EMPLOYMENT TRIBUNALS

Claimant: Dr Gail Richardson

Respondent: University Hospitals Leicester NHS Trust

Heard: in Leicester, with Professor Bu'Lock joining via Cloud Video Platform
On: 5,6,7,8,9,12 & 13 September 2022

Before: Employment Judge Ayre, sitting alone

Representatives:

Claimant: Mr S Healy, counsel
Respondent: Ms B Criddle KC, counsel

RESERVED JUDGMENT

1. The claimant was fairly dismissed. Her claim for unfair dismissal fails and is dismissed.

REASONS

Background

1. The claimant was employed by the respondent as a Consultant Cardiologist from 30 March 2005 until 14 August 2020 when she was dismissed.

2. On 12 November 2020 the claimant issued proceedings in the Employment Tribunal, following a period of Early Conciliation that started and finished on 22 September 2020. Her claim form included complaints of unfair dismissal and for breach of contract. The respondent defends the claim. It says that the claimant was fairly dismissed for some other substantial reason ("**SOSR**").

3. On 9 March 2021 a Preliminary Hearing took place before Employment Judge Heap. The case was listed for a seven day final hearing to deal with both the merits of the claim and remedy if required. Orders were made to prepare the case for that hearing.

4. Following the Preliminary Hearing, the claimant withdrew her claim for breach of contract, and that claim was dismissed in a Judgment of Employment Judge Victoria Butler dated 4 May 2021 and sent to the parties on 2 June 2021.

The Proceedings

5. The first day of the hearing was a reading day and the parties did not attend the Tribunal. I heard evidence on days 2 to 6 of the hearing, and submissions on day 7. I reserved my judgment.

6. There was an agreed bundle of documents running to 3,233 pages. Nine pages were added to that bundle, by consent, at the start of the second day of the hearing.

7. I heard evidence from the claimant and, on her behalf, from:

a. Professor Frances Bu'Lock, Consultant in Congenital and Paediatric Cardiology and honorary Professor of the University of Leicester;

b. Joe Chattin, the claimant's trade union representative from 2012 to 2019; and

c. Stuart Lythgoe, the claimant's trade union representative from March 2021 onwards.

8. I also heard evidence from the following witnesses on behalf of the respondent:

a. Andrew Furlong, Medical Director and Consultant Paediatric Orthopedic Surgeon;

b. Joanne Tyler-Fantom, Deputy Chief People Officer;

c. Wayne Lloyd, HR Business Partner; and

d. Claire Teeney, Chief People Officer.

9. On 1 September 2022 the respondent's representative wrote to the Employment Tribunal objecting to the introduction into evidence of the witness statements of Professor Bu'Lock and Mr Chattin on the grounds that they contained opinion evidence and were irrelevant. The claimant objected to that application, and the application was considered at the start of the second day of the hearing.

10. I gave both parties the opportunity to address me on the admissibility of these witness statements. Ms Criddle submitted, on behalf of the respondent, that witnesses of fact can only give evidence of fact and

not opinion evidence. The purpose of witness statements is not to make arguments, yet that was what both witness statements do.

11. Admitting the witness statements would, she said, prolong the hearing unnecessarily, and leave her with the dilemma of whether to cross-examine the witnesses on the opinions contained within the statements, or be criticised for not challenging those statements.

12. Mr Healy submitted that the evidence of both witnesses was relevant and should be admitted. He referred me to the judgment of Mr Justice Underhill in ***HSBC Asia Holdings BV and anor v Gillespie EAT 0417/10*** and argued that the Tribunal should not spend time dealing with applications for the exclusion of evidence but should take a pragmatic approach and hear the evidence, filtering out any irrelevant parts. The Tribunal should not 'make a fuss' about evidence unless the presentation of the evidence is likely to prejudice the orderly progress of the case. Mr Healy accepted that Ms Criddle did not need to cross examine the witnesses on their opinions.

13. After listening to the submissions of both parties, it was my decision that the witness statements of Professor Bu'Lock and Mr Chattin should be admitted into evidence. Whilst I had sympathy for the arguments of Ms Criddle, Rule 41 of Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 gives Tribunals the power to regulate their own procedure and specifically provides that "*The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts*". There is, therefore, no prohibition on opinion evidence in the Employment Tribunal.

14. I had some doubt about the relevance of both witnesses' evidence but could not say at the start of the hearing that their evidence was entirely irrelevant. The opinions of Professor Bu'Lock and Mr Chattin on the fairness of the claimant's dismissal and the procedure followed were of marginal relevance at best.

15. The key witnesses in this case are those who took the decision to dismiss the claimant and the appeal hearer. The decision on the fairness of the dismissal lies with the Tribunal and not with Professor Bu'Lock or Mr Chattin.

16. It is important that both parties leave the hearing feeling that they have had a fair hearing. I therefore decided, on balance, to admit the evidence of Professor Bu'Lock and Mr Chattin. Ms Criddle was not required to cross examine the witnesses on their opinions however, and I made clear that, by not cross examining them, she would not be considered to have accepted their opinions.

17. The evidence of the claimant's other witness, Mr Lythgoe, related almost entirely to the time taken to arrange the appeal hearing. Ms Criddle cross examined the claimant at length on that issue and, with the agreement of the Tribunal, was not required to cross examine Mr Lythgoe on it.

18. Ms Criddle therefore did not cross examine Mr Lythgoe, Mr Chattin or Professor Bu'Lock.

19. Both parties prepared written skeleton arguments, for which I am grateful. There was also an agreed bundle of authorities which included the following:

a. Perkin v St George's Healthcare NHS Trust [2006] ICR 617 ("**Perkin**")

b. McFarlane v Relate Avon Ltd [2010] ICR 507 ("***McFarlane***");

c. A v B [2010] ICR 849;

d. Ezsias v North Glamorgan NHS Trust [2011] IRLR 550 ("**Ezsias***")*;

e. Governing Body of Tubbenden Primary School v Sylvester UKEAT/0527/11/RN ("***Tubbenden***");

f. Kerslake v North West London Hospitals NHS Trust [2012] EWHC 1999 (QB) ("***Kerslake***");

g. Leach v Office of Communications [2012] IRLR 839 ("***Leach***");

h. Christou v Haringey LBC [2013] ICR 1007 ("***Christou****")*; and

i. Smo v Hywel Dda University Health Board [2021] IRLR 273 ("***Smo***").

20. I am grateful to Mr Healy and Ms Criddle for their collaborative and helpful approach to the hearing.

The Issues

21. The respondent admits that the claimant was an employee with more than two years' service and that she was dismissed. The parties submitted an agreed list of issues identifying the following issues as falling to be determined by the Tribunal:

a. What was the reason or principal reason for the dismissal?

b. Was that reason a potentially fair reason for dismissal within the meaning of section 98(1) of the Employment Rights Act 1996 ("**the ERA**")? The respondent says that the claimant was dismissed for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant did, namely a lack of trust and confidence ("**SOSR**"). The claimant says that there was no fair reason for dismissal and that, to the extent that the respondent can establish that the reason for dismissal was the factual matters it relies upon as SOSR, they are matters related to capability or conduct.

c. Was the decision to dismiss substantively and procedurally fair within the meaning of section 98(4) of the ERA?

d. If the dismissal was unfair, should the basic award be reduced on the ground of the claimant's conduct before dismissal, in accordance with section 122(2) of the ERA?

e. If the dismissal was unfair, was the dismissal caused or contributed to by the blameworthy conduct of the claimant? If so, should the compensatory award be reduced in accordance with section 123(6) of the ERA and, if so, in what proportion?

f. If the Tribunal finds that the dismissal was procedurally unfair, should there be any reduction in the compensatory award to reflect the possibility that the claimant would have been dismissed in any event, in accordance with the principles set out in *Polkey v AE Dayton Services Ltd [1987] ICR 142?*

g. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the respondent unreasonably fail to comply with it? If so, is it just and equitable to increase any award payable to the claimant, and by what proportion?

22. It was agreed at the start of the hearing that, other than considerations of Polkey and contributory conduct, questions related to remedy would be dealt with at a separate hearing if the claimant succeeds in her claim.

Findings of Fact

23. The claimant was employed by the respondent as a consultant interventional cardiologist from 30 March 2005 until her dismissal on 14 August 2020. She was employed on a full-time contract as a member of the respondent's cardiology department based at Glenfield Hospital in Leicester.

24. A full time cardiology consultant is normally required to carry out 10 programmed activities ("**PA**"s) a week, with each PA lasting 4 hours. Each consultant is given a 'job plan' which sets out the details of the PAs that they are required to carry out. PAs are reviewed and can change.

25. There are approximately 32 consultants within the respondent's cardiology department, 8 of whom (including the claimant at the time) work within interventional cardiology. The cardiology department is broadly divided into three areas: interventional cardiology, heart failure and arrythmia. The overall headcount within the department is between 100 and 130. There is a Head of Service for the department, to whom the claimant reported. Between 2009 and 2011 Dr Ian Hudson was Head of Cardiology. Between 2011 and 2016 it was Dr Jan Kovac, and from late 2016 onwards Dr Elved Roberts was Head of Cardiology.

26. The work of the cardiology department is team based. Cardiology has many sub-specialisms and there are very few cardiologists with expert

knowledge across all of those specialisms. The claimant's particular expertise was in interventional cardiology, and her work required her to liaise with colleagues who had other areas of expertise, such as arrythmia specialists and cardiothoracic surgeons. The claimant accepted when giving her evidence that working as a team is important to patient safety.

27. The General Medical Council ("**GMC**") has issued guidance to doctors entitled "Good Medical Practice". That guidance states that establishing and maintaining good relationships with patients and colleagues is a fundamental requirement of a good doctor. Team work and working collaboratively with colleagues is considered by the GMC to be one of the four pillars of good medical practice.

28. The respondent is an NHS Trust and, as such, is covered by the Department of Health's "Maintaining High Professional Standards in the Modern NHS" document ("**MHPS**"). MHPS applies to doctors and dentists employed in the NHS and contains detailed procedures for dealing with matters relating to:

a. Conduct and discipline (including exclusion from work);
b. Capability; and
c. Health.

29. During the course of her employment with the respondent, the claimant was subject to multiple complaints by other members of staff. She was accused variously of shouting, being confrontational, difficult, rude, demanding and intimidating, particularly when she was experiencing stress. Over a twelve-year period between 2007 and 2019 there were nine investigations carried out which involved the claimant:

a. The Pearman investigation (2007-8) following a dignity at work complaint about the claimant by a radiographer. The outcome of this investigation was mediation and no formal disciplinary action;

b. The Harris investigation (2008-9) into the claimant's interaction with her colleagues, her responses to stress, clinical performance issues and her job plan. The investigation resulted in a number of recommendations for the claimant and the department, including that the claimant should behave in a respectful and professional manner with all colleagues at all times;

c. The Gowan investigation (2009) following a dignity at work complaint by another doctor who alleged that the claimant had bullied and harassed her. The outcome of this investigation was a disciplinary hearing at which the claimant was given a first written warning;

d. The Kovac investigation (2011-12) into six issues, resulting in a formal performance meeting in April 2012 as an alternative to a disciplinary hearing;

e. The Critchley investigation (2014) into a number of issues including an alleged failure to engage or work collaboratively with colleagues. Whilst this investigation was underway a formal complaint was made against the claimant by a non-clinical manager, and the Critchley investigation matters were passed to a Professor Furness to investigate;

f. The Furness investigation (2014-5) into the subject matter of the Critchley investigation and further allegations that the claimant had failed to treat managers with courtesy and respect, failed to engage with managers and colleagues, failed to comply with reporting requirements and requests, failed to follow reasonable management instructions, failed to fulfill her contractual duties and failed to work collaboratively with colleagues. This investigation resulted in a disciplinary hearing;

g. The McGregor investigation (2015-16) into complaints about the claimant's behaviour during an operation. Following this investigation, a disciplinary hearing was convened in June 2016 to consider the issues arising from both the McGregor and the Furness investigations. The claimant was issued with a final written warning on condition that she enter into a behavioural agreement, which the claimant signed on 7 July 2016;

h. The Deane investigation (2016-18) into a number of issues including alleged bullying of a junior doctor, Dr T. The outcome of the Deane investigation was that the claimant was dismissed for gross misconduct in January 2018. Her dismissal was overturned on appeal, and she was reinstated. She did not however physically return to work;

i. The Trust and Confidence investigation commissioned by Andrew Furlong in August 2018, and which resulted in the claimant's dismissal in August 2020.

30. The claimant was off sick for a period of approximately 15 months after the performance meeting in April 2012 that followed the Kovac investigation. Upon her return to work in August 2013 she undertook a 7 month re-skilling placement at Papworth Hospital, returning to Grenfield Hospital in March 2014. The secondment to Papworth seemed to go well, at least as far as the claimant was concerned, but after she returned to Grenfield there were further difficulties in the working relationships between the claimant and her colleagues, which resulted in the Critchley and Furness investigations.

31. In 2015, following the Furness investigation, the Assistant Medical Director of the Trust commissioned an external review of relationships within the cardiology department in Glenfield Hospital. An investigation was carried out by an external consultant, Claire McLaughlan, who interviewed 18 members of staff including the claimant.

32. Ms McLaughlan produced a report in October 2015. Amongst her conclusions were the following:

"*There is a history of conflict between Dr Richardson and, mainly, colleagues in managerial positions going back to 2005. Dr Richardson also has a history of poor behaviours towards non-consultant colleagues going back to 2007. This is well known within the department and as a result Dr Richardson has a reputation, particularly when stressed, for shouting, being confrontational, difficult, rude, demanding and intimidating. Dr Richardson admits some of these behaviours and also that she has poor social skills…*

Dr Richardson feels harassed, lambasted, constantly under scrutiny and targeted, particularly by management…

I found Dr Richardson lacking in true self awareness thought and reluctant to take responsibility for her actions and her future. By her own admission she repeatedly makes the same mistakes and instead of addressing her behaviours she bottles them up and tries to react behind closed doors. She is unable to see the interventions that has already been provided by the Trust and her colleagues as support.

33. Ms McLaughlan was asked to make recommendations for improving working relationships between the claimant and her colleagues, and made four suggestions, including that: -

a. The claimant should be helped to change her behaviours through a structured and monitored action plan and a behavioural contract. Ms McLaughlan was not confident that this would work however, as she commented in her report that "*A number of different interventions have been implemented in the past to try to achieve this and it would appear that these have not worked even with the involvement of very experienced providers…*"

b. Management should consider changing the Catheter lab operating model; and

c. Management should stop treating the claimant differently.

34. Following the McGregor investigation in 2015-2016 the claimant was invited to a disciplinary hearing, which took place on 27th and 28th June 2016. The claimant was represented at the hearing by her then trade union representative, Joe Chattin. The panel that heard the disciplinary hearing upheld many of the allegations against the claimant, including that the claimant had failed to:

a. Treat managers and colleagues with courtesy and respect;

b. Engage with managers and colleagues;

c. Comply with reporting requirements and requests;

d. Follow reasonable management instructions; and

e. Work collaboratively with colleagues as required by Good Medical Practice.

35. The panel considered dismissal as a potential outcome of the disciplinary hearing but decided instead to issue the claimant with a two year final written warning, because the claimant agreed to sign a behavioural agreement and to fully engage with an action plan to improve her relationships with others. In an outcome letter sent to the claimant on 2nd July 2016, the claimant was warned that if she breached the respondent's disciplinary policy or the behavioural agreement, she may be dismissed.

36. The claimant did not appeal against this decision, and on 7 July 2016 she signed a detailed "Behavioural impact and action agreement", which set out steps that the claimant had to take to improve her behaviours at work and identified the types of behaviour that were not acceptable. An Action Plan was also drawn up to enable the claimant to demonstrate her ability to acquire the skills necessary to achieve a pattern and style of behaviour that was in keeping with the respondent's policies. The Action Plan came into force on 1 September 2016.

37. On 22 August 2016 a cardiology registrar, Dr Taher, made a formal written complaint of workplace bullying by the claimant. He gave examples of alleged bad behaviour by the claimant, including an incident that he said had taken place on 4 August 2016. He alleged that on 4th August the claimant seemed stressed and unable to cope, blamed him, repeatedly shouted and used aggression towards him and other colleagues, and demonstrated "*rude abhorrent behaviour**".***

38. An investigation was carried out into the allegations made by Dr Taher. The claimant was informed about the complaint and a formal investigation into her behaviour was started under the MHPS procedure. The investigation was carried out by a consultant ophthalmologist, who produced an investigation report.

39. Whilst this investigation was ongoing, the respondent received a letter from the Postgraduate Dean at Health Education England ("**HEE**"). In the letter the Dean referred to a recent visit to the Trust during which the claimant's behaviour had been brought to HEE's attention and following which the respondent had assured HEE and the GMC that the claimant would no longer act as Educational or Clinical Supervisor for any trainees. The Dean went on to say that HEE did not think it appropriate for the claimant to have any contact with trainees, so that they should not work with the claimant at all. It is highly unusual for HEE to place a restriction on a doctor working at all with trainee doctors.

40. The GMC had also raised concerns with the Trust about the claimant's behaviour towards junior doctors. The Dean of HEE told Mr Furlong, the respondent's Medical Director, that complaints had been raised by a number of junior doctors in addition to Dr Taher, but she was not willing to share the names of those other doctors with Mr Furlong. The Dean also made it clear to Mr Furlong that if the respondent did not

take the steps that HEE were requesting, they would withdraw all trainee doctors from the unit in which the claimant worked, which would have caused the respondent significant operational difficulties.

41. The prohibition on the claimant working with trainee doctors had an impact on the work that she could carry out. Much of her work was in the Cath Lab where she carried out procedures on patients. Trainee doctors were used as scrub assistants within the Cath Lab and without a scrub assistant the claimant would not carry out procedures.

42. The claimant was invited to a disciplinary hearing to consider allegations that she had breached the behavioural agreement by her behaviour towards the cardiology registrar on 4 August 2016, and that her ongoing employment with the respondent was untenable in light of the decision of HEE that she was not to have any contact with trainee doctors.

43. The disciplinary hearing took place over two days, and the claimant was again accompanied by her trade union representative Joe Chattin. The outcome of that disciplinary hearing was that the claimant was dismissed with three months' notice.

44. The reasons for the decision to dismiss the claimant were set out in a letter dated 23 January 2018 which included the following comments:

"*The Panel's view based on the evidence provided, is that on the balance of probabilities, your behaviour towards Dr. Taher in the CCU and/or the Cath Lab on 4 August 2016, meant that you failed to treat him with courtesy and respect and thus maintain the professional standards of behaviour expected of a senior clinical colleague. This was in breach of the Behavioural Impact and Action Agreement…*

Further to the Final Written Warning given on 28 June 2016, the Panel concluded that this further breach constituted Gross Misconduct. Having considered the matter carefully, the Panel concluded with regret that it could not be satisfied that any sanction other than dismissal could prevent a further reoccurrence…"

45. In relation to the letter from HEE the panel concluded that the prohibition on the claimant having contact with trainee doctors made her on-going employment untenable.

46. The claimant appealed against the decision to dismiss her and an appeal hearing took place in April 2018. The panel that heard the claimant's appeal upheld a number of the claimant's grounds of appeal and concluded that the decision to dismiss the claimant was not sound. The panel overturned the decision to dismiss the claimant and recommended a number of steps for the respondent to consider, including:

a. Extending the final written warning and behavioural agreement for another two years;

b. Providing psychological input and additional coaching for the claimant;

c. Holding a facilitated session for the claimant to talk to the whole team about her situation and the support she needed; and

d. Putting in place an appropriate period of re-training for the claimant as she had been out of practice for some time.

47. Mr Furlong, the Trust's Medical Director, was charged with putting in place a plan to implement the recommendations of the appeal panel and get the claimant back to work. He reinstated the claimant to the payroll and arranged for her to be paid back pay.

48. An action plan was drafted by HR and a number of meetings were held to discuss how best to get the claimant back to work. The Trust contacted HEE to see what their position was on the claimant working with trainees. HEE told the Trust in May 2018 that the prohibition on the claimant working with doctors in training would need to remain in place until HEE could be satisfied by the respondent that the claimant would conform to the behaviours expected of a senior clinician. It told the respondent that it would review the position after 12 months of compliance with the required standards of behaviour by the claimant.

49. A draft Job Plan was prepared for the claimant based upon the restricted duties that she would have been able to carry out had she physically returned to work. There were a number of duties that a cardiology consultant would normally have been expected to carry out that the claimant would not be able to do due to the prohibition on working with trainees. These included doing 'on call' shifts, working in the Coronary Care Unit and working in the Clinical Decisions Unit.

50. Attempts were made by the respondent to contact the claimant's trade union representative, Joe Chattin, to arrange a meeting to discuss the claimant's return to work. On 20 April 2018 Joanne Tyler-Fantom in HR sent an email to Mr Chattin suggesting that the two of them speak the following week. She followed up in an email of 4 May 2018 asking Mr Chattin to provide his availability to attend a meeting. The HR Director's PA sent further emails to Mr Chattin on 30 May and 4 June asking for dates for a meeting. Mr Chattin did not reply to any of these emails.

51. Eventually, having received no reply from Mr Chattin, Joanne Tyler-Fantom wrote directly to the claimant on 7 June inviting her to a meeting on 6 July 2018 to plan her return to work. The meeting finally took place on 16 August 2018 and was attended by Andrew Furlong, Tina Larder from HR, the claimant and her trade union representative.

52. Whilst plans were being made to get the claimant back to work, the senior management team in cardiology were made aware that the claimant's appeal had been successful, and that the claimant would be returning to work. On 2 May 2018 Dr Elved Roberts, consultant cardiologist and Head of Service in cardiology, sent an email to Joanne

Tyler-Fantom, Deputy Director of Human Resources, raising concerns about the prospect of the claimant returning to work.

53. In the email Dr Roberts wrote at length about the claimant 'losing it' in the Cath Lab, about her work in clinic and on the wards, and about the claimant not working in the Coronary Care Unit. He commented that: "*Cardiology simply cannot absorb this doctor back into the service. It would be a disaster for us all. It would render all the hard work I and others have gone to in raising standards and promoting accountability a waste of time…"*

54. The following day Dr Ian Hudson, also a consultant cardiologist and the previous Head of Service, sent an email supporting the comments made by Dr Roberts. He wrote that: "*…I am in total agreement with Dr Roberts statement and express my grave concerns over a potential return to work. We are talking about a problem that extends back over a decade of multiple behavioural transgressions peppered with staff who have been too afraid to report concerns formally, have had their concerns dealt with weakly, and staff who have moved on as a direct consequence of being unable to work with her….I feel very strongly that a doctor who cannot work on CCU because of stress is incapable of working in a cath lab where calmness in a crisis is mandatory and leadership key….I cannot see how she can function in this environment, she is simply not fit for purpose…We should have learned the lessons over the past 15 years but have not done so. If something can't be fixed – it can't be fixed…*"

55. On 7 June 2018 Drs Roberts and Hudson wrote a letter to the respondent's medical director, Mr Furlong, copying in the Chief Executive. In the letter the doctors raised concerns that the Trust had failed to adequately respond to a complaint submitted by two nurses, had failed to challenge the appeal panel about its conclusions and in particular the panel's failure to consider patterns of behaviour that had been formally investigated and upheld since 2007, and that the Trust had failed to protect members of staff from bullying and intimidation over more than a 10 year period.

56. They also wrote that: "*On the current path, the Trust is about to agree to a rehabilitation package which mirrors almost exactly what has gone before. That package is already known to have failed to change the individual's behaviour. During its time course the Trust has already put patients and staff at risk. The same will happen again…*"

57. The doctors said that they were preparing a document calling for a comprehensive investigation. That document was subsequently submitted and ran to 9 pages. It set out in great detail the concerns that Dr Roberts and Dr Hudson had about the claimant returning to work and finished with the following paragraph:

"We are trying to break down the hierarchical barriers in the department and we have pursued an active campaign against bullying, harassment, and intimidation. This will be worthless if members of staff see Dr Richardson being re-appointed in spite of all the harm she

has caused to countless members of staff over the years and despite numerous processes to discipline and rehabilitate her."

58. Mr Furlong arranged a meeting with the two doctors and with Ms Tyler-Fantom from HR. Dr Hudson had previously been a supporter of the claimant, so the fact that he was one of the complainants was of particular concern to Mr Furlong. During the meeting Dr Hudson told Mr Furlong that he did not believe that the Trust could safely bring the claimant back to work.

59. Mr Furlong and Ms Tyler-Fantom met with Drs Roberts and Hudson to discuss their concerns in more detail. Mr Furlong told the doctors that he would look into the concerns being raised in light of the recommendations of the disciplinary appeal panel.

60. Mr Furlong considered what action to take and took advice. He was conscious of his duty of care towards the claimant as well as to the wider team. He discussed the situation with the management decision-making group and his deputies as well as with HR.

61. Around this time, Mr Furlong was also approached by Drs Jan Kovak, Doug Skeehan and Will Nicholson, all of whom were consultants in cardiology. Dr Nicholson was the education lead for the cardiology department and all three had had significant interactions with the claimant. All three expressed concerns about the claimant returning to work in the department.

62. It was put to Mr Furlong in cross examination that the issues that Dr Hudson and Dr Roberts were raising with him were really ones of capability or conduct. Dr Furlong acknowledged that there can be an overlap between behaviour and capability but his evidence, which I accept, is that in this case he was clear with the doctors who made the complaints that issues that had been dealt with previously would not be reinvestigated.

63. Mr Furlong did consider whether the matters that were raised with him should be investigated using the MHPS procedure. He and others felt, and were advised, that the conduct issues had previously been dealt with under MHPS, and that there was insufficient evidence to meet the threshold for a capability procedure under MHPS. The advice given to the Trust was that the matters raised should be investigated by way of a trust and confidence investigation.

64. Mr Furlong wanted to try and resolve the situation in the interests of everyone involved. He was aware and concerned that Dr Richardson was in a difficult situation but came to the view that there should be a trust and confidence investigation to try and establish whether there was any way that Dr Richardson could be safely reintegrated into the cardiology team. He asked Ms Tyler-Fantom and Claire McLoughlin, as an external consultant, to carry out this investigation. He took the decision that the matters complained of did not concern conduct or capability so that the MHPS procedure was not appropriate.

65. On 16 August 2018 Mr Furlong met with the claimant and her trade union representative. The meeting was originally arranged to discuss the outcome and recommendations of the appeal panel and the claimant's return to work. Mr Furlong also used the meeting to tell the claimant that some of her senior colleagues in cardiology had expressed significant concerns about her returning to work in the department. Mr Furlong explained that he needed to be satisfied that colleagues could work together as a team and that discord and tension between colleagues could have an impact on patient care.

66. He also told the claimant that he had a duty to listen to and take seriously all concerns that are brought to him, and that he had a duty of care to all of the respondent's employees to ensure that they are working in a positive working environment. He was not comfortable about sending the claimant back to clinical work in a department where colleagues had raised concerns about the appropriateness of the claimant being there, without fully investigating and dealing with those concerns first.

67. Mr Furlong explained to the claimant that he had commissioned an investigation into the state of relationships within cardiology and whether she could be successfully reintegrated into the department. He asked her not to attend work whilst the investigation was ongoing and told her that she would remain on full pay during the investigation.

68. After the meeting Mr Furlong wrote to the claimant confirming the matters that they had discussed. He also enclosed a copy of the Terms of Reference for the trust and confidence investigation. The Terms of Reference set out four questions for investigation:

a. What is the state of relationships between the claimant and her colleagues in the senior clinical team in the Cardiology department? Do they trust her? Do they have confidence in her? Does she trust and have confidence in them?

b. What is the state of relationships between the claimant and more junior colleagues in the Cardiology department?

c. What is the current view of Health Education England to the claimant returning to work alongside doctors in training?

d. Is it likely that the claimant can be successfully reintegrated into the Cardiology department?

69. The Terms of Reference also state that the purpose of the investigation is not to gather evidence or make findings of fact about the claimant's past behaviour or her capability as a clinician. It stated that if issues of conduct or capability arose in the investigation, their relevance was to be explored only insofar as they related to the fact of the perceptions of colleagues and the impact, if any, of such perceptions on the questions being investigated.

70. The respondent does not have a specific policy that covers trust and confidence investigations. It does however have a disciplinary policy

which states that the principles and practices it contains may also be used in circumstances falling within the definition of some other substantial reason of a kind so as to justify dismissal.

71. In August 2018 the respondent also received complaints about the claimant from two nurses. It was therefore decided that these nurses would also be interviewed as part of the investigation.

72. During the meeting on 16 August the claimant's trade union representative raised concerns about Claire McLaughlan being involved in the trust and confidence investigation. Mr Furlong considered those concerns and wrote to the claimant explaining that the investigation was being conducted by Joanne Tyler-Fantom but that due to the pressures of her workload she had asked Claire McLaughlan to help by carrying out the interviews.

73. Ms McLaughlan had knowledge of the background to the claimant's situation following the management review that she had carried out in 2015 and as a result Mr Furlong considered that she was well placed to be involved in the investigation. In addition, during her appeal against the decision to dismiss her, the claimant had relied upon evidence gathered by Ms McLaughlan as part of the previous investigation.

74. Mr Furlong sought to reassure the claimant that neither Joanne Tyler-Fantom nor Claire McLaughlan would be decision-makers in the trust and confidence process, they were merely helping to pull together relevant information.

75. Mr Furlong told the claimant that she would be invited to an interview as part of the investigation process and asked her to send any information that she wanted to be considered as part of the investigation, and any names of people that she thought had relevant information to Joanne Tyler-Fantom by 14 September 2018.

76. The claimant did not send in any information to be considered as part of the investigation. Nor did she suggest the names of anyone to be interviewed. Instead, on 14 September, her trade union representative wrote to Mr Furlong raising a grievance about the investigation.

77. On 8 October, the PA to the respondent's HR Director sent an email to the claimant to try and arrange a time for the claimant to meet Claire McLaughlan. She asked the claimant to let her know when it would be convenient for her to meet with Ms McLaughlan. The claimant did not reply to that email.

78. A further attempt was made to get the claimant to meet with Ms McLaughlan later in the month of October. On 30 October Joanne Tyler-Fantom wrote to the claimant by email asking her again to get in touch to arrange a meeting with Claire McLaughlan. The claimant did not do so. Rather, the claimant's trade union representative wrote back on 1 November 2018 stating that the trade union strenuously objected to any further investigation of the claimant, and that the investigation must not continue for a number of reasons including:

a. The matters covered by the trust and confidence investigation had already been investigated and addressed during the disciplinary proceedings;

b. The Trust had a contractual obligation not to treat the claimant arbitrarily, capriciously or inequitably;

c. The Trust was undermining the claimant's professional standing and acting in breach of contract and of the Equality Act by not reinstating her;

79. The trade union's letter also stated that a formal statement of grievance would be sent to the respondent on 9 November 2018, and threatened litigation against individuals who the union considered were "culpable".

80. The claimant therefore chose deliberately not to participate in the trust and confidence investigation, on the advice of her trade union, despite having been given a reasonable opportunity to do so.

81. Claire McLaughlan carried out a number of interviews as part of her investigation. On 1 October 2018 she interviewed Dr Hudson, Dr Will Nicholson and Nurse Helen Payne and spoke by telephone to Shona MacLeod. On 11 October she interviewed Dr Roberts and Nurse Celia Bloor. On 23 October she interviewed Dr Jan Kovac.

82. A number of the employees interviewed as part of the investigation used very emotive language about the claimant, and some described doing everything possible to avoid working with her.

83. On 14 November 2018 the claimant's trade union sent a detailed and lengthy grievance to the respondent. The statement of grievance itself ran to 11 pages and was accompanied by a chronology running to 15 pages and going back to March 2005 when the claimant started her employment with the respondent.

84. In light of the grievance that had been raised by the claimant the respondent put the trust and confidence investigation on hold whilst the grievance was investigated. Mr Furlong wrote to the claimant on 29 November to acknowledge receipt of the grievance and explain that someone else would deal with it. In that letter he also explained that because the claimant had referred in the grievance to suffering from stress and anxiety, he had referred her to Occupational Health.

85. The claimant's trade union responded to Mr Furlong in a letter dated 2 December 2018 in which they accused Mr Furlong of being 'completed disingenuous' and stated that the claimant would attend occupational health when she received notification of a definite return to work date. The tone of this letter was unreasonable, aggressive and uncooperative.

86. An occupational health assessment was arranged for the claimant in December 2018, but she did not attend it. Mr Furlong wrote to the

claimant on 21 December explaining that he could not notify her of a definite return to work as a prerequisite to her attending an occupational health assessment, and gently reminding her that she had a contractual duty to submit to reasonable requests for medical information and investigation.

87. A further appointment with occupational health was arranged for January 2019. The claimant did not attend that appointment either. The respondent therefore wrote to the claimant to inform her that her lack of cooperation caused it some difficulty because it was unable to get medical input into the grievance and the trust and confidence investigation. It would therefore be proceeding with the grievance without the benefit of medical advice.

88. Mark Wightman, Director of Strategy and Communications, was appointed to hear the claimant's grievance and wrote to her on 24 January inviting her to a grievance meeting on 5 February 2019.

89. The grievance meeting took place on 5 February. Mr Wightman was accompanied by Michelle Robinson from HR, and the claimant was accompanied by Clinnie Ngo-Pondi from the HCSA trade union. During the meeting the claimant said that she thought the trust and confidence investigation should not go ahead because of the process, the fact that Mr Furlong was involved, and because there were no grounds for the investigation.

90. Mr Wightman wrote to the claimant after the grievance meeting enclosing the minutes of the meeting and requesting further information. He asked her whether there were any medical or other reports she wishes to submit, whether she wanted to be seen by Occupational Health, what adjustments she thought needed to be made, and whether there was anyone else she would like him to speak to as part of his grievance investigation.

91. The claimant's trade union replied on her behalf, indicating that the claimant was willing to be seen by Occupational Health. There was however some delay in obtaining a report from Occupational Health. This delay was due to the claimant deferring her initial appointment and delaying in providing her consent to the release of the report. A report was produced by Occupational Health on 30 April 2019 and released to the respondent with the claimant's consent on 31 May. Occupational Health subsequently provided, in July 2019, a review and summary of their involvement in the claimant's case.

92. On 30 July 2019 Mark Wrightman wrote to the claimant to inform her of his decision on her grievance. One of the issues raised by the claimant in her grievance was that by not allowing her to return to work, and instead commencing the trust and confidence investigation, Mr Furlong had acted in an 'arbitrary, capricious and inequitable 'way towards the claimant. Mr Wightman concluded that there should be further investigation into this issue.

93. Mr Wightman told the claimant that Mr Furlong would play no further part in the trust and confidence investigation, and that the claimant's

complaint about Mr Furlong's decision to start the investigation would be further investigated. The Terms of Reference for the trust and confidence investigation were therefore amended to include an additional question:

"*Why was this investigation commenced? In commissioning it, is there evidence that the Medical Director acted "arbitrarily, capriciously and inequitably" towards GR?*"

94. The other points raised in the claimant's grievance were not upheld. The claimant's trade union wrote to Mr Wightman, after receiving the outcome, complaining about it, asking for Ms Tyler-Fantom also to be removed from any involvement in the trust and confidence investigation, and asking that the grievance be reinvestigated by an 'independent and external investigator'.

95. Mr Wightman wrote back to the trade union responding to the points raised in their letter, refuting their request for a fresh investigation which an external investigator because that "*would cause a great deal of further delay and cost to the Trust, which I do not believe could be justified*" and stating that the trust and confidence investigation would now proceed as previously advised.

96. In October 2019 the trade union escalated matters by writing to the Chief Executive of the Trust and the Chair of the Trust. The union complained again about the way in which the claimant had been treated and asked for a fresh investigation with a new and independent investigator, without any involvement of Ms Tyler-Fantom. The letter sent by the trade union concluded with the threat that:

"*This Association is not prepared to allow the Trust to ruin the career, self-confidence, and wellbeing of Dr Richardson by callous neglect and senior management antipathy. Unless swift action is taken to address the complaints, by commissioning of an external independent investigator, a review of the management of the exclusion from work, and plans put in place to refresh her clinical skills pending an outcome of her grievance complaint, it will be necessary to take this example of callous mis-management of an employee and the waste of NHS funds that this case has so far entailed to the relevant oversight bodies."*

97. The Trust's Chief Executive replied to the trade union's letter on 4 November 2019. In his response the Chief executive wrote that, having considered the points raised by the union, he had concluded that it would not be appropriate for him to intervene at this stage. There was an ongoing Trust process, and it was not his role to intervene and impose an alternative process.

98. The trust and confidence investigation was put on hold whilst the claimant's grievance was considered. Following the outcome of the grievance, Joanne Tyler-Fantom wrote to the claimant on 5 August asking her whether she would like to meet her and/ or to submit any further information. The claimant did not meet with Ms Tyler-Fantom and did not submit any information for consideration as part of her investigation.

99. Ms Tyler-Fantom carried out further investigation into the additional question that had been included in the Terms of Reference and having done so, produced her Investigation Report.

100. The Investigation Report was dated 21 October 2019 and is an extremely detailed and thorough document. The report itself runs to 36 pages, which are followed by 8 Appendices. In the report, Ms Taylor-Fantom set out the background to the investigation, explained her methodology, summarised the history of previous investigations and also the support that had been provided to the claimant over the years, and then set out in some detail her findings on each of the questions that she had been asked to investigate.

101. Ms Tyler Fantom's report included the following comments:

a. The consultants interviewed did not have confidence in the claimant and were concerned about patient safety;

b. The Trust had given the claimant a lot of support over the years, but this had been to no avail;

c. It would be difficult to reintegrate the claimant as they did not trust her;

d. Nurses and registrars avoided calling the claimant because they were scared of the responses that they would get from her;

e. One of the nurses interviewed used to hide from the claimant and not sleep the night before she had to work with the claimant;

f. HEE's view was that if the claimant were to return to work, HEE would expect the Trust to assure them that they would be monitoring her behaviour, and that she would not be supervising trainees until they had evidence that her past behaviours had changed for good;

g. There was a general question as to whether the claimant is suited to the role of an interventional cardiologist; and

h. There was no evidence that the claimant had been treated differently by the Medical Director, or that the decision to start the trust and confidence investigation was arbitrary or capricious. Rather, it was a response to serious written complaints and concerns raised by senior members of staff which could not be ignored.

102. Ms Tyler-Fantom's report was sent to Mr Wightman for his consideration. Mr Wightman formed the view, having considered the report, that the fairest and most appropriate way forward would be to convene a panel to consider it.

103. Mr Wightman wrote to the claimant on 8 November inviting her to a hearing to be conducted under the Trust's disciplinary policy and procedure on 23rd and 24th January 2020. Mr Wightman told the claimant who the panel would comprise, reminded her of her right to be represented at the hearing, and warned her that one possible outcome of the hearing could be the decision to dismiss her for some other substantial reason based on a breakdown in working relationships. The claimant was invited to send in any documentation that she wanted to be considered in advance of the hearing.

104. On 21 November Rob Quick, National Officer of the claimant's trade union HCSA wrote to Mr Wightman objecting the hearing dates in January 2020. The reasons he gave was that he was not available on those dates, and the dates gave the union insufficient time to prepare for the hearing. This is surprising, given that the respondent gave the claimant approximately 2 and a half months' advance notice of the hearing dates.

105. Mr Wightman agreed to postpone the hearing due to the unavailability of the claimant's trade union representative, and it was rearranged for 31 January and 4 February 2020. The claimant was also given an extension of time to submit documents for consideration.

106. On 21 January 2020, ten days before the hearing was due to take place, solicitors acting on behalf of the claimant sent a 'letter before claim' to the respondent. In the letter they accused the respondent of breaching the duty of trust and confidence by having made "*no attempt*" to follow the appeal panel recommendations. The solicitors also threatened to apply for injunctions restraining the Trust from dismissing the claimant and requiring it to implement the appeal panel's recommendations and asked for a postponement of the hearing.

107. Solicitors acting on behalf of the respondent replied to the claimant's solicitors responding to the issues that they had raised and refuting the allegations made. There was no evidence before me to suggest that the claimant's solicitors had followed through on the threats contained in their letter of 21 January. The day before the hearing was due to take place the union told the respondent that the claimant would not be attending.

108. The hearing began on 31 January 2020 before a panel of three people: Carolyn Fox, Chief Nurse and Chair of the Panel, Moira Durbridge, Director of Safety and Risk, and Wayne Lloyd, HR Lead. Roisin Ryan, HR Business Partner also attended and took notes of the meeting.

109. The claimant did not attend the hearing, but was represented by Rob Quick, National Officer of the HCSA. Ms Tyler-Fantom attended to present her report, and Mr Furlong was present as a witness.

110. At the start of the hearing Mr Quick raised some procedural points and applied for a postponement. He said that he had a chest infection. He explained that the claimant was not present because the

union felt she was not well enough to do so. He said that the claimant had been advised to see her GP.

111. In her evidence to the Tribunal the claimant accepted that she had not been certified by her GP as unfit to attend the hearing. She told the Tribunal that she had never said she was too ill to attend the hearing, but that Mr Quick had advised her not to attend because of his concerns about the risk to her health. She did not take medical advice at the time.

112. Ms Fox indicated that she was not willing to agree to a postponement because the issue had been ongoing for some time, and it was difficult to know when the claimant would be fit to attend. This was in effect the third attempt by the union to postpone the hearing, and it had already been postponed once.

113. Ms Fox asked Mr Quick if he was prepared to represent the claimant in her absence. Mr Quick replied that that was the reason he had made the journey to the meeting, but that he did not feel well enough to represent her effectively. After an adjournment, the hearing panel decided to adjourn the meeting until 4th February, to give Mr Quick time to recover and represent the claimant effectively. It was made clear to Mr Quick that the hearing would go ahead on 4th February, whether or not the claimant or Mr Quick were present.

114. At 5.03pm on 3rd February Mr Quick sent an email to the note taker Roisin Ryan asking for a further adjournment of the hearing. The main reason given was that, on the trade union's advice, the claimant was seeking an urgent psychiatric consultation. Other reasons were also mentioned in the email, including that the claimant had not had access to continuing professional development, should be allowed access to career counselling, that the hearing panel was, in the union's view, flawed because it did not include a medical practitioner and had not been convened under MHPS.

115. The hearing panel decided to proceed with the hearing. An hour before it was due to start, Mr Quick indicated that he would not be attending. The hearing went ahead without either the claimant or Mr Quick present.

116. At the hearing Ms Tyler-Fantom presented her report. Neither the claimant nor her representative had submitted any documents or representations for the hearing, and Ms Tyler-Fantom told the panel that. The claimant's evidence to the Tribunal was that it was the trade union's strategy not to submit any evidence or submissions to the hearing.

117. The panel asked a number of questions of Ms Tyler-Fantom and then asked to question Mr Furlong.

118. After the hearing on 4 February, the panel wrote to the claimant on 17 February 2020 asking her a number of questions that they would have asked her if she had attended the hearing. These questions were:

a. How she would propose working with staff who had made 'very candid comments' about her during the investigation in the future, and restoring their trust and confidence in her?

b. Whether there was any help that the Trust did not provide in the past which might have been helpful in ensuring the maintenance of positive relationships with her colleagues?

c. What she thought the Trust needed to do to support and assist her reintegration to the clinical team, and how this would be different from what had been tried in the past?

d. Why she had not fully engaged with the investigation and hearing process?

119. The claimant was asked to provide a response within seven days and to limit the response to each question to 250 words. A copy of the letter was also sent by email to Mr Quick. Mr Quick replied on 25 February raising a number of concerns about the process that had been followed. He wrote that the union did not recognize the concept of a trust and confidence hearing or the constitution of the panel, as it did not conform to MHPS. He complained about the 250 word restriction on answers to the questions raised but did not actually provide answers to those questions. He said that he would be happy to meet the Trust to try and agree a resolution.

120. The panel then considered what action to take. The panel concluded, in summary, that:

a. Key members of staff in the cardiology department had lost trust and confidence in the claimant to such an extent that it was difficult to see how this might be restored.

b. HEE's position remained that if the claimant were to return to work, they would only consider allowing her to work with trainees if the Trust could provide assurances about her future behaviour.

c. It was not feasible to successfully reintegrate the claimant into the cardiology department because key clinical colleagues no longer had trust and confidence in her.

d. The history of complaints against the claimant and the previous efforts that had been made to help her to function as a fully integrated member of the cardiology team could not be overlooked.

e. There was no evidence of Mr Furlong having a particular bias against the claimant or of the decision to investigate matters being arbitrary or capricious.

f. There had been a serious loss of trust and confidence in the claimant

121. The panel considered what action to take, including whether or not the recommendations set out in the decision of the appeal panel following the claimant's earlier dismissal could be implemented as an alternative to dismissal. It concluded that those recommendations added little or nothing to previous attempts that had been made to rebuild relationships between the claimant and her colleagues.

122. The panel took account of the very considerable cost, time and effort already invested in supporting the claimant. It concluded, with reluctance, that the correct course of action was to terminate the claimant's employment on the ground of an irretrievable breakdown in relationships and a loss of mutual trust and confidence.

123. The claimant was therefore dismissed for 'some other substantial reason' and given three months' notice of termination of her employment, expiring on 14 August 2020.

124. The panel's decision was set out in a detailed letter dated 15 May 2020, which also advised the claimant of her right of appeal.

125. On 20 May 2020 the claimant appealed against the decision to dismiss her. Her appeal took the form of a brief letter in which she said that "*A full statement of case will be submitted in due course.*".

126. On 27 May Hazel Wyton, the respondent's Director of Workforce and OD, wrote to the claimant acknowledging receipt of her appeal, asking when she would be sending in her statement of case and indicating that an appeal hearing would be arranged as soon as possible.

127. An initial statement of case was sent to the respondent by Mr Quick on the 3 June.

128. On 4 June 2020 Rebecca Brown, the acting Chief Executive of the Trust, wrote to the claimant inviting her to an appeal hearing on 2 July 2020 before an appeal panel of three people, including Ms Brown, Mr Kerr, the Director of Estates and Facilities & Reconfiguration, and Ms Wyton. In light of the Covid 19 pandemic and the fact that the country was in lockdown, it was proposed that the appeal hearing take place remotely via MS Teams.

129. Mr Quick wrote to the respondent again on 9 June acting a revised statement of case. He objected to the involvement of Ms Brown in the appeal panel and also objected to the hearing taking place via video link. The hearing was, he said, "*far too important*" to take place by video, and he could not "*permit such a travesty to take place.*" He asked for an external person to be appointed to the panel, and for more time to be allocated to it as he said that the claimant intended to call up to 7 witnesses. He also wrote that the trade union and the claimant had made a complaint to NHS Improvement about what he called "*corporate and individual bullying"* of the claimant.

130. Hazel Wyton replied to Mr Quick in a letter dated 17 June 2020. She asked Mr Quick for more information about his objection to Ms Brown forming part of the appeal panel and who the 7 witnesses were. She explained that an in-person hearing was not possible at the time, and that even courts and tribunals were using video hearings, so the claimant would not be disadvantaged by a video appeal hearing.

131. Mr Quick sent an email to Ms Wyton on 19 June in response to her letter. He continued to object to the involvement of both Ms Brown and Ms Wyton in the appeal process, and to object to the appeal hearing taking place by video.

132. On 25 June Ms Wyton wrote back to Mr Quick. She told Mr Quick that in light of the concerns about Ms Brown being involved in the appeal, the Trust would arrange for the acting Chief Operating Officer to take Ms Brown's place. She suggested, in light of Mr Quick's ongoing objection to a video hearing, that they look at dates for after 1 August 2020 when it was hoped that more normal working arrangements would have resumed.

133. The union replied indicating that they were happy for the appeal hearing to be arranged for August. On 21 July 2020 Ms Wyton wrote to Mr Quick setting a date of 23 September 2020 for the appeal hearing. This was the second date proposed by the respondent. The Acting Chief Operating Officer wrote to the claimant directly on 3 September 2020 confirming arrangements for the hearing on 23 September.

134. A management statement of case was prepared for the appeal hearing and circulated to the panel by Wayne Lloyd on 11 September. On 16 September the management statement of case was sent to Mr Quick. He replied the same day attaching the claimant's statement of case and confirming that he would send the respondent's statement of case to the claimant.

135. Shortly before the appeal hearing was due to take place, it was agreed between the parties that it would be postponed because other discussions were taking place with a view to resolving the dispute. Those discussions do not appear to have been successful, and another appeal hearing date was fixed for 22 January 2021.

136. That hearing (the third proposed date) was postponed by the respondent due to operational pressures on the Trust caused by Covid and the start of the third national lockdown.

137. A fourth date was arranged for 12 and 13 May 2021. That date was originally agreed by the union. On 20 April 2021 however Stuart Lythgoe of the HCSA wrote to the respondent informing them that Mr Quick had been taken ill and was unlikely to be well enough to represent the claimant on 12 and 13 May. Mr Lythgoe also raised concerns about the composition of the appeal panel, specifically that there was no external representative on the panel and no one with medical qualifications.

138. Mr Lythgoe asked for two of the three members of the panel to be removed and replaced with independent medically qualified panel members. He also asked for further information and for an undertaking by the Trust that "*no further attempt will be made by it…to influence the opinions of any and all panel members in advance of the appeal panel hearing…*"

139. Mr Lythgoe's letter was passed to Ms Brown, the Acting CEO of the Trust, who took legal advice on it. Having done so, she wrote back to Mr Lythgoe setting out her view that the appeal panel was appropriately constituted and the reasons for that view. She also expressed concern that changing the panel would cause further delay in the appeal process. She asked Mr Lythgoe to discuss her letter with the claimant and to let her know if the claimant still wanted one or more of the appeal panel members to be changed.

140. Mr Lythgoe replied on 6 May 2021, not to Ms Brown, but to the Interim Chair of the Trust. In this letter he raised concerns about all three proposed members of the appeal panel, asked a number of questions about them and accused the Trust of "*deliberately departing from a previously fair procedure*".

141. In light of this letter, the respondent postponed the appeal hearing. A letter was sent to Mr Lythgoe on 7 May 2021 which stated that "*…I note that it is your preference and that of Dr Richardson to postpone the appeal yet again even if this means further delay…"*

142. The fourth date set for the appeal hearing was therefore postponed due to the objections raised by the claimant's trade union about the composition of the appeal panel. On 17 June 2021 Mr Lythgoe wrote to the Trust thanking it for postponing the appeal hearing.

143. On 23 June 2021 solicitors acting on behalf of the respondent wrote to the claimant's solicitors seeking to agree a date for the appeal hearing. They informed the claimant's solicitors that the Trust would replace two members of the appeal panel with an independent chair from another NHS Trust, and with a legally qualified member, namely the Trust's Deputy Medical Director. It was suggested that the hearing take place on 1 and 8 October 2021.

144. There does not appear to have been any response to this letter until 12 September 2021 when Mr Lythgoe wrote directly to the respondent's solicitors. In his letter Mr Lythgoe objected to the Deputy Medical Director forming part of the appeal panel, because he was a member of Mr Furlong's team and had, Mr Lythgoe believed, had previously involvement in the claimant's case.

145. The dates of 1 and 8 October 2021 (the fifth dates proposed by the respondent) were cancelled in response to Mr Lythgoe's letter. In addition, by that time these Employment Tribunal proceedings were under way and the parties were considering judicial mediation.

146. On 22 September the respondent's solicitors wrote to the claimant's solicitors explaining that the appeal hearing dates had been cancelled and asking them to confirm that there was no longer a dispute about the constitution of the appeal panel. The HCSA replied on 24 September repeating its concerns about the Deputy Medical Director attending.

147. Over the course of the next few weeks there was correspondence between the parties about holiday pay, the maintenance of the claimant's medical license and the Employment Tribunal proceedings. In January 2022 Mr Lythgoe wrote to the new Chief Executive Officer of the Trust setting out a detailed complaint about the way that the claimant had been treated.

148. There continued to be a dispute about the composition of the appeal panel. In February 2022 the HCSA asked the CEO to intervene and remove the Deputy Medical Director from the panel.

149. An appeal hearing was eventually arranged for 21 and 22 July 2022. On 28 June 2022 the respondent wrote to the claimant notifying her that the appeal hearing would be taking place and of the members of the appeal panel. The respondent had changed the composition of the panel again, and the final panel comprised Clare Teeney, who had joined the respondent as Chief People Officer in June 2022, Lorraine Hooper, Chief Finance Officer, and Dr Suganya Sukumaran, Deputy Medical Director from Kettering General Hospital.

150. Mr Lythgoe replied to this letter on the claimant's behalf, confirming that he and the claimant would attend the appeal hearing, and would shortly be submitting a revised statement of case.

151. Members of the appeal panel were provided with a lengthy and detailed pack for the appeal, which ran to 288 pages. In addition, Mr Lythgoe submitted an appeal pack comprising almost 350 pages.

152. The panel considered the documents and interpreted the claimant's grounds of appeal as being:

a. The trust and confidence investigation was inappropriate;

b. The investigation should have been carried out under MHPS;

c. The investigation was flawed;

d. The procedure adopted by the panel that dismissed the claimant was unfair;

e. The claimant was being penalized for making a protected disclosure;

f. The claimant disputed the finding that HEE objected to her working with trainee doctors in 2020;

g. The outcome of the hearing was disputed; and

h. The recommendations of the previous appeal panel which reinstated the claimant had not been taken into account or acted on.

153. The appeal hearing took place over two days on 21 and 22 July 2022. The claimant was accompanied at the hearing by Stuart Lythgoe of the HCSA. The hearing was recorded, and a transcript was produced of the recording. The transcript runs to 40 pages.

154. It is clear from the evidence in the bundle that a great deal of discussion took place at the appeal, and that the claimant and her representative spent some time putting forward her case. They presented the panel with a great deal of evidence and arguments, including legal arguments.

155. The panel asked itself a number of questions, including:

a. Was the decision to initiate a trust and confidence investigation a reasonable one?

b. Was the investigation carried out fairly?

c. Had the trust and confidence hearing been dealt with in a fair manner?

d. Was the decision to dismiss a reasonable one, given the evidence before the panel?

156. The panel recognised that this was a difficult case with a long and complicated history. After the appeal hearing it considered its decision, and then wrote to the claimant on 5 August 2022 informing her of the decision.

157. The panel was not able to reach a unanimous decision, and instead reached a decision by majority. The majority of the appeal panel concluded that:

a. The decision to dismiss and the processes that preceded it were reasonable.

b. The Trust was not compelled to use MHPS.

c. Whilst more colleagues could have been interviewed during the trust and confidence investigation, the claimant had been provided with the opportunity to put forward witnesses and / or witness statements but had not done so.

d. The claimant and her union had been given the chance to make any points that they wished to during the original process but had chosen not to submit any evidence to the trust and confidence panel.

e. There had been consideration of the recommendations made by the previous appeal panel, which had been taken into account when deciding to proceed with the trust and confidence investigation.

f. There was insufficient evidence to support the claimant's allegation that the decision making was tainted by discrimination.

g. Despite the new evidence that had been submitted on the claimant's behalf at the appeal stage, there was still sufficient opinion within the cardiology department that was strongly against the reintegration of the claimant.

h. The original decision to dismiss was reasonable in all the circumstances.

158. The panel therefore decided, by a majority, not to uphold the claimant's appeal.

159. One of the issues that the claimant raised at the appeal stage and during the Tribunal hearing was that steps could have been taken to reintegrate her into the cardiology department.

160. Over the years that the claimant was employed by the respondent a number of steps had been taken to try and support the claimant at work and resolve the problems in the relationships between the claimant and her colleagues. These included:

a. Repeated referrals to occupational health to try and understand whether there was an underlying health problem.

b. Offering the claimant a mentor.

c. Fortnightly meetings between the claimant and Dr Hudson to provide the claimant with support.

d. Removing her from the on-call rota.

e. Reducing her PAs from 10 to 7 whilst keeping her on full pay.

f. Referring the claimant, at its cost, for a behavioural assessment by Dr Jenny King.

g. Referring the claimant for cognitive analytic therapy and a clinical psychology report, at the Trust's expense.

h. Reducing her job plan to 4 PAs a week whilst maintaining her full time salary.

i. Paying for therapy at the Tavistock Institute in London.

j. A 7.5 month secondment to Papworth hospital to reskill the claimant after a lengthy period of absence from work.

k. Allowing the claimant to cancel Cath lab sessions if no scrubbed assistant was available.

l. Engaging Claire McLaughlan to conduct an independent review of the cardiology team at the claimant's request.

m. An action plan prepared by Ms McLaughlan to sit alongside the behavioural agreement.

161. None of the steps taken by the respondent resolved the issues on a permanent or even a long term basis. There was no evidence before me to suggest that the claimant's behaviour at work was due to an underlying medical condition.

162. The claimant had been referred to occupational health on several occasions, with a view to establishing whether there was any underlying medical condition which was causing or contributing to her behaviour in the workplace and her difficulties in interacting with some of her colleagues.

163. In November 2007 Dr Anne de Bono, Consultant Occupational Physician, produced a report on the claimant in which she commented that the claimant did not appear to be suffering from any major health problem which might affect her ability to carry out her duties, but may be in a 'stressed state'.

164. In May 2008 Dr de Bono wrote again to the respondent saying that her contacts with the claimant over the past few months "*have not caused me to alter my initial assessment, namely that there is no evidence of any significant health problem…*" and that in her opinion there were no medical or health interventions which might be helpful. A similar opinion was sent to the respondent in September 2008.l

165. In June 2009 a behavioural assessment report was produced for the claimant by a Dr Jenny King. Dr King concluded that the claimant was a committed doctor who enjoyed treating patients, but who had continual underlying self-doubt and had become increasingly isolated from her colleagues. Dr King commented that the claimant tended to focus on herself and her needs, rather than the concerns and needs of other colleagues, and demonstrated a tendency to externalize blame for her difficulties. Dr King's comments ring true to the behaviour demonstrated by the claimant during the course of the Tribunal hearing, when she was very quick to blame and criticise others rather than take personal responsibility.

166. Dr King also observed that the claimant found it difficult to accommodate the needs of others and reacted poorly to conflict and pressure. In Dr King's opinion, the claimant's difficulties derive from complex and deep-seated behavioural patterns that are the result of her personality, some difficult life experiences and some learned and ingrained ways of working. Dr King also wrote that there was no indication of specific health problems, and that because the claimant's

interpersonal problems with colleagues extended back beyo9nd her current role, they were likely to continue.

167. In December 2009 Dr de Bono wrote to the respondent following a referral in November 2009, confirming her opinion that there was no underlying health problem or illness that had been identified.

168. In April 2010 a detailed report was obtained on the claimant from a clinical psychologist, Dr Janine Robinson. Dr Robinson concluded that the claimant did not meet the criteria for a formal diagnosis of Asperger Syndrome, and did not appear to be on the autistic spectrum. Rather, the difficulties that the claimant was experiencing were, in Dr Robinson's view, at personality level.

169. Further opinions were obtained from Dr de Bono over the following years. In her last letter about the claimant, in July 2019, Dr de Bono wrote that "*I have never found evidence that Dr Richardson has any underlying medical/health issue which would be incompatible with medical practice or work as a consultant in interventional cardiology…*

Work by Dr Jenny King…and the subsequent assessment…with a clinical psychologist did not identify any significant underlying health/psychological disorder which might be relevant to the difficulties which had occurred…

…there have undoubtedly been periods when Dr Richardson has suffered from 'stress'…but there has never been any evidence that Dr Richardson had any significant underlying mental ill health…"

The Law

170. In a case such as this one, where the respondent admits that it dismissed the claimant, the respondent must establish that the reason for the dismissal was one of the potentially fair reasons set out in section 98(1) or (2) of the Employment Rights Act 1996 ("**the ERA**").

171. Section 98(1) provides that:

"*In determining for the purposes of this Part whether the dismissal of …an employee is fair or unfair, it is for the employer to show – (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason I do not accept that a reasonable employer would as Mr Healy have suggested reinstated the claimant. Of a kind such as to justify the dismissal of an employee holding the position which the employee held.*"

172. Section 98(4) of the ERA states:

"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is

fair or unfair (having regard to the reason shown by the employer) –

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

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

173. Where an employer seeks to rely upon SOSR as the reason for dismissal, the reason relied upon must be such as to justify the dismissal holding the role that the claimant held. The reason must be substantial and genuine, not frivolous, or trivial. An employer is only required to show that the substantial reason for dismissal is a potentially fair one, it then falls to the Tribunal to decide whether the reason justifies the dismissal.

174. SOSR can include elements of conduct or capability, as demonstrated by the decision of the EAT in ***Huggins v Micrel Semiconductor (UK) Ltd EAT*** in which the EAT upheld a finding that a breakdown of trust and confidence caused or contributed to by an employee's conduct could be categorised as SOSR justifying a dismissal.

175. In ***Perkin***, a case involving the dismissal of a senior executive whose manner and attitude towards colleagues led to a breakdown in the employer's confidence in him and made it impossible for the senior team to work together, the Court of Appeal took the view that, whilst the Tribunal had not erred by finding that the dismissal was for conduct or SOSR, SOSR was the preferred reason for dismissal.

176. The dividing line between conduct or capability and SOSR can sometimes be very thin, and Tribunals should be wary of attempts to relabel conduct or capability issues as SOSR for the convenience of the employer. In some cases, however it may be appropriate for an employer to treat a loss of confidence in an employee's ability to perform their role as SOSR rather than capability.

177. What is clear from the case law is that a breakdown in working relationships can amount to SOSR and justify a dismissal. This was the case in ***Ezsias***, a case involving the dismissal of a consultant whose working relationships with his colleagues had broken down. In that case, an internal enquiry concluded that interpersonal issues prevented the running of a harmonious and efficient department and a number of senior members of the department wrote to the respondent's chief executive expressing their concerns. The respondent dismissed the consultant for a 'fundamental breakdown of trust and confidence' between the consultant and his colleagues, which it considered was largely due his actions. The dismissal for SOSR was found to be fair and upheld by the EAT.

178. Tribunals should however examine carefully cases in which the employer relies upon 'loss of trust and confidence' as the SOSR to justify the dismissal. In ***Leach*** the EAT cautioned against assuming that 'loss of trust and confidence' automatically justifies a dismissal and stressed the importance of identifying why the employer considered it impossible to continue to employ the employee. This conclusion was supported by the Court of Appeal.

179. There are conflicting authorities on the question of whether the ACAS Code of Practice applies to SOSR dismissals. In ***Hussain v Jurys Inns Group Ltd EAT 0283/13*** the EAT expressed the view that the ACAS Code should apply to a SOSR dismissal that was based upon a breakdown of mutual trust and confidence. In contrast, in ***Phoenix House Ltd v Stockman 2017 ICR 84*** the EAT held that the ACAS Code does not apply to SOSR dismissals based on a breakdown in the working relationship, although it accepted that parts of the Code should be applied.

180. The applicability or otherwise of the ACAS Code may depend on whether the procedure leading up to the dismissal was 'disciplinary' in nature.

181. Where a Tribunal finds that a claimant has been unfairly dismissed, the respondent can be ordered to pay a basic award and a compensatory award to the claimant. Sections 119 to 122 of the ERA contain the rules governing the calculation of a basic award and include, at section 122(2) the power to reduce a basic award to take account of contributory conduct on the part of a claimant: -

> "*Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly*. "

182. The rules on compensatory awards are set out in sections 123 and 124 of the ERA and include, at section 123(6) the following: -

> "*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding*."

183. The leading case on contributory conduct is ***Nelson v BBC (No.2) 1980 ICR 110*** in which the Court of Appeal held that, for a Tribunal to make a finding of contributory conduct, three factors must be present:-

a. There must be conduct which is culpable or blameworthy;
b. The conduct in question must have caused or contributed to the dismissal; and
c. It must be just and equitable to reduce the award by the proportion specified.

184. 'Culpable or blameworthy' conduct can include conduct which is 'perverse or foolish', 'bloody-minded' or merely 'unreasonable in all the circumstances' (Nelson v BBC (No.2))

185. In ***Polkey v AE Dayton Services Ltd 1988 ICR 142*** the House of Lords held that it is, in most cases, not open to an employer to argue where there are clear procedural failings, that following a different procedure would have made no difference to the outcome (i.e., the employee would still have been dismissed) and that accordingly the dismissal is fair. Their Lordships did however find that when deciding the amount of compensation to be awarded to an employee who has been unfairly dismissed, a deduction can be made if the Tribunal concludes that there is a chance that the employee would have been dismissed anyway had a fair procedure been followed.

Submissions

186. I have summarised below the oral and written submissions made by each party. To the extent that any issue mentioned by either party is not referred to below, that should not be taken as any indication that I have not considered the issue, but rather that the summary below is just that, a summary, rather than a repeat of the full submissions made by each representative.

Claimant

187. Mr Healy submitted on behalf of the claimant that there are only two legal questions in this case that are out of the ordinary: -

a. identifying the reason for dismissal and whether SOSR should be accepted as the true reason for dismissal; and

b. To what extent should the respondent be obliged to follow MHPS either as a matter of contract or as a matter of fairness under section 98(4) of the ERA?

188. In relation to the reason for the dismissal, Mr Healy submitted that the Tribunal should be wary of an employer abusing SOSR or using it as a fig leaf. He referred me to paragraph 58 of the judgement in ***Ezsias*** in which, he says, Mr Justice Kay reminds Employment Tribunals to be on the lookout for an employer using the rubric of SOSR as a pretext to conceal the real reason for dismissal. The Tribunal should not just accept the reason for dismissal put forward by the respondent without looking into it.

189. Mr Healy also submitted that trust and confidence should not be relied upon too easily as a reason for dismissal and that the Tribunal should consider the decision of ***Leach***, and in particular the comment that "*to justify dismissal the breakdown in trust and confidence must be a 'substantial reason'. Tribunals and courts must not dilute that requirement. 'Breakdown of trust' is not a mantra that can be mouthed*

whenever an employer is faced with difficulties in establishing a more conventional conduct reason for dismissal."

190. In cases where the employer can establish a breakdown of trust and confidence as the reason for dismissal, Mr Healy argues that the Tribunal should still have regard to how that situation came about and principles applicable to a conduct case may equally be relevant when considering the fairness of a dismissal for trust and confidence (***Tubbenden***). When dealing with a specialist doctor, the reason has to be particularly substantial and water tight to justify a dismissal which would end the claimant's career.

191. Mr Healy acknowledged that whilst an employer's disciplinary procedures should follow the principles of natural justice, breaches of such principles would not automatically render a dismissal unfair. He also accepted that there was no rule of law that unfairness in the procedure can be cured only by an appeal by way of a rehearing rather than a review. The Tribunal should, he said, examine the fairness of the disciplinary process as a whole, each case turning on its own facts. (***Taylor v OCS Group Ltd [2006] ICR 1602***).

192. Mr Healy submitted that the real reason for the claimant's dismissal was capability or, in the alternative, conduct. Nothing had changed since the claimant's dismissal in 2018 which was for conduct. There had been no return to work, so the claimant had not caused any new issues. The concerns raised by her colleagues were ones that had been raised previously and there was no new evidence.

193. The tribunal should, Mr Healy said, consider the size and administrative resources of the employer when deciding whether the dismissal falls within section 98(4)(a) of the ERA. If the Tribunal accepts that capability or conduct was the true reason for dismissal, the respondent should have followed MHPS in dismissing the claimant. That was not done, and that in itself renders the dismissal unfair.

194. If the cause of the loss of trust and confidence is conduct or capability, Mr Healy says that the tribunal can consider, when looking at the question of fairness, whether a conduct or capability procedure should have been followed. The key cause of the breakdown in relationships here, Mr Healy says, is that Mr Roberts and Mr Hudson did not believe that the claimant was performing a role that an interventional cardiologist should be doing and was therefore capability.

195. In the claimant's submissions, whatever the Tribunal's conclusion as to the reason for dismissal, the respondent acted unreasonably in treating the facts before it as sufficient reason for dismissing the claimant, bearing in mind the highly skilled nature of her work, her length of service and the likely consequences for the claimant's career. The procedure followed by the respondent was, he submitted, unfair and the dismissal falls outside the band of reasonable responses.

196. In particular, Mr Healy argued that:

a. A reasonable employer would have respected the decision of the previous appeal panel and reinstated the claimant;

b. It was unreasonable to proceed to a Trust and Confidence investigation. No reasonable employer would have done this without exploring all other options first;

c. The respondent should have considered a trial return to work, a facilitative meeting, mediation and the involvement of external organisations;

d. A reasonable employer would have followed MHPS;

e. The investigation was too narrow and insufficient colleagues were interviewed;

f. Interviewing only those who were likely to speak against the claimant demonstrated a closed mind;

g. The investigation ignored other sources of information such as appraisals;

h. Insufficient attempts were made to speak to the claimant during the investigation;

i. The respondent did not consider limiting the period of the claimant's exclusion from the workplace or keeping her up to date;

j. The evidence against the claimant was not robustly challenged and, had the evidence been challenged, a number of relevant issues would have come to light;

k. The investigation report unnecessarily and unfairly went into the history of the previous allegations, investigations and sanctions which was unfairly prejudicial, unnecessary and outside the scope of the terms of reference;

l. The panel did not properly consider the advice from HEE or seek to find a workaround; and

m. The approach to the claimant's grievance unduly delayed the Trust and Confidence investigation.

197. Mr Healy also submitted that the decision to dismiss fell outside the range of reasonable responses because:

a. The majority of interventional consultant cardiologists had not been approached for their views;

b. There was next to no evidence from junior colleagues;

c. There was no evidence that the alleged relationship breakdown was having a significant effect on service provision or patient care;

d. The colleagues who spoke against the claimant did not say that they would not work with her or would leave if she returned to work;

e. Most of the consultants' evidence related to historical issues, their own view on her abilities and whether she had the personality to perform the role;

f. There was no consideration of the draft action plan prepared by Mr Furlong;

g. There was no basis for the panel to conclude that the previous appeal panel did not know about previous attempts to resolve issues between the claimant and her colleagues; and

h. No consideration was given to alternatives to dismissal.

198. The procedure followed by the respondent also fell outside the range of reasonable responses, Mr Healy argues, because:

a. There was delay in arranging the Trust and Confidence panel;

b. The claimant's application to adjourn the hearing was pre-determined and it was unfair not to adjourn when neither the claimant nor her representative was present;

c. Insufficient time was taken at the hearing;

d. The panel failed to interrogate the management case or consider the evidence in detail;

e. Mr Furlong should not have been allowed to present the management case;

f. A 250 word limit was placed on written responses requested of the claimant;

g. There was delay in arranging the appeal panel, for which the claimant was not responsible;

h. The make-up of the panel was unreasonable and unfair;

i. The appeal panel took an unduly restrictive approach;

j. Insufficient time was allocated to the appeal; and

k. The appeal outcome letter was inadequate.

199. In relation to ***Polkey***, Mr Healy submitted that as everything had gone wrong at the start of the process, it would be impossible for the

Tribunal to decide what would have happened had a fair procedure been followed. Who could say what would have happened if the claimant had been able to sit down and discuss the situation with her colleagues? It is impossible to say when a dismissal would have occurred had a fair procedure been followed, or what the outcome of that procedure would have been.

Respondent

200. Ms Criddle invited the Tribunal to disregard the evidence of Mr Chattin and Professor Bu'Lock on the basis that it consists of opinion evidence. The evidence of Mr Lythgoe adds nothing to the evidence of the claimant, she says, as it relates solely to the arranging of the appeal.

201. Ms Criddle referred me to the case of ***Perkin*** in which the Court of Appeal held that the manifestation of an employee's personality can amount to SOSR, and that a breakdown in confidence between employer and employee for which the employee is responsible and which makes it impossible for senior colleagues to work together as a team, is a potentially fair reason for dismissal. She also referred to ***Ezsias*** as authority for the proposition that if an employee is dismissed because there is in fact a breakdown in working relationships, irrespective of whose fault the breakdown is, the dismissal can be for SOSR.

202. In paragraphs 49 and 50 of the judgment in ***Ezsias***, Ms Criddle submits, the EAT drew a distinction between a dismissal for behaviour which caused a breakdown in relationships (which may be a conduct issue), and the fact that relationships had broken down (irrespective of who has caused the breakdown) which could be SOSR.

203. The claimant's argument that where individuals say they can't work with the claimant because of their adverse views of her conduct and/or capability, the respondent must deal with the matter under MHPS is, in Ms Criddle's submission, wrong. The argument was, she says, considered in detail in ***Kerslake***, albeit in the context of an application for an injunction to restrain an NHS Trust from proceeding to a hearing to consider whether she should be dismissed for SOSR.

204. In ***Kerslake***, Ms Criddle submits, the Court held that:

a. It was not capricious, arbitrary or whimsical to commission an investigation report where there was evidence of a breakdown in working relationships. The Trust had a responsibility to the public to ensure that the clinical team worked harmoniously and safely. It was inappropriate to apply MHPS to an investigation of a possible breakdown in relationships based upon a perception of lack of capability.

b. The fact that the claimant's colleagues had an adverse view of her capability did not mean that the trust was acting because of concerns about capability. Rather, it was responding to the

separate and distinct matter of whether the breakdown in working relationships was irremediable.

c. MHPS did not apply given that the issue was one of trust and confidence, and there was therefore no obligation to follow an MHPS type procedure.

205. Ms Criddle referred me to paragraphs 12-34, 39, 45, 46, 53, 66, 67 77, 168, 169 and 217 of the judgment in ***Kerslake.***

206. Ms Criddle also submitted that this case can be distinguished from ***Smo*** which was, she says a very particular case on its facts, in that the investigation into the breakdown in working relationships started whilst there were ongoing disciplinary proceedings into allegations of conduct and capability.

207. The fact that a breakdown in working relationships stems from adverse views of capability or conduct does not oblige the respondent to adopt those views as its own and does not mean that it has done so. There is no express or implied contractual obligation to follow MHPS when dealing with a breakdown in working relationships. A decision to follow a reasonable process which is not in all respects identical to MHPS cannot be said to fall outside the band of reasonable responses.

208. The question of the reason for the dismissal is not, in Ms Criddle's submission, a difficult one. The claimant's argument to the contrary is misconceived. The respondent did not need to get to the bottom of who was right or wrong about the claimant, rather the focus of the Tribunal should be on what the respondent actually did. It is, Ms Criddle argues, abundantly clear that the respondent dismissed the claimant because of the breakdown in working relationships which was a potentially fair reason for dismissal.

209. Ms Criddle also submitted that the dismissal was substantively and procedurally fair. Mr Furlong had started work on getting the claimant back to work after the 2018 dismissal but was overtaken by events. The claimant had accepted in her evidence that Mr Furlong could not have ignored the concerns raised by her colleagues, that doctors must be able to work together to get the best outcome for patients, and that teams which do not work together our way potential risk to patient safety. The obligation to maintain good working relationships is a core obligation of doctors imposed by the GMC and the decision to Commission the trust and confidence investigation was therefore logical and reasonable.

210. In response to the claimant's suggestion that the respondent should have organised meetings for the claimant with colleagues who had raised concerns so that the claimant could explain to them how they were wrong, arranged a facilitated meeting, arranged for her to undertake CPD and audit activities, and/ or returned the claimant to work, Ms Criddle submitted that:

a. This was not the claimant's case during her employment with the respondent and the respondent should not be criticised for not taking steps that she did not suggest should be taken; and

b. None of these suggestions were feasible or reasonable.

211. In Ms Criddle's submission, the investigation report disclosed significant evidence of a breakdown in working relationship. The investigation should be judged by reference to the range of reasonable responses test. The purpose of the investigation was not to look at the number of people who were 'pro' or 'anti' the claimant, but rather to test the viability of working relationships in the context of team working. The claimant failed to provide any input into the selection of interviewees despite being given the opportunity to do so. This was a deliberate decision by the claimant on the advice of her trade union representative.

212. The alternatives to dismissal now being suggested by the claimant had not, in Ms Criddle's submission, been raised at the time. In any event:

a. A facilitated meeting or mediation was reasonably regarded as not realistic given the strength of feeling on both sides;

b. A referral to PPA was not relevant because the issues were not ones of capability; and

c. A secondment to another organisation had been tried before but had failed, was not reasonable and did not address the problem.

213. Ms Criddle argued that the claimant did not participate in the Trust and Confidence process until the appeal, and the case that she presented at that stage did not engage with the real issue, i.e. what could be done to mend the fractured working relationship. Rather it focused on the action plan and the alleged unfairness of the way in which the claimant was being treated.

214. In relation to the process followed by the respondent, Ms Criddle submitted that:

a. The respondent was not obliged to follow MHPS given that this was a case of a breakdown in working relationships. MHPS is only concerned with conduct, capability and ill health cases;

b. It was not out with the range of reasonable responses not to follow MHPS;

c. MHPS is not the only way to achieve a fair process;

d. The claimant was given the opportunity to participate in the investigation but chose not to;

e. It was reasonable for the respondent not to postpone the disciplinary hearing, given that there had already been an

adjournment of the hearing at the claimant's request, the claimant's evidence was that she was not too ill to attend, and that her non-attendance was part of her trade union representative's strategy;

f. There was no requirement for a re-hearing at appeal stage – and in any event the appeal panel did consider the claimant's new evidence; and

g. The delay in arranging the appeal was largely caused by the claimant's union representative taking a legalistic and unrealistic approach to the composition of an appeal panel, and there was no unfairness to the claimant as a result of the delay.

215. In relation to ***Polkey*** Ms Criddle submitted that the claimant would inevitably have been dismissed within a short period of time because any attempt to get her back to work was doomed to fail, given the very significant history of difficulties in the claimant's working relationships which targeted interventions had failed to improve.

Conclusions

216. I have reached the following conclusions having carefully considered all of the evidence before me and the legal principles summarised above and in the submissions of the parties.

Reason for dismissal

217. I am satisfied, on the evidence before me, that the claimant was dismissed because working relationships between her and her senior colleagues within the cardiology team had broken down. The panel that dismissed the claimant concluded, with good reason based on the content of the trust and confidence investigation report, that relationships had irretrievably broken down and that the claimant could not be reintegrated into the department. This led to a loss of the mutual trust and confidence that is a fundamental term of every contract of employment.

218. The reason for the claimant's dismissal is clear from the letter of dismissal, the evidence of Mr Lloyd, and the contents of the trust and confidence investigation report. There was an abundance of evidence before me indicating that relationships had broken down, and I accept that evidence.

219. It matters not who is to blame for the breakdown, what matters is that by the time the claimant was dismissed, the relationship between her and four of her senior colleagues, including the current and two previous Heads of Service had broken down and the respondent concluded that it could not be mended.

220. Given the strength of feeling expressed not just by four consultants who worked with the claimant, but also by the two nurses who came forward and were interviewed during the investigation, and given also the history of difficult working relationships and repeated

complaints about the claimant, including from those who were external to the respondent, such as HEE, it was not, in my view, unreasonable for the respondent to conclude that there had been an irretrievable breakdown in working relationships.

221. A dismissal for a breakdown in working relationships can be a dismissal for SOSR, and I find that in this case it was.

222. The claimant's role as an interventional cardiology consultant required her to work closely with her colleagues as part of a team. This involved working not just with other consultants, but also with junior doctors, nursing and other staff. As Mr Furlong commented in his evidence, 'medicine is a team game'. It was clear from the GMC guidance, from the long history of complaints about the claimant, and the evidence gathered as part of the trust and confidence investigation, that having the trust and confidence of colleagues, and an ability to work with them, was fundamental to the claimant's role.

223. SOSR was not, in my view, a pretext or a fig leaf designed to conceal the real reason for the dismissal. It is clear from the Terms of Reference for the trust and confidence investigation that the respondent, having taken legal advice, had concluded that the real issue here was a breakdown in the working relationships between the claimant and some of her colleagues, and that the investigation was not going to consider issues of conduct and capability.

224. I am satisfied on the evidence before me that the reason for dismissing the claimant was substantial and genuine and was not frivolous or trivial. This seems to me to be a case which is similar to ***Perkin*** in that the claimant's manner and attitude towards colleagues led to a breakdown in the employer's confidence in her and made it impossible for her to work within her consultant colleagues in cardiology.

225. I do not accept Mr Healy's eloquent submission that the real reason for the claimant's dismissal was capability or, in the alternative, conduct. The trust and confidence investigation was not looking at matters that had already been investigated. There had been a material change since the claimant's dismissal in 2018 and subsequent reinstatement on appeal. Senior consultants within the cardiology department had, for the first time, told the respondent that they no longer had trust and confidence in the claimant and did not believe she could be reintegrated into the department. They were no longer willing to work with the claimant.

226. Mr Healy suggested that the real cause of the breakdown in relationships was Mr Roberts and Mr Hudson's belief that the claimant was not performing properly. I do not accept that submission. I find that Mr Roberts and Mr Hudson were genuinely concerned about the impact of the claimant's behaviour at work on the rest of their department. This is particularly so given that Mr Hudson used to be a supporter of the claimant.

227. The respondent has therefore discharged its burden and established a potentially fair reason for dismissal, namely some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held.

Fairness of the dismissal

Should the respondent have followed MHPS?

228. The respondent had used MHPS in the past when considering questions of the claimant's conduct, and there was no reason to believe that they would not have done so again on this occasion if they believed that the real issue for investigation was either conduct or capability.

229. There was no evidence before me to suggest that the respondent had deliberately tried to avoid using MHPS on this occasion with a view to depriving the claimant of the protections that it contains. Rather, I accept Mr Furlong's evidence that it was his decision, based on the nature of the concerns raised about the claimant and the legal and other advice that he obtained, that MHPS was not appropriate and that a trust and confidence investigation was the best route to follow.

230. The decision to commission a trust and confidence investigation rather than use the MHPS procedure was not one that the respondent took lightly. It was taken after careful consideration of the issues raised and having taken legal advice. There was no evidence before me to suggest that the respondent was motivated by anything other than proper considerations when deciding which procedure to use. The Trust had used the MHPS procedure before, and there was no reason to believe that it would not do so again if it considered it appropriate.

231. I have considered whether the respondent in this case attempted to relabel conduct or capability issues as SOSR for its own convenience, and to avoid having to follow MHPS. I find on the evidence before me that it did not. The respondent had followed MHPS in the past with the claimant and had Mr Furlong genuinely thought that the concerns that were brought to his attention were ones of conduct or capability, I believe that MHPS would have been followed. Mr Furlong was clear, in the Terms of Reference for the trust and confidence investigation, that the investigation was not to consider matters of conduct or capability.

232. MHPS is designed to deal with cases of conduct, capability and ill health. It is not designed to deal with issues of trust and confidence caused by a breakdown in working relationships. I therefore find that there was no breach of any implied or express term by the respondent when it chose not to follow MHPS in this case.

233. I accept Ms Criddle's submission that there is a distinction between conduct and capability and individuals saying they cannot work with an employee. Ms Criddle referred me to ***Kerslake*** in which the court held

that the fact that the claimant's colleagues had an adverse view of her capability did not mean that the Trust was taking action because of concerns about capability. MHPS does not apply where issues are ones of trust and confidence.

234. I find that it was entirely reasonable for the respondent to proceed with a trust and confidence investigation. The issues raised by the consultants were in my view ones which went to the heart of the working relationship. They were not ones that could be classified as ones of conduct or ones of capability.

The procedure followed by the respondent

235. The respondent does not have a specific procedure for use in trust and confidence cases and relied instead on its general Disciplinary Policy and Procedure. The procedure that it followed included:

a. An investigation, using an external investigator to carry out interviews;

b. The opportunity for the claimant to participate in the investigation, to submit evidence and to suggest witnesses to be interviewed;

c. Regular communication with the claimant and her trade union throughout the investigation, the grievance, the dismissal process and the appeal;

d. Putting the investigation on hold when the claimant raised a grievance about the investigation;

e. Sharing the Terms of Reference for the investigation with the claimant, so that she was aware of the issues, and amending those Terms to include matters raised in the grievance;

f. Sharing the investigation report with the claimant and her trade union;

g. Inviting the claimant to a trust and confidence hearing with a panel of three senior employees, who had not been involved in the investigation, to discuss the investigation report and possible sanctions;

h. Warning the claimant in advance of the trust and confidence hearing that a possible outcome of the meeting could be her dismissal;

i. Postponing the hearing and then delaying its start at the request of the claimant's trade union;

j. Inviting the claimant to answer questions put by the trust and confidence panel;

k. Informing the claimant in writing of the outcome of the trust and confidence panel and of her right to appeal;

l. Arranging an appeal by an independent appeal panel who had played no part in the investigation or the decision to dismiss;

m. Changing the composition of the appeal panel and postponing the appeal hearing at the request of the claimant's trade union;

n. An appeal hearing that lasted two days;

o. Allowing the claimant the opportunity to present a substantial amount of documentation and detailed submissions to the appeal hearing;

p. Informing the claimant in writing of the outcome of the appeal; and

q. Allowing the claimant to be represented throughout the process by her trade union.

236. I do not accept that a reasonable employer would have followed MHPS rather than the procedure adopted by the respondent. I accept the respondent's submissions that MHPS does not apply to trust and confidence investigations. The process that was followed by the employer in this case was, in my view, reasonable. There was an independent investigation, and the claimant had the opportunity to participate in that investigation. She was repeatedly invited to meet with the investigator but chose not to do so. She was also invited to submit evidence but chose not to do so. If the claimant had wanted the investigator to speak to other people, then she should have said so. It cannot be said that insufficient attempts were made to speak to the claimant during the investigation, multiple attempts were made but to no avail.

237. It was not unreasonable to ask Ms Tyler-Fantom, as a senior HR professional, to carry out the investigation, with the support of an external consultant Claire McLaughlan, who had worked with the respondent before.

238. The claimant had the opportunity to participate in the investigation but, having taken advice from her trade union, chose not to do so on their advice. Rather, the strategy adopted by the claimant and the trade union was not to recognise the trust and confidence investigation and hearing and therefore not to participate. The claimant now criticises the respondent for not interviewing more employees. I do not accept this as a valid criticism. She had the opportunity to suggest people for interview at the time of the investigation but chose not to.

239. The claimant therefore chose on the advice of her trade union not to engage in the investigation process. This was a deliberate strategy. In circumstances where an employee has chosen not to be involved in an investigation or indeed to attend or submit evidence or

representations to a hearing that could determine her future, as was the case here, it is very difficult for an individual then to criticise an employer for taking a decision on the evidence before it without the benefit of her input.

240. Mr Healy submitted that the investigation report unnecessarily and unfairly went into the history of the previous allegations against the claimant. Given that the Terms of Reference of the investigation included whether the relationship between the claimant and the respondent had broken down, it was in my view neither unfair nor unreasonable to set out the background to the case.

241. One of the notable features of this case is the number of investigations into the claimant's behaviour and the range and volume of complaints that have been made about her. Even an external body, HEE, had taken the most unusual step of telling the respondent that no trainees whatsoever should work with the claimant, and had threatened to withdraw all of their trainees from the cardiology department if the respondent did not agree to that.

242. The claimant, on the advice of her trade union, chose not to attend the trust and confidence hearing that resulted in her dismissal. She was not certified as unfit to attend due to ill health and had not even consulted her GP or any other medical professional about her fitness to attend. Rather, she chose not to attend, as part of the trade union's strategy of non-attendance and non-participation.

243. The respondent took steps to ensure that both the claimant and her representative could be present at the trust and confidence hearing. As the claimant admitted in her evidence, it was a deliberate strategy not to participate in the investigation or the hearing. That was, with hindsight, an unfortunate strategy for the trade union to adopt, as it resulted in the claimant's dismissal without the claimant, or her representative having been involved in the investigation or the decision-making process. This was however through no fault of the respondent, which took considerable steps to encourage the claimant and her representatives to be involved.

244. One of the complaints of procedural unfairness made by the claimant is that the trust and confidence panel, when it wrote to her after the hearing that she did not attend to ask her questions, placed a 250 word limit on the answer to each question. I find this criticism surprising, given that the claimant chose not to answer the questions that had been asked. It is difficult to see how she was prejudiced by the word limit.

245. The claimant did participate in the trust and confidence process at the appeal stage, but the case that she presented at that stage did not engage with the real issue, namely what could be done to mend the broken working relationship. Instead, it focused on the alleged unfairness of the way in which the claimant was being treated, a theme that was pursued also (and understandably) at the Tribunal hearing.

246. The process that was followed by the respondent was in my view fair. The delays at the appeal stage were unfortunate but do not in themselves render the dismissal unfair. A substantial part of the delay was due to the claimant's trade union asking for postponements or for changes to the composition of the appeal panel. Some of the delay was due to the pressures on the respondent that were caused by the Covid 19 pandemic and by attempts by both parties to resolve their dispute amicably. Whilst a delay of two years is most unusual, in these circumstances it does not render the dismissal either procedurally or substantively unfair.

247. It is clear from the evidence before me that the claimant had every opportunity to put forward her case at the appeal. The appeal panel included, at her request, both an external member and a medically qualified member. Substantial documentation was submitted on behalf of the claimant and was considered by the appeal panel. It cannot be said that insufficient time was allocated to the appeal. Two whole days were set aside for the appeal hearing – that is longer than many Employment Tribunal hearings.

248. The fact that the panel reached a decision by majority shows in my view how carefully they considered the appeal and their decision, and that it was not an easy decision to make. Reaching a decision by majority does not however render that decision any less valid or cast doubt on the reason for dismissal or on the fairness of dismissal. Indeed, it is not uncommon in Employment Tribunal proceedings themselves for decisions to be made by majority. Such decisions are no less valid than ones made unanimously.

249. At every stage in the proceedings the claimant's representatives have raised objections and obstacles and sought delays. The claimant has participated willingly in this strategy. There were often delays in responding to communications, and the claimant did not attend occupational health assessments that were organised for her by Mr Furlong.

250. The approach taken by the claimant and her representatives was that anyone who had made a decision or been involved in something that they did not agree with should have no further involvement whatsoever in the process. Hence, they suggested that Mr Furlong should not have been allowed to present the management case at the trust and confidence hearing. Having heard the evidence of Mr Furlong I found him to be a credible and sympathetic witness. There was nothing in the evidence before me, including his detailed witness evidence, to suggest that he had behaved in any way inappropriately. The worst that he can be accused of is making a decision that the claimant did not like.

251. Looking at the process followed by the respondent as a whole, I find that it was a fair and reasonable one with considerable procedural safeguards for the claimant.

Was the dismissal substantively fair

252. One of the striking features of this case was that the claimant and her trade union were very quick to criticise the respondent, but took no responsibility for their own actions, and did not appear to accept that the claimant had played any part in the breakdown of working relationships. There was no recognition on their part of any wrongdoing on the part of the claimant, despite the clear findings of several investigations.

253. For example, the claimant criticised the respondent for not taking more steps to facilitate her return to work, yet the claimant's representative delayed matters by repeatedly failing to respond to attempts by HR to arrange a meeting to discuss the return.

254. It was apparent from the claimant's answers to questions in cross examination that she is extremely critical of the respondent. On many occasions, rather than answering the question that had been put to her, she replied with criticisms of the respondent which suited her narrative. Whilst that, in itself, is not entirely unusual in Employment Tribunal proceedings, in this case it was an indication of the strength of the claimant's feelings towards the respondent and her colleagues.

255. The claimant appeared to show no consideration for the feelings of others, and very little recognition of the impact that her behaviours had on her colleagues. She was focused very much on herself and appeared to dismiss the concerns raised by a number of colleagues who had worked with her for years, including those raised by Dr Hudson, who had previously been a supporter of hers.

256. In these circumstances, it is difficult to see how the working relationship between the parties could have continued.

257. This case is, in my view, similar to that of ***Ezsias*** which also involved the dismissal of a consultant whose working relationships with colleagues had broken down. In that case where the employer concluded that interpersonal issues prevented the running of a harmonious and efficient department the dismissal of the claimant for a fundamental breakdown of trust and confidence was held to be fair.

258. There was a plethora of evidence before the respondent which demonstrated that the relationships between the claimant and her colleagues had broken down. It is not in my view necessary for the respondent to establish that the relationship between the claimant and all of her colleagues had broken down, but rather that the overall relationship was no longer tenable.

259. I do not accept the submissions of Mr Healy that a reasonable employer would have respected the decision of the previous appeal panel and reinstated the claimant. Contrary to the assertions made by the trade union at the time, the respondent did take steps to reinstate the claimant following the previous appeal decision, including drawing up an action plan to get her back into work and trying to arrange a meeting with her. It was only after serious concerns were raised by a number of consultants in cardiology that these attempts were put on hold.

260. At the time the previous appeal panel made its decision, it did not know that four consultants and two nurses would complain to the respondent's Medical Director that they could no longer work with the claimant. The new concerns that were raised were a material change in circumstances. The respondent could not just ignore these complaints, as it has a duty not just towards the claimant, but towards other employees as well. The claimant did not appear to recognise this.

261. I accept the respondent's evidence that it did consider alternatives to dismissal but concluded that they were not workable. By the time it took the decision to dismiss in May 2020, the respondent had been through no less than nine investigations involving the claimant. A very substantial amount of time, effort and public money had been spent on supporting the claimant and seeking to help her to remain in employment. The claimant has shown no appreciation or recognition of this. Rather she complains, without justification in my view, of a culture of corporate and individual bullying. There was quite simply no evidence before me to suggest that the claimant had been bullied.

262. The claimant suggested at Tribunal that the respondent should have organised a facilitative meeting, mediation or the involvement of external organisations. Many of the alternatives to dismissal which were suggested during the course of the Tribunal proceedings were not suggested at the time of the dismissal and the appeal. In any event, in cannot be said, in my view, that they were credible alternatives to dismissal. It was not unfair or unreasonable of the respondent not to take those steps, given the many attempts that had been made over the years to enable the claimant to remain in employment. The previous steps had all been unsuccessful in finding a permanent solution to the claimant's difficulties in working with colleagues.

263. Mr Healy suggested that the majority of cardiologists had not been approached for their views and there was limited evidence from junior colleagues. This does not in my view render the dismissal unfair. The fact that some colleagues may have been willing to work with the claimant does not detract from the fact that all those interviewed during the investigation said that working relationships had broken down and that the claimant could not be successfully reintegrated to the department. All of those interviewed expressed serious concerns about the claimant. The claimant had the opportunity to submit her own evidence, but did not do so until the appeal stage, and even when she did that did not change the outcome. The respondent must be judged on the evidence before it at the time it took the decision to dismiss.

264. I accept Ms Criddle's argument that the dismissal was both procedurally and substantively fair. The respondent did not need to get to the bottom of who was right or wrong about the claimant and the breakdown in working relationships, rather the focus should be on what the respondent actually did.

265. Whilst no one can fail to have sympathy with the difficult position in which the claimant finds herself, it cannot be said in this case that the dismissal was unfair. The respondent had over many years taken considerable steps to support the claimant, but unfortunately those steps were not successful in enabling the claimant to work harmoniously with her colleagues.

266. The respondent had tried to understand the cause of the claimant's behaviour in the workplace by referring her not just to occupational health but also to Dr Jenny King and to a clinical psychologist. None of the medical professionals to whom she was referred could find any medical reason for her behaviour. Rather it appears that her behaviour at work was a result of her personality.

267. In light of the nature of the concerns raised by the claimant's colleagues, the steps that had been taken in the past to try and resolve issues, to no avail, and the lack of insight by the claimant into the impact of her behaviour, dismissal was in my view within the range of reasonable responses available to the respondent. The respondent had duties to other members of staff and to patients, as well as to the claimant. It is hardly surprising that in light of these the respondent ultimately concluded that dismissal was the appropriate sanction.

268. I am therefore satisfied that in the circumstances, including the size and administrative resources of the respondent, the respondent acted reasonably in treating SOSR as a sufficient reason for dismissing the claimant.

269. For these reasons I find the claimant was dismissed for some other substantial reason and that her dismissal was both procedurally and substantively. The unfair dismissal claim therefore fails and is dismissed.

270. In light of these conclusions, it is not necessary for me to consider questions of ***Polkey*** and contributory conduct. Had I been required to do so however I would have had no hesitation in finding that dismissal would have taken place had a different procedure been followed.

271. Even when the claimant did submit a substantial amount of evidence and submissions at the appeal hearing, this did not change the respondent's decision to dismiss her.

272. It would be far too speculative, based on the evidence before me, for me to conclude that the claimant would not have been dismissed had a different procedure been followed. She had been dismissed previously following an MHPS disciplinary investigation.

273. The claimant's relationship with her colleagues had broken down to such an extent, the claimant showed no willingness to change her behaviour, and previous attempts to resolve issues had failed. All of this leads me to conclude that the claimant would inevitably have been dismissed.

274. I would also have found that the claimant contributed substantially to her dismissal through her behaviour towards her colleagues, and her unwillingness to take any responsibility for the breakdown in relationships.

275. The claim fails and is dismissed.

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Employment Judge Ayre
23 November 2022

FOR THE TRIBUNAL OFFICE
Yahya Merzougui