvor attended the claimant's place of work and handed the dismissal letter to the claimant. He then escorted him out of the premises.
50. On 29 October 2021 the claimant had an email exchange with Mr Mclvor regarding the removal of his personal belongings from his locker without his permission. Mr Mclvor advised the claimant that he was informed the day before that his locker was open and that he was instructed to have security empty his locker to ensure safe keeping of his belongings. He further requested that the claimant provide his home address to allow the items to be delivered. (D343-44)
51. On 1 November 2021 Mr Kirkpatrick emailed Mrs MacPherson to inform her that the claimant wished to appeal against the decision to dismiss him and that further details would follow. (D341)
52. On 8 November 2021 the claimant wrote to Mrs MacPherson setting out his detailed grounds of appeal. (D345-69) In his letter, the claimant stated that he was raising the appeal because the stages of the disciplinary procedure were not duly followed or were unfair and the outcome was too severe.
53. In particular, he stated the respondent was in breach of its own conduct policy because the early resolution process was completely bypassed with no explanation, the matter went straight to a formal process following the investigation report, he was not made aware of any complaint by Mr Hutchison until 29 March 2021 and there was no note of a formal grievance being lodged. There was also no timetable provided to him for the investigation process and there was unreasonable delay in that it took 5 months to complete the process from the date of the alleged incident. Although he was not suspended, he felt that the terms of the respondent suspension policy were applied to him. The written statements attached to the invitation to the disciplinary hearing did not provide evidence of a threat made by him to Mr Hutchison. He did not consider Ms Ward to be an impartial witness as she was not present during the incident itself and Mr Mclvor is her manager. He felt that it was unfair of Mrs Watt to comment in the report that he raised his voice and became irate with her during a telephone conversation as the whole process including the lack of

management support and information caused him extreme distress. He had no meeting with a manager to confirm the conclusions of the report in accordance with the investigation policy.

54. Further, in respect of the disciplinary hearing, he stated that the respondent  
5 was in breach of paragraph 1.5.7.1 of the conduct policy concerning impartiality of the panel as Mr Mclvor was in attendance and not Mr MacKenzie as previously advised. Mr Mclvor had been involved in the Cowlairs incident in 2017 and he had prior involvement in the investigation. The hearing venue was also not private or confidential and he was not  
10 permitted to provide a copy of his written statement of 16 September 2021 to the panel, even though Mr Hunter already had a copy of it, and the mitigating circumstances referred to in it were not acknowledged in the outcome letter.

55. In terms of the decision to dismiss him, he stated that he had no disciplinary  
15 sanctions on his employment record throughout his employment with the respondent and no alternative to dismissal was considered despite his mitigating circumstances. Nor were the general principles of equity and consistency applied in regard to sanctions imposed in similar cases on the other supervisor within the department and on persons involved in his investigation. He therefore did not consider that his actions constituted an act  
20 of gross misconduct or that it was a pattern of behaviour.

56. On 1 December 2021 Mr Cairns, the claimant's union representative emailed  
25 3 separate grievances on behalf of the claimant to Mr Wallace, Head of Human Resources. These concerned an alleged breach of confidentiality in respect to the claimant's dismissal, the handling of his personal belongings from his locker without his knowledge or a representative being in attendance and that he had not received payment for his protected weekends for some time. (D373-380) These were acknowledged by Mr Wallace on the same date. (D381)

57. Mr Hunter was appointed by Mr Wallace to consider these grievances and on  
30 22 December 2021, he wrote to the claimant to inform him of the outcomes. In summary, he advised that he wished to review the claimant's pay arrangements in more detail before making a decision in relation to that

complaint. In respect of the alleged breach of confidentiality, he was content that the disciplinary panel would not divulge confidential information in relation to his hearing and that a respectful message, maintaining confidentiality was communicated across the Department. However, he considered it would be inappropriate to respond in detail about that complaint as this formed part of the claimant's appeal. In terms of the removal of his personal belongings from his locker, he did not uphold this complaint because on the basis of the information obtained, he was content that the action taken was appropriate and reasonable in the circumstances. (D386)

58. On 5 January 2022, Ms McGuigan emailed the claimant to inform him that the dismissal appeal hearing was arranged for 11 January 2022 and was being held via ms teams. She advised that Mr Steele, Director of Facilities & Estates would chair the hearing, supported by Mr Ritchie, Non-Executive Director and Mr Quinn, Head of Human Resources, East Dunbartonshire HSCP and that a scribe would also be in attendance. She explained that the management case would be presented by Mr Hunter, supported by Mrs McCabe and that Mr Hutchison, Ms Ward, Mr Rankin and Ms Bond would be called as witnesses. (D389) She also attached a copy of the management statement of case for the dismissal appeal hearing. (D390-97)

59. The dismissal appeal hearing took place on 11 January 2022. The claimant was accompanied by Mr Cairns. A minute of the hearing was taken. (D398-404)

60. On 17 January 2022 Mr Steele wrote to the claimant to inform him of the outcome of his appeal hearing as follows:

*"Thank you for attending the appeal hearing on Tuesday 11<sup>th</sup> January 2022 which was held via Microsoft Teams in agreement with all parties. I confirm the hearing was held in accordance with NHS Scotland Conduct Policy. The purpose of the hearing was to consider your appeal against the decision taken to terminate your employment, as a result of your gross misconduct, effective from 28<sup>th</sup> October 2021 following a disciplinary hearing held on 14<sup>th</sup> October 2021.*

I chaired the hearing accompanied by Ian Ritchie, Non-Executive Director and Tom Quinn, Head of HR, East Dunbartonshire HSCP. William Hunter, Assistant Director, Facilities Management presented the management case supported by Sarah McCabe, HR Manager and you were accompanied by  
5 Josh Cairns, Unison representative. Diane Wilding was also present in the capacity of note taker. No witnesses were cited by you to support your appeal and Mr Hunter cited the witnesses noted below to support the management case:

Paul Hutchison–Decontamination Technician, Shaun Rankin–  
10 Decontamination Technician, Tracy Ward – Decontamination Assistant Manager, Sandra Bond - Decontamination Technician.

The procedure for the appeal hearing was explained to all parties and all parties confirmed their clear understanding of this. In your letter of appeal, you note you believe the stages of the disciplinary procedure were not duly  
15 followed or were fair and the outcome of dismissal is too severe. It was established that a satisfactory outcome for yourself would be reinstatement to your role with a first and final written warning and associated support in place.

Mr Cairns presented the key points from your appeal case and noted that on 11<sup>th</sup> March 2021, on your way to work, you received distressing news about  
20 the suicide of one of your oldest childhood friends and he conveyed the impact this had on you. On arrival at work you noticed that your cup was covered in an unknown liquid and Mr Cairns stated that part of your reason for such upset was as a result of the pandemic and concerns regarding your wife's health and recent hospitalisation during this time. You asked colleagues who had  
25 used your cup, no one admitted, and you were disappointed with the lack of honesty and respect for personal property. Further dialogue regarding the cup and its ownership took place with your colleague, Paul Hutchison, who you said sought you out and was not wearing the correct PPE, and you fully accept you swore and raised your voice during the altercation. You dispute making  
30 reference to knowing where Mr Hutchison parked his car.

Mr Cairns highlighted the delay in Tracy Ward, Assistant Manager discussing the incident with you until later that afternoon and you had continued to work

without issue up until this point. Mr Cairns referred to inconsistencies and lack of corroboration in witness testimony and noted there had also been no attempt at early resolution and neither were you provided with any opportunity to apologise to your colleague, even in writing. Mr Cairns added that Mr Hutchison had actually referred to you as appearing to have a mental breakdown but you were sorry for your actions on 11<sup>th</sup> March 2021 but this was a result of personal stressors and challenges you experienced on the day. In addition, Mr Cairns noted that you believe there is prejudice against you within the Decontamination Service because you had raised concerns when you worked at another location and had been branded a troublemaker which you dispute.

Mr Hunter presented the key points from the management statement of case and stated that Paul Hutchison had raised concerns regarding behaviour you directed towards him on 11<sup>th</sup> March 2021. The incident related to the use of a cup and you acknowledged you shouted and swore at Mr Hutchison. Furthermore, Mr Hutchison stated you had then threatened him by saying you knew where he parked his car. This was corroborated by Shaun Rankin who had also heard you make this threat. Both Mr Hutchison and Mr Rankin considered that this was a genuine threat and Mr Hutchison was clear on how fearful and anxious you had made him feel. Whilst you denied you had threatened Mr Hutchison, Mr Hunter confirmed there was no reason for him to disbelieve either of the witnesses.

Mr Hutchison confirmed you had been friends prior to the incident and had a good working relationship and he advised your behaviour towards him was frightening as he had not experienced this before. Mr Hunter added that it was apparent during the hearing that you appeared to have issues with several colleagues and had demonstrated a pattern of inappropriate behaviour therefore he took the opportunity to review your personnel file which confirmed this. In relation to you not being offered the opportunity to apologise to Mr Hutchison, Mr Hunter confirmed he was not convinced you were aware of the impact your behaviour had on a fellow colleague and highlighted that as a supervisor he would expect your conduct to be beyond reproach.



Mr Hunter confirmed he gave full consideration to your mitigation and added that he was sympathetic to the difficult and sometimes trying personal circumstances that employees face, however this did not lower his expectations for their behaviour, especially for those employed in supervisory roles. In addition he added that he also had to remind you that your behaviour at the disciplinary hearing on 14<sup>th</sup> October was unprofessional and you were asked to respect colleagues who were actively participating.

Mr Hunter confirmed that consideration was given to all the evidence presented at the conduct hearing and concluded your actions constituted gross misconduct. Therefore, in line with NHS Scotland Conduct Policy, Mr Hunter concluded that dismissal was the appropriate sanction. All witnesses cited by Mr Hunter to the appeal hearing in support of the management case reinforced the position that your conduct on 11<sup>th</sup> March 2021 was unacceptable.

As a closing statement you stated that you enjoyed your job since commencing in 2002, previously working as a storeman, and you were a loyal, dedicated employee who took pride in your work and there had been no complaints about your conduct previously. You had also been praised by management and no issues had arisen about your capability or competency. You advised you had managed large teams and had built positive relationships with everyone you worked with. You reiterated again that there had been no opportunity for early resolution, mediation or for you to offer an apology to Mr Hutchison and you sincerely regretted your actions and meant no ill will. Furthermore, you made reference to similar cases for other employees that had not resulted in dismissal and this was one momentary lapse on your part.

In considering your appeal the panel took into account the management case, a copy of which was provided to you in advance of the hearing, together with your supporting statement of case and the verbal evidence presented by both parties. I now confirm that having carefully considered the management case and your response the decision of the appeal panel is not to uphold your appeal. This decision was formed on the following basis considering the

grounds of your appeal the panel explored all the information submitted in relation to breach of policy and acknowledge there were a number of delays but these were clearly out with management control. In addition, it was noted you were not afforded the opportunity of early resolution, however Mr Hunter confirmed he did not commission the investigation so was not party to the discussion in relation to progression.

I confirm the appeal panel concluded it was not unreasonable to progress straight to a formal process taking into consideration the circumstances related to the incident. You made reference to similar cases that did not result in dismissal; however I conclude each case is considered on an individual basis to ensure the appropriate decision is reached. The appeal panel also considered witness testimony to be credible and reliable.

You advised that the decision to terminate your employment as a result of your gross misconduct was too severe. The appeal panel were satisfied that your actions constituted gross misconduct and were content that Mr Hunter had fully considered your mitigating circumstances and all alternatives before taking the decision to terminate your employment. The appeal panel support the position that any alternative to dismissal would not be appropriate due to the irreparable breakdown of trust and confidence in the employment relationship. Furthermore, your gross misconduct represents a significant breach of the standards of conduct expected as an employee of NHS Greater Glasgow & Clyde.

You should be aware that the internal procedure has now been exhausted and you have no further right of appeal against this decision.” (D405-407)

61. On 14 March 2022, Mr Hunter wrote to the claimant to inform him that having reviewed his pay records, the correct protection had not been applied and confirmed that he was due arrears of pay to the sum of £1,790.35 before deductions which would be processed via bank transfer as soon as possible. (D408)

62. Since his dismissal, the claimant has mitigated his losses and has not been in receipt of any state benefits. On 28 March 2022, the claimant commenced

full-time employment with Clarkes Fire Protection as a Material Handler. He works 40 hours per week and is paid a weekly net wage of £418.00.

### Submissions

5 63. I have read and digested the oral and written submissions made by parties' and taken account of them in my findings.

### Relevant Law

#### *Unfair Dismissal*

10 64. The law relating to unfair dismissal is contained in section 98 of the Employment Rights Act 1996 (the 'ERA'). It is initially for the employer to establish that the claimant was dismissed for a potentially fair reason, one of which is for 'conduct' as set out in section 98(2)(b) of the ERA. Thereafter, in considering the reasonableness of the dismissal, the burden is neutral.

15 65. The leading case relating to conduct as a reason for dismissal is **British Home Stores v Burchell [1980] ICR 233**. This states that in order for an employer to rely on misconduct as the reason for dismissal, the employer must believe that the claimant was guilty of the misconduct alleged. The tribunal must then ask itself whether there were reasonable grounds for this belief and at the time it formed that belief, that the employer carried out as much investigation into the matter as was reasonable in the circumstances.  
20 This means that the employer need not have conclusive direct proof of the employee's misconduct. As per Arnold J: "*It is the employer who manages to discharge the onus of demonstrating those three matters...It is not relevant.. that the tribunal would themselves have shared that view in those circumstances. The test and the test all the way through, is reasonableness and ... a conclusion on the balance of probabilities will in any surmisable*  
25 *circumstance be a reasonable conclusion.*"

#### *Fairness of the Dismissal*

30 66. If the employer succeeds in proving there was a potentially fair reason for the dismissal, then whether the dismissal is to be considered fair or unfair depends on whether, in the circumstances (including the size and the

administrative resources of the employers undertaking), the employer acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the employee. This question has to be determined in accordance with equity and the substantial merits of the case (section 98 (4) of the ERA), and includes an assessment of whether the procedure adopted by the employer was fair. It is now well established that a dismissal may be found to be unreasonable under section 98(4) of the ERA on account of an unfair procedure alone. This was the result of the decision in **Polkey v AE Dayton Services Limited [1988] ICR 143, HL**.

67. What has to be assessed is not whether the dismissal is 'fair' to the employee in the way that is usually understood, but whether with the knowledge that the employer had at the time, the employer acted reasonably in treating the misconduct that he believed had taken place as a reason for dismissal. In **Orr v Milton Keynes Council (2011) IRLR 317** Aitkens LJ stated at para 44: *"The approach taken in these cases to the determination of the fairness of the dismissal concentrates on the conduct and state of mind of the employer immediately before and at the time of the dismissal. In substance it requires one to ask whether, when he took the decision to dismiss the employee, the employer had taken all reasonable steps to inform himself of the facts, whether, having done so, he formed the view on reasonable grounds that the employee had behaved in a way that justified his dismissal and, finally whether his conclusion that the conduct justified dismissal was itself reasonable."*

68. The tribunal must be careful not to assume that merely because it would have acted in a different way to the employer, that the employer has therefore acted unreasonably. The well known case of **Iceland Frozen Foods Limited v Jones [1983] ICR 17, EAT**, makes it clear that there may be a "band of reasonable responses" to a given situation. One reasonable employer may react in one way whilst another reasonable employer may have a different response. In accordance with **J Sainsbury PLC v Hitt [2003] ICR 111, CA**, the Tribunal's task is to determine whether the respondent's decision to dismiss, including any procedure adopted leading up to the dismissal, falls

within that band of reasonable responses. If so, the dismissal is fair. If not, the dismissal is unfair.

69. In **Westminster City Council v Cabaj 1996 ICR 960, CA** the Court of Appeal stated that the question a tribunal must decide in cases of unfair dismissal under section 98 (4) of the ERA is whether the employer acted reasonably in treating the reason shown as a sufficient reason for dismissing the employee. The Court of Appeal confirmed this approach in **Taylor v OCS Group Ltd 2006 ICR 1602**, in that a tribunal's task under section 98 (4) 'ERA' is not simply to assess the fairness of the disciplinary process as a whole but also to consider the employer's reason for the dismissal as the two impact upon each other. In **Sharkey v Lloyds Bank plc EATS 0005/15** Langstaff J stated that it is for the tribunal to evaluate whether a flaw identified in the employer's process is so significant as to amount to unfairness.

#### *Compensation*

70. If the tribunal find that the claimant has been unfairly dismissed, it can order reinstatement, re-engagement and/or award compensation. Compensation is made up of a basic award and a compensatory award. The basic award is based on age, length of service and gross weekly wage (section 119(2) ERA). Section 122(2) of the ERA states that the basic award can be reduced if the tribunal considers that the claimant's conduct was such that a reduction would be just and equitable.
71. The compensatory award is such amount as the tribunal considers just and equitable having regard to the loss sustained by the employee in consequence of dismissal, insofar as that loss is attributable to action taken by the employer (section 123(1) ERA). This generally includes loss of earnings up to the date of the hearing (after deducting any earnings from alternative employment), an assessment of future loss, if appropriate, and a figure representing losses such as statutory rights, benefits and pension losses.
72. If the tribunal finds that the claimant's conduct has contributed to his dismissal, it can reduce the amount by such proportion as it considers just

and equitable as set out in section 123(6) of the ERA. If the dismissal is found to be unfair on procedural grounds, it may be reduced by an appropriate percentage if the tribunal considers there was a chance that had a fair procedure been followed, that a fair dismissal would still have occurred. This is known as a **Polkey** reduction. In such circumstances, the tribunal must have regard to all relevant evidence, as set out in **Software 2000 Limited v Andrews & Others [2007] ICR 825**.

73. Where there may be grounds to make both types of reduction, the Court of Appeal in **Rao v Civil Aviation Authority 1994 ICR 495 CA** held that the proper approach of tribunals in these circumstances is first to assess the loss sustained by the employee in accordance with section 123(1) of the ERA which will include the percentage deduction to reflect the chance that he or she would have been dismissed in any event and the deduction for contributory fault under section 123(6) ERA should be made thereafter. In deciding the latter deduction, the Court held that the tribunal should bear in mind that there has already been a deduction made under section 123(1) ERA. The tribunal can also reduce the compensatory award if the claimant has failed to mitigate their losses. (section 123(4) of the ERA)

#### *Effect of Failure to Comply with ACAS Code*

74. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (“TULRCA”), provides that if the ACAS Code of Practice entitled “Disciplinary and Grievance Procedures” applies and it appears to the tribunal that the claim concerns a matter to which the code applies; the employer has failed to comply with the code in relation to that matter; and the failure was unreasonable, then the tribunal may, if it considers it just and equitable in all the circumstances, increase the award it makes to the employee by no more than 25%. There is a similar provision for reduction if the employee has failed to comply with the code and the failure was unreasonable. The ACAS Guide, which complements the ACAS Code, reinforces the principle that the more serious the allegations against the employee, the more thorough the investigations conducted by the employer ought to be.

#### **Issues to be Determined by the Tribunal**

75. The tribunal identified the following issues require to be determined:

- i. Has the respondent shown the reason for dismissal?
- ii. Is the reason for dismissal a potentially fair one?
- iii. Did the respondent follow a fair procedure?
- 5 iv. Did the respondent's decision to dismiss fall within the band of reasonable responses?
- v. Were there any failures by either party to follow the ACAS Code and if so, were such failures unreasonable?
- 10 vi. If the claimant was unfairly dismissed, what remedy is appropriate?
- vii. If compensation is to be awarded, how much should be awarded?
- viii. If the claimant caused or contributed to the dismissal, is it just and equitable to reduce compensation?

## 15 **Conclusions**

76. Overall, I found that the claimant and the respondent witnesses gave their evidence in a clear way giving an honest account of events as they remembered them. I have considered matters arising from the evidence in more detail below.

20 77. In accordance with **Burchell (“supra”)**, I was required to determine whether the respondent believed that the claimant was guilty of the misconduct alleged, whether there were reasonable grounds for this belief and at the time it formed that belief, that the respondent carried out as much investigation into the matter as was reasonable in the circumstances.

25 78. I began by considering whether the respondent had established the reason for dismissal.

79. I was satisfied that the respondent genuinely believed the claimant was guilty of the misconduct alleged; *“On the 11<sup>th</sup> March in the GRI EDU washroom that Stephen Mullen shouted and threatened a technician”* and that conduct is a potentially fair reason for dismissal. This belief was based upon the witness and documentary evidence before the conduct panel.
80. In doing so, I noted that the alleged misconduct was two-fold in that the claimant shouted and threatened a technician and that whilst the claimant admitted both shouting and swearing at Mr Hutchison, he denied that he had threatened Mr Hutchison.
81. I then considered whether the respondent’s belief was formed on reasonable grounds in respect of the misconduct alleged and specifically, whether the claimant had threatened Mr Hutchison.
82. In his initial statement emailed to Ms Ward on 11 March 2021, Mr Hutchison referred to *“the apparent threats made (by the claimant) later on.”* (D213) In his further statement submitted to Ms Ward on 24 March 2021 he stated: *“This sense of shocked confusion gradually became the awareness of the hanging threat as Steven continued to rant and threaten action at a later time, from behind the curtain separating our rooms, which was also repeated to me by another member of staff working with Steven.”* (D219) At the investigatory meeting on 21 May 2021, Mrs Watt asked him who the claimant had repeated this to and recorded his response as: *“You explained that Mr Rankin had said to you “can you hear him,” he also told you that Mr Mullen had said that he knew where you parked your car and that he would “get him outside,” he also told you that Mr Mullen appeared to be goading you in an attempt to start a fight.”* (Qu.10 - D240) He was again asked by Mr Hunter at the conduct hearing on 14 October 2021 what the threat was and he replied: *“I know where he parks his car, I’ll get him outside.”* (D306) At the appeal hearing on 11 January 2022, Mr Hunter asked him: *“Did you feel your own safety was threatened?”* to which he responded: *“Yes, I clearly heard threats about where I parked my car and I felt unsafe in the environment.”* However, when the claimant’s representative, Mr Cairns subsequently asked him if the claimant



made a direct threat to him, he replied: *“Not verbally, but it makes no difference.”* (D400-401)

At the investigatory meeting with the claimant on 21 May 2021, Mrs Watt asked him: *“Did you threaten to take action against Mr Hutchison at a later time/date?”* to which his response was recorded as: *“You stated that you did not, but there had been a “nonchalant” conversation regarding Mr Hutchison going home.”* (Qu.10 – D250) In his statement submitted prior to the conduct hearing, the claimant said: *“I have admitted that I may have raised my voice and used harsh language when speaking with Paul, I cannot remember the exact words, but I am certain I did not threaten him. I know, and have said, that I could have handled the situation better.”* He further said: *“I did not directly or indirectly threaten Mr Hutchison, I was not attempting to goad him or had any wish to get into any physical altercation with Mr Hutchison, this is Mr Rankin’s perception.”* (D299) At the conduct hearing, he stated that he did not directly threaten Mr Hutchison (D318-319) and was consistent in his evidence about that before the tribunal.

83. Ms Ward’s statement dated 22 March 2021 was largely based upon her recollection of Mr Hutchison’s and the claimant’s account of events of 11 March 2021. She stated that Mr Hutchison had told her the claimant was coming at him, talking loudly over him and swearing at him. He had felt threatened and that his safety had been compromised. Her recollection of Mr Hutchison’s account did not include him alleging that the claimant had threatened him. When she spoke to the claimant, she said he had told her that he had sworn at Mr Hutchison and that he had also made further comments about him to her. (D216-218) Ms Ward was consistent in her account at both the conduct and appeal hearings. (D314-318 & 402-3)

84. At the investigatory meeting with Mr Rankin on 1 July 2021, Mrs Watt asked him if he told Mr Hutchison that the claimant had made a threat against him that he knew where he parked his car and he would “get him outside?” to which his response was recorded as: *“You confirmed that Mr Mullen had made these threats. You explained that you had been working with Mr Mullen; Mr Mullen was working in the same area which was separated by a curtain,*

that Mr Mullen was talking very loudly making these threats and it was clear that he was speaking loudly so that Mr Hutchison could hear him.” (Qu.9 – D245) Mr Rankin was further asked if he told Mr Hutchison that he believed that the claimant appeared to be goading him in an attempt to start a fight, to which his reply was noted as: “You stated that Mr Mullen appeared to be goading Mr Hutchison, however you did not believe this would come to anything, that perhaps Mr Mullen just wanted to annoy Mr Hutchison.” (Qu.10 – D245) At both the conduct and appeal hearings, Mr Rankin confirmed he heard the threat and that this had not been directly said to Mr Hutchison. (D312-3 & 401-2)

85. At the investigatory meeting with Ms Bond on 1 July 2021, Ms Bond stated that she heard the claimant swearing at Mr Hutchison, but she was not aware of the claimant making any threats towards him. (Qus. 8,9 &10 - D257) She was consistent in her evidence about that at both the conduct and appeal hearings. (308-10 & 403)

86. Having considered the above in the round, I am satisfied that the respondent did have reasonable grounds for believing that the alleged misconduct had occurred based upon the independent corroborative evidence of Mr Rankin, who was working in the same area as the claimant at the time and gave clear and consistent accounts throughout the conduct process. In reaching this view, I have noted that in terms of **Burchell** (“supra”), the employer need not have conclusive direct proof of the employee’s misconduct. I also accepted Mrs Watt and Mr Hunter’s evidence as credible that less weight was attached to Ms Ward’s statement as she was not a witness to the alleged misconduct.

87. I then considered whether at the time the respondent formed that belief, they had carried out as much investigation into the matter as was reasonable in the circumstances. In doing so, I have also considered the claimant’s complaint that he was provoked by Mr Hutchison in that he approached him, without wearing the correct ‘PPE,’ telling the claimant it wasn’t even his cup and that this had not been investigated by the respondent.

88. I noted that following the appointment by Mr McIvor of Mrs Watt as Investigating Officer, the claimant, Mr Hutchison and Ms Ward were each

invited to investigatory meetings that took place in May 2021. During the course of Mr Hutchison's meeting, Mr Rankin and Ms Bond were identified as potential witnesses to the alleged misconduct and were subsequently invited to investigatory meetings which took place in July 2021. The allegations were put to the claimant at his investigatory meeting and he had an opportunity to respond to them. On the basis of the findings made from these meetings, Mrs Watt and thereafter, Mr McIvor, recommended that the case was referred to a formal hearing under the conduct policy.

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89. The claimant submitted a detailed written statement to the conduct panel prior to the conduct hearing. At the hearing, Mrs Watt presented the respondent case. The claimant, Mr Hutchison, Ms Ward, Mr Rankin and Ms Bond were all present and questioned about the events of 11 March 2021 by the conduct panel. The claimant and his representative, Mr Kirkpatrick also asked questions of the witnesses. After an adjournment, Mr Hunter informed the claimant that he was unable to make a decision as he wished to have more time to consider the evidence presented due to the seriousness of the situation and in order to look at his file to ascertain the reasons he was relocated to GRI and if there was a pattern of behaviour. (D323 & D327) In the claimant's dismissal letter, Mr Hunter set out his findings relating to the allegation based on consideration of all the information presented. (D327)

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90. The claimant submitted a detailed written appeal statement to the appeal panel prior to the appeal against dismissal hearing. At the hearing, Mr Hunter presented the respondent case. The claimant, Mr Hutchison, Ms Ward, Mr Rankin and Ms Bond were all present and the respondent witnesses were asked by Mr Hunter to describe the events of 11 March 2021. Questions were also asked of them by the claimant's representative, Mr Cairns and the appeal panel and in addition, Mr Cairns asked questions of Mr Hunter. At the end of the hearing, Mr Steele advised that the panel would consider all the information and material presented at the hearing and that the claimant would receive the outcome within 7 days. (D404) Furthermore, in cross examination Mr Quinn gave evidence that prior to their decision being made, he did consider the other cases referred to by the claimant in relation to the issue of consistent treatment.

91. In the letter informing the claimant of the appeal outcome, Mr Steele stated that in considering the claimant's appeal, the panel took into account the management case, the claimant's supporting statement and the verbal evidence presented by both parties. Further, that in reaching the decision to not uphold the appeal, he said the panel had explored all the information submitted in relation to breach of policy and that whilst there were a number of delays, these were clearly out-with management control. As to the issue of early resolution, he referred to Mr Hunter's confirmation that as he did not commission the investigation, he was not party to the discussion in relation to progression. (D407)
92. In considering the claimant's position that the respondent did not investigate his account that he was provoked by Mr Hutchison, I have noted that the claimant raised this issue at his investigatory meeting and in his written statement submitted to the conduct panel. (Qu.15 D251 & D302) I have also noted that at his investigatory meeting, Mr Hutchison accepted that he had not been wearing the proper 'PPE' as he had not planned to go into the room, but did so as the claimant was shouting and he was going to try to talk him down. (Qu.6 D239 & conduct hearing D305) Although this issue was noted in the investigatory report, it was not referred to in the report's conclusions. It was also not considered at the conduct hearing or noted as such in the dismissal letter. At the appeal hearing, Mr Ritchie did ask Ms Bond if there was any provocation by Mr Hutchison, to which she replied not that she could remember, it was a long time ago and she couldn't be certain. (D403) There was no reference to this issue in the appeal outcome letter.
93. In cross examination, both Mrs Watt and Mr Hunter said there had been no evidence to corroborate the claimant's position that he had been provoked and they had accepted that Mr Hutchison had been trying to calm him down. Mr Hunter further said that he accepted Mr Hutchison was not wearing the correct 'PPE,' but this was still not an excuse or reason for the claimant's behaviour.
94. In assessing all this evidence in the round, I am satisfied that at the time the respondent formed their belief that the alleged misconduct had occurred, they

had carried out as much investigation into the matter as was reasonable in the circumstances. This is because the claimant and all witnesses to the incident on 11 March 2021 were interviewed at their respective investigatory meetings, the witnesses evidence was tested at both the conduct and appeal hearings and the claimant and his representative asked questions of the witnesses. The conduct hearing was also adjourned in order for the panel to review further evidence referred to at the hearing before reaching a decision and Mr Quinn had further investigated the issue raised by the claimant of inconsistent treatment prior to the appeal panel making their decision.

5  
10 95. Whilst the issue of whether the claimant had been provoked by Mr Hutchison was not specifically referred to in the investigatory report's conclusions, the dismissal or appeal outcome letters and it was therefore understandable that the claimant questioned whether it had been investigated, I accepted from Mrs Watt's and Mr Hunter's evidence that as there was no corroborative evidence given during the conduct process to support such a finding, there had been no further consideration of it.

15  
20 96. In assessing whether the **Burchell** ("supra") has been met and in accordance with **Iceland** ("supra") and **Hitt** ("supra"), I then proceeded to consider whether the decision of the respondent to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might have adopted.

97. The claimant complained there were a number of deficiencies in the process that were in breach of the respondent's policies and procedures.

25  
98. The claimant's evidence was that the respondent did not inform him of the allegations made by Mr Hutchison until Mr Mclvor met with him on 29 March 2021, that Mr Hutchison did not lodge a formal grievance prior to the commissioning of a formal investigation into the alleged misconduct and the early resolution process was bypassed by the respondent who proceeded directly to a formal investigation without explanation.

30 99. I found the claimant's evidence reliable that he was not informed of Mr Hutchison's allegations by the respondent until he met with Mr Mclvor on 29

March 2021 and was told that there would be a formal investigation. (D220)  
This is because I have noted that in Ms Ward's statement dated 22 March  
2021, she spoke to the claimant on 11 March 2021 at the end of the working  
day about work matters and then she had asked him to explain the incident  
5 that had happened between him and Mr Hutchison earlier that day. In doing  
so, she did not put Mr Hutchison's account of events to the claimant or his  
allegations. (D217) Further, that at the request of Mr Gracie, Ms Ward  
subsequently asked the claimant to make a statement about the events of 11  
March 2021, which he did on 17 March 2021, even though he had still not  
10 been informed of the allegations made by Mr Hutchison. There was also no  
evidence to indicate he was informed by Ms Ward or Mr Gracie of the status  
of any such statement, the policy under which his statement was being dealt  
with or his entitlement to trade union support.

100. In respect of whether Mr Hutchison raised a formal grievance, Mrs Watt gave  
15 evidence in chief that a more formal process was triggered by Mr Hutchison's  
second statement of 24 March 2021. (D219) However, when the claimant put  
it to Mrs Watt in cross examination that Mr Hutchison had not lodged a formal  
grievance, she responded that he would need to ask Mr McIvor about that as  
she had not received a copy of the grievance form and had just been sent the  
20 commissioning letter with the relevant details.

101. I therefore found it was unclear whether Mr Hutchison's initial complaint made  
to Ms Ward on 11 March 2021 and his statement of the same date was dealt  
with in accordance with the respondent's bullying and harassment policy or  
their grievance policy which have different procedures. In light of Mrs Watt's  
25 evidence and the absence of a formal grievance, I considered that if it was  
dealt with under the grievance policy, this would amount to a breach of the  
respondent's grievance policy which states at 1.5.3.1: "*If the grievance cannot  
be resolved during early resolution, the employee may choose to initiate the  
formal procedure. They should complete the Stage 1 Grievance notification  
30 form for individual grievance...*" (D78) If, however it was dealt with under the  
bullying and harassment procedure, this does not appear to require that a  
formal grievance is lodged. (D66 and Flowchart)

102. In respect of the early resolution process, I have noted from both the grievance and bullying and harassment policies that this process is the first stage in their procedures, although it does state in the bullying and harassment policy that if *“the bullying or harassing behaviour is significant or persistent in nature, the employee or manager may initiate the formal procedure.”* (D68)

103. I found that the reason for the respondent not instigating the early resolution process was also unclear. In making this finding, I have noted Mrs Watt gave evidence that this process was ruled out by Mr Mclvor at the outset. She then stated that she and Mrs Wilson decided it was not an option due to the seriousness of the allegation and that Mr Hutchison had refused to participate in such a process. At the conduct hearing, Ms Ward was asked about this issue by Mrs McCabe and her response was recorded as: *“Paul came to me, couldn’t stay at work due to threatening and mediation wouldn’t work.”* (D316)

15 In the claimant’s cross-examination of Mr Hunter, he also stated that Mr Hutchison did not want to take part in the early resolution procedure. However, at the appeal hearing, in response to a question from Mr Cairns about this issue, Mr Hutchison said that he was not spoken to by anyone about early resolution. (D401) There was also no evidence to indicate the decision

20 not to instigate the process had been formally communicated to the claimant.

104. Having considered this evidence in the round, I am of the view that prior to Mr Mclvor meeting with the claimant on 29 March 2021, there was a lack of transparency by the respondent in terms of the policy they were following and in their communications with the claimant about the matter. I have therefore

25 concluded that this was a breach by the respondent of their grievance and bullying and harassment policies, which both oblige the respondent to discuss the concerns raised with the employee at the earliest opportunity (D77 & D66). It was also a breach of natural justice because the claimant was not informed of the allegations made against him until Mr Mclvor advised him of them

30 nearly 3 weeks after the alleged misconduct, which was after the claimant had spoken to Ms Ward and he had already given a statement.

105. The claimant complained that the respondent was in breach of their policies regarding their failure to provide him with a time line for the process, the length of time the investigation took to complete and the lack of management support he received throughout the conduct process.
- 5 106. In view of the evidence in respect of these matters, I considered that Mr Mclvor provided the claimant with appropriate information in his correspondence of 25 and 29 March 2021 in that he gave him contact details for the respondent's Occupational Health Service, advised he may find it beneficial to seek support from his Trade Union/Professional Organisation  
10 representative, told him that his independent point of contact was Mr Boyd and provided contact details for Mr Boyd and himself. (D220-1 & D222-3)
107. However, following his Investigatory Meeting with Mrs Watt on 21 May 2021, the claimant heard nothing further about the progress and timeline of the investigation process until he contacted Mrs Watt on 21 June 2021 and  
15 thereafter emailed Mr Boyd. I considered this was a breach of the 'Investigation Process policy – Guide for employees,' that states after the Investigatory Meeting: *"the investigating manager will provide a provisional timescale for completion of the investigation."* (D94)
108. Nevertheless, after the claimant made contact with Mr Boyd, I found that the  
20 claimant did receive management support from Ms Ward. Whilst it was understandable that the claimant was uncomfortable meeting with Ms Ward as she was a witness in the conduct process and I considered that an alternative manager could have been identified due to the size and capacity of the respondent, Ms Ward did refer the claimant to the occupational health  
25 service and follow up support measures with him that were recommended by them in order to resolve any ongoing issues.
109. The claimant received the investigation report and appendices from the respondent on 26 August 2021 which was over 5 months after the alleged  
30 misconduct had occurred. The claimant was informed about the formal investigation on 29 March 2021, yet the first investigatory meeting did not take place until 7 May 2021. The last investigatory meetings were held on 1 July



2021 and although the investigatory report was completed on 29 July 2021, it took almost a further month for it to be sent to the claimant.

- 5 110. Even when taking account of the reasons given by Mrs Watt for the length of time the investigation process took in terms of annual leave and the unavailability of witnesses, I found there were delays during the process which were not accounted for and that overall, the process took an unreasonable length of time. I therefore considered that the respondent was in breach of paragraph 1.5.6.2 of the conduct policy which states: (An investigation) *“should be undertaken in a timely manner to establish the facts of the case.”*
- 10 (D87) I have further noted that the respondent did not adhere to the 7 calendar days timescale in which to send the claimant the investigatory report after it was submitted to Mr Mclvor on 11 August 2021, as prescribed by paragraph 1.5.6.3 of the conduct policy. (D87)
- 15 111. The claimant complained that Mrs Watt in her role as investigating officer was not impartial because in 2017 she was the investigating officer in respect of a grievance made against him by his then line manager, Ms Newton. In response to this issue, Mrs Watt gave evidence that she did not have preconceptions about the claimant in her role as investigating officer in this case and that other than knowing where he worked, she did not know him particularly or line manage him. She further stated that she could not honestly
- 20 remember the outcome of the 2017 investigation.
- 25 112. I accepted Mrs Watt’s evidence as reliable in this regard because she had undertaken a number of investigations in her role for the respondent, there were 4 years between these two investigations and she had not been involved in the line management of the claimant.
- 30 113. The claimant also complained there was lack of impartiality in respect of the conduct panel because of Mr Mclvor’s knowledge and involvement in the grievance made against him in 2017 by Ms Newton and his subsequent transfer to GRI. Further, that in this case, due to Mr Mclvor’s involvement in the formal investigation and being a member of the conduct panel, the claimant submitted this was a breach of paragraph 1.5.7.1 of the respondent’s conduct policy that states: *“The conduct hearing will comprise of a Chair,*

*according to the scheme of delegation, and two other panel members, one of whom will be an HR representative...To ensure impartiality, panel members, including the Chair, must have had no prior involvement in the case.” (D88)*

- 5 114. I found that there was a lack of impartiality in the respondent’s approach to the conduct process which amounted to a breach of paragraph 1.5.7.1 of the respondent’s conduct policy due to the appointment of Mr Mclvor to the conduct panel.
- 10 115. This is because in respect of the grievance made against the claimant by Ms Newton in 2017, it was not in dispute that Mr Mclvor, as Decontamination Site Manager, had knowledge of the grievance made against the claimant by Ms Newton in 2017 and that he was initially responsible for drafting and discussing the ‘supported improvement action plan’ with the claimant. Furthermore, Mr Mclvor did have prior involvement in this case and control over the direction it would take, in that it was he who decided to commission the formal investigation and endorsed Mrs Watt’s recommendations made in the investigation report that the case should proceed to a formal conduct hearing. I have also noted from Mr Hunter’s evidence that Mr Mclvor played an equal part in the decision to dismiss the claimant, in that he said it was a joint decision by the three panel members which Mr Hunter then agreed was the appropriate outcome.
- 15 20
- 25 116. In reaching this view, I did not find Mr Hunter’s evidence in cross examination reliable that Mr Mclvor was independent and it was a reasonable assumption for him to be on the conduct panel as his prior role had only been to arrange the investigation. I also accepted the claimant’s evidence as credible that he did not raise this issue at the conduct hearing because he did not know in advance of the rescheduled hearing that Mr Mclvor would be on the conduct panel as he had not received the respondent’s letter advising him of that. He was therefore shocked when he learnt this at the hearing, but was stressed and just wanted to get the hearing over with. Furthermore, whilst the claimant did refer to this issue in his grounds of appeal, it was not addressed in the appeal outcome letter and Mr Steele’s evidence on this issue was simply that
- 30

he would expect all panel members to treat people impartially and that he could not comment on why Mr Mclvor was on the panel.

5 117. Although I accepted Mr Mclvor did not carry out the investigation as such, I considered that because of the role he had in respect of the investigation and the future direction of the case, his appointment to the conduct panel also amounted to a breach of paragraph 6 of the ACAS Code of Practice on disciplinary and grievance procedures: *“In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.”* This was particularly in view of the size and capacity of the  
10 respondent and therefore, it would have been practicable for them to appoint different people for each stage of the process. Indeed, this was demonstrated by the fact that Mr Mackenzie was originally appointed to the conduct panel.

118. I have further noted that after Mr Mclvor endorsed Mrs Watt’s recommendation that the case should proceed to a formal conduct hearing,  
15 Mrs Wilson emailed Mr Mclvor to ask him to confirm who would be on the conduct panel, even though in accordance with paragraph 1.5.8.1 of the conduct policy, this was the role of Mr Hunter, the nominated chair of the panel. (D284)

20 119. I therefore considered that Mr Mclvor had in effect appointed himself to the conduct panel. This is because Mr Mclvor was not a member of the conduct panel for the hearing scheduled on 16 September 2021, but was a panel member by replacing Mr Mackenzie when the hearing was rescheduled to 14 October 2021, and it was Mr Hunter’s evidence that whilst Mr Mclvor had originally intended to sit on the conduct panel, he was not available on the  
25 date first scheduled for the conduct hearing, but was able to sit on it when it was rescheduled.

120. The claimant complained that the decision to dismiss him was too severe in view of his mitigating circumstances, his clean disciplinary record and the sanctions imposed in similar cases and the respondent did therefore not  
30 comply with paragraph 1.5.9.6 of the conduct policy which states: *“Where the outcome of the conduct hearing is such that dismissal would be an appropriate action, it may be that because of mitigating circumstances, an*

*alternative to dismissal may be considered appropriate. Any such alternatives should be based on the general principles of equity and consistency and will be in conjunction with an appropriate level of warning.” (D89)*

5 121. The claimant gave evidence that the respondent did not sufficiently take into account his mitigating circumstances. These were that just prior to the date of the alleged incident, his friend’s wife had died in child birth and that on the day of the alleged incident itself, he was in a low mood having heard on his way into work that one of his oldest childhood friends had committed suicide. The dismissal letter did also not refer to his anxiety at the time due to the ongoing Covid 19 pandemic, particularly as he and his wife had recently had Covid 19 and his wife had suffered health complications as a result of that.

15 122. In cross examination, the claimant asked Mr Hunter what weight he gave to his mitigating circumstances in making the decision to dismiss him. Mr Hunter responded that he had considered his mitigation and that although he was sorry to hear about his difficulties and accepted it was a stressful period for him to deal with, the claimant had a duty to behave appropriately as a supervisor towards his colleagues. Whilst Mr Hunter also accepted that Mr Hutchison had not been wearing the appropriate ‘PPE’ at the relevant time, he said that the claimant’s aggressive behaviour and the significant impact of that on Mr Hutchison was still serious enough to dismiss him.

25 123. The claimant also considered that the decision to dismiss him did not take account of his length of service with the respondent and that he had no previous disciplinary sanctions on his record. In cross examination, he asked Mr Hunter to explain his finding that he had a pattern of inappropriate behaviour, even though he had no previous disciplinary sanctions. In doing so, he made reference to paragraph 1.5.9.5 of the respondent conduct policy which states: *“Previously issued warnings which have expired must be disregarded. However, consideration may be given to circumstances where the background to such warnings demonstrates a repeated pattern of*

30 *behaviour taking into account the time that has elapsed.” (D88)*

124. Mr Hunter responded that although the claimant did not have any previous formal sanctions, in October 2018 it was decided that a corrective action plan

would be put in place for the claimant to address inappropriate behaviour identified following a disciplinary hearing. Mr Hunter then said this had not been a contributory factor in the decision to dismiss him which was based upon his behaviour towards Mr Hutchison on 11 March 2021. Further, that he had considered the claimant's length of service, but when balanced against the impact of his behaviour on Mr Hutchison, he still believed his decision to dismiss the claimant was appropriate. As an alternative to dismissal, he said he had considered redeployment, but did not think that was appropriate based on his findings regarding the claimant's alleged misconduct and his history of behaviour.

125. In respect of the issue of consistency of sanctions imposed in similar cases, Mr Hunter's evidence was that his focus was on the claimant's case and that he did not have knowledge of other cases. Mr Steele's evidence in this regard was that every case was treated on its own circumstances and that the two cases referred to by the claimant were different in that the parties wanted to participate in mediation and were therefore resolved at an early stage. Mr Quinn's evidence was consistent with Mr Steele's in this respect and that having further investigated the two other cases, he considered mediation had been appropriate in both instances as they were isolated incidents that were not witnessed.

126. In assessing this evidence in the round, I found that Mr Hunter did take account of the claimant's mitigating circumstances, his length of service and consider redeployment as an alternative to dismissal in reaching the decision to dismiss the claimant. I was also satisfied that the issue of consistency was further investigated and considered by the appeal panel before reaching their decision not to uphold the appeal.

127. However, I found there were inconsistencies in Mr Hunter's evidence as to whether the pattern of the claimant's behaviour identified by the respondent was a contributory factor in the decision to dismiss him which I considered raised doubts about the real reason for the dismissal and the sufficiency of that reason.

128. Although Mr Hunter gave evidence in cross examination that it was not a contributory factor and that the decision to dismiss the claimant was based upon his behaviour towards other members of staff on 11 March 2021, this was not borne out by his findings in the dismissal letter: *“It was apparent during the hearing that you appear to have issues with several colleagues and have a pattern of inappropriate behaviour. I took the opportunity to review your file as detailed above. You were issued with a supportive improvement plan to address your behaviour, however despite the additional training, you have displayed this type of inappropriate and intimidating behaviour once again.”* (D27)
129. The dismissal letter also made reference to complaints in July and August 2019 from other colleagues about the claimant’s inappropriate and aggressive behaviour towards them which Ms Ward had spoken to him about, as well the claimant’s telephone conversation with Mrs Watt on 21 June 2021, in that Mrs Watt felt that she should not have been subjected to intimidation and abuse from the claimant. (D326-27) In respect of the latter, the claimant asked Mr Hunter in cross examination about the weight that was given to these comments by Mrs Watt, to which he responded that it did demonstrate a pattern of behaviour which had been previously described. I have further noted Mr Steele’s evidence that the appeal panel took account of Mr Hunter’s finding in the dismissal letter regarding the pattern of behaviour identified in reaching their decision not to uphold the claimant’s appeal.
130. I have carefully assessed all the evidence in the round. In doing so, I have found there were procedural defects in the process leading to the claimant’s dismissal. In applying the authorities of **Taylor** (“supra”) and **Sharkey** (“supra”) to my findings, I considered that the respondent’s failure to inform the claimant of the allegations against him until he was told about the formal investigation on 29 March 2021, the lack of impartiality in the conduct process due to Mr McIvor being a member of the conduct panel and the lack of certainty surrounding the real reason for dismissal were material procedural deficiencies that fell out-with the band of reasonable responses which a reasonable employer might have adopted.

131. In reaching this view and applying the authority of **Cabaj** (“supra”), I am satisfied that the respondent did not act reasonably in treating the reason shown as a sufficient reason for dismissing the claimant. This is because these material procedural deficiencies impeded the claimant in demonstrating that the real reason for his dismissal was not sufficient and there was no reason given by the respondent for deciding to dismiss the claimant in spite of these procedural deficiencies that I could consider, as the evidence indicated they did not accept these were such deficiencies.

132. I have therefore concluded that these procedural deficiencies had such impact that they rendered the whole process unfair and that the respondent did not act reasonably in dismissing the claimant.

133. For all these reasons the dismissal was unfair.

### **Compensation**

134. The claimant was seeking compensation only.

135. On 28 March 2022, the claimant commenced full-time employment with Clarkes Fire Protection as a Material Handler. He works 40 hours per week and is paid a weekly net wage of £418.00

### *Notice Payment*

136. On the basis of my finding that the claimant was unfairly dismissed, the claimant is entitled to notice pay which was not paid to him upon termination of his employment due to his summary dismissal.

137. Section 86 of the ERA sets out the statutory minimum periods of notice required to terminate a contract of employment up to a maximum of 12 weeks for continuous employment of 12 years or more and displace shorter contractual notice periods. As the claimant’s contract of employment only provides for 4 weeks notice pay, in accordance with his length of service and section 86 of the ERA, I have calculated that he is entitled to a notice payment of 12 week’s net pay. The claimant was paid £26,000 gross per annum. His notice pay has therefore been calculated at 12 week’s x £410.43 net weekly pay at the date of dismissal = £4,925.16

*Basic Award*

138. In respect of the basic award the calculations are based on the claimant's age, length of service and his gross weekly wage. The claimant's gross weekly wage at the date of dismissal is calculated at £500.00. This is  
5 calculated at 18.5 weeks x 500 = £9,250.
139. I considered whether there should be a reduction because of the claimant's conduct. On these findings, I am of the view that it would be just and equitable to make such a reduction. This is because of the serious nature of the claimant's misconduct and the adverse impact of that behaviour on Mr  
10 Hutchison's mental health and well-being which I considered was exacerbated by the fact that the claimant was employed in a supervisory role and supervised Mr Hutchison.
140. For these reasons, I have assessed the claimant's contributory conduct towards his dismissal at 75%. The total basic award is therefore calculated at  
15 £2,312.50 (75% of 9,250 = 6,937.50) (9,250 – 6,937.50)

*Compensatory Award*

141. I considered there should be compensation for loss of earnings up to the date the claimant commenced his new employment, loss of statutory rights and loss of pension benefit.
- 20 142. I found that there had been procedural unfairness in this case which led to the claimant's dismissal. However, I considered that a **Polkey** ("supra") reduction did apply on these facts, in that had there been a fair procedure, there was a 75% likelihood that the claimant would have been fairly dismissed. This is because of the serious nature of the claimant's misconduct and the adverse  
25 impact of that behaviour on Mr Hutchison's mental health and well-being which I considered was exacerbated by the fact that the claimant was employed in a supervisory role and supervised Mr Hutchison.
143. I am satisfied that in light of the breach by respondent of paragraph 6 of the ACAS Code of Practice on disciplinary and grievances, that in all of these



circumstances a 10% uplift to the compensatory award was just and equitable.

144. I also considered that in applying the authority of **Rao** (“supra”), to these facts and having made a **Polkey** (“supra”) deduction to the compensatory award,  
5 that it would not be just and equitable to reduce the compensatory award further in respect of the claimant’s contributory conduct to the dismissal.

145. I have calculated the compensation as follows:

146. The compensatory award is made up of net loss of earnings, from 28 October  
2021 to the date the claimant commenced new employment on 28 March  
10 2022 at 21 week’s x 410.43 = £8,619.03. The claimant’s notice payment is deducted from this amount and the claimant’s total net loss of earnings is therefore calculated at £3,693.87 (8,619.03 – 4,925.16)

147. The claimant is awarded £400 for loss of his statutory rights and £2,155.60  
for loss of pension benefit (20.6% employer’s contribution). The  
15 compensatory award before adjustments is £6,249.47 (3,693.87 + 400 + 2,155.60). The compensatory award after a 75% Polkey reduction is calculated at £1,562.37 (75% of 6,249.47 = 4,687.10) (6,249.47 – 4,687.10 = 1,562.37) A 10% uplift of this award in respect of the ACAS code of conduct is calculated at £156.23. The total compensatory award after adjustments is  
20 therefore calculated at £1,718.60. (1,562.37 + 156.23)

Employment Judge: Rosie Sorrell  
Date of Judgment: 12 September 2022  
Entered in register: 13 September 2022  
25 and copied to parties