



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/116150/11 Held at Aberdeen on 9, 10, 11 & 12, 29 & 30
September & 27 October 2014

Employment Judge: R G Christie
Members: Mr A W Bruce
Mr R C Bowden

Mr Warren J Cooper

CLAIMANT
Represented by:
Mr D Cameron -
Advocate
Instructed by:
Ellis Wallis –
Solicitor

Aberdeen City Council

RESPONDENT
Represented by:
Mrs F Selbie –
Solicitor
Instructed by:
Mrs A Donaldson

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the unanimous judgment of the Employment Tribunal that:

1. the claimant was unfairly dismissed by the respondent; and
2. no monetary award is payable by the respondent to the claimant.

REASONS

E.T.Z4(WR)

Introduction

1. A judgment to the effect that the claimant had been unfairly dismissed was first issued (without reasons) by the tribunal on 20 November 2014. At that time written reasons were reserved. These are now the written reasons in respect of which the employment judge would firstly wish to apologise for the considerable delay which has occurred in having these issued.

2. The complaint before the present employment tribunal was one of unfair dismissal. The fact of dismissal was admitted by the respondent but they pled that they had acted reasonably throughout the whole matter. The tribunal heard evidence firstly for the respondent from:

Jennifer Foster (Team Manager)
Ann Donaldson (Manager of Children's Services)
Fiona A Smith (Legal Services Support Officer)
Patricia Cassidy (Head of Communities, Culture & Sport)

3. The tribunal then heard evidence from the claimant himself. In addition, the parties brought together a very substantial bundle of documentary productions, (numbering over 900 pages) and we shall refer to these by page number with the prefix "p.". The Tribunal heard the case over some seven days.

4. The proceedings indeed had a lengthy history, having been raised as long ago as December 2011 after the claimant's dismissal on 29 September 2011. In the initial period there had been a lengthy wait to await the completion of an internal appeal process. Thereafter, and because the original claim contained a separate complaint of disability discrimination, there was a preliminary hearing on the issue of whether or not the claimant was a "disabled person" within the statutory definition. In due course an employment judge issued a judgment in May 2014 to the effect that in the claimant's circumstances he did not fall within that definition. Accordingly that complaint was dismissed. This left the proceedings with the remaining complaint of unfair dismissal with which this judgment is now concerned.

Facts

The tribunal found the following salient facts to be admitted or proved.

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5. The respondent is the local authority responsible for the provision of various public services for the City of Aberdeen. One of these is a social work service.

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6. The claimant was qualified as a social worker and was employed by the respondent in that capacity from 1 September 1999. His employment ended on 29 September 2011. During the period with which this tribunal was concerned, the claimant's work had been in the Children's Services section of the Social Work department since 2008. The Children's Service Manager was Ms Ann Donaldson.

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7. During late 2008, two matters arose in relation to the claimant's conduct which were thought worthy of investigation. In February 2009 an investigation report recommended disciplinary action in relation to these two matters. However, before such further procedure could take place the claimant fell into a long-term ill-health absence, the stated reason being a condition of stress. He was absent indeed until 7 June 2010 – a period of almost one year and three months.

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8. Eventually at the end of 2009 the respondent's occupational health service providers (Serco) recommended that the claimant had reached a stage of being able to deal with any disciplinary matters and after a disciplinary meeting was held in relation to these two matters, the claimant received a warning as to his conduct, this being transmitted to him by letter of 24 February 2010 (p.208). The warning was to remain on his personnel record for six months.

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9. On the claimant's subsequent return to work on 7 June 2010 (initially on a phased basis) he was assigned to work at "Deeside Family Resource Centre", situated in Torry, Aberdeen, under a line-manager Ms Susan Stewart, the team leader and Ms Lynne Mann, her team leader.

10. However, during the claimant's absence in 2009 a meeting of the Social Work Complaints Review Committee had taken place on 25 May 2009 to deal with a complaint by the mother (known to the tribunal as "DH") of a child ("RH") about the service provided by the Social Work department in connection with the support of her son, and in particular relating to the actions of the social worker in question, namely the claimant. The committee had resolved, *inter alia* (p.180):

"(i) that the report written by the social worker for submission to the Children's Panel in July 2008 was excessively detailed and lacking in analysis, as conceded by the representatives of the Social Work service at the meeting, and contained inappropriate terminology when referring to the relationship between the complainer and her son;

(iii) to express concern that, following the decision of the Children's Panel in July 2008 around which time responsibility for the complainer's son had passed from the Outreach Service to the Fieldwork Team, the outreach social worker appeared to have continued his involvement in the case by, according to the complainer, (1) independently continuing to pursue the option of placing the complainer's son at Merchiston School despite the Panel decision that he remain living at home, and (2) making unexpected and unwelcome contact with the complainer; and on the basis that the Social Work Service was not in a position to verify that this was the case or not, to recommend that this be further investigated."

11. For some years now, by legislative provisions, each local authority in Scotland has been required to have in operation an independent Social Work Complaints Review Committee ("CRC"). A person dissatisfied with some aspect of the service can apply to the CRC which has the power to examine the case and make findings or recommendations to the local authority to take such steps as the committee deems appropriate, such as that the conduct of a particular social worker be investigated. Local authorities feel obliged to follow such recommendations.

12. The recommendation of the CRC in relation to the claimant had become known to Ms Donaldson, the Children's Services Manager, during his absence. Successive reports during 2009 on the claimant's medical condition from the respondent's occupational health provider had recommended initially that he should not be involved meantime in meetings of a disciplinary nature. Accordingly Ms Donaldson, with a view to complying with that recommendation, decided she

had to wait until the claimant returned from his absence before raising the matter with him and arranging any appropriate investigation.

- 5 13. Just prior to the claimant's return to work on 7 June 2010, Mrs Donaldson held a "return to work" meeting with him on 3 June (p.226-228). It was decided he would be based at the Deeside Family Resource Centre, managed by Susan Stewart. She also advised him that the recommendation from the CRC meant that she would require to arrange for an investigation into his practice. The first investigation officer appointed by Mrs Donaldson became absent due to ill-health and she subsequently appointed Mrs Jennifer Foster, a team manager.
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14. Also at the return to work meeting various matters were discussed relating to how the claimant's work would be arranged and managed. Because of his diagnosis of dyslexia these matters included having a desk of his own in the open-plan working arrangement and the use of particular software as an aid. As regards
15 the latter, Mrs Donaldson acknowledged that it might require to be updated. However the claimant complained about the environment in which he was being asked to work and raised a grievance about what he considered to be necessary "reasonable adjustments" because of his dyslexia. Mrs Donaldson felt that in more than one respect the claimant's responses as to how his line managers
20 were proposing that the work be arranged was making the position difficult.
15. Between the claimant's resumption of work in June and early September Mrs Donaldson became aware of a number of further aspects of the claimant's
25 conduct which were causing concern to his line manager Susan Stewart and others with whom the claimant was working at "Deeside".
16. In addition, Mrs Donaldson became concerned about the number and content of e-mails which the claimant was sending to the respondent's HR Department
30 about work-related matters and which she considered ought to have been sent to her as Head of Department. In her letter to the claimant of 6 September she sought to respond to these e-mails (p.272).

17. Mrs Donaldson collated the various complaints about the claimant and concluded that they should be investigated, together with the matter which had arisen from the CRC. In a letter to the claimant of 16 September (p.308) Mrs Donaldson listed the various matters and confirmed what she had told him at a meeting the day before, namely that he would meantime be suspended. The list in her letter was as follows:

“1. [This contained the substance of the remit for examination from the CRC as set out above];

2. *“During the week commencing 23 August 2010 you failed to comply with a reasonable management instruction to carry out duties;*

3. *On 25 August 2010 hand-written minutes of a meeting involving you went missing from a desk which Susan Stewart was working at. It is alleged that that took these minutes as you wanted to amend them; (sic.)*

4. *On 8 September 2010 you deliberately misled your line manager, Susan Stewart, by telling her that a member of staff from ICT had attended the workplace to install new software knowing that they were there to review your computer hardware and software at the request of your trade union representative;*

5. *Your behaviour is causing concern to other members of staff and making them feel uneasy. On 9 September 2010 you returned your keys and fob and allegedly made comments to a member of staff indicating that you felt you were under suspicion;*

6. *Information was received on 9 September 2010 that you had been to Linksfield Annexe, found a torn up confidential SERCO report belonging to another member of staff which you removed and some days later sent it via internal mail to that member of staff;*

7. *During a meeting on 10 September 2010 you allegedly maliciously accused your line manager of giving you false information and going through your drawer without permission whilst allegedly behaving in a threatening manner;*

8. *Your alleged actions are in breach of several areas of the Scottish Social Services Council Code of Practice.”*

18. Mrs Donaldson then went on to explain the decision to place the claimant under suspension, by saying:

“ The decision to suspend you from duty was not taken lightly and was on the basis of the apparent nature and seriousness of the allegations. Your suspension is not to be regarded as a disciplinary sanction or as prejudicing the matter.....”

19. Ms Foster was then charged with the investigation of all of these matters in order to establish the facts and report. She wrote to the claimant on 23 September

2010 (p.315) reiterating the various allegations and explaining the process which she intended to follow. Between 20 September and 15 November she interviewed and obtained statements from nine different people, all as referred to hereafter. The particular details of all the evidence and statements obtained by her were as shown in her subsequent investigatory report which she produced on 23 November 2010 extending to some 61 pages (inclusive of statements taken) (p.345-406). She dealt in the report with each allegation in turn, a summary of each being as follows:

Allegation 1

This was the matter referred to by the social work services by the CRC (see above) and related back to matters in which the claimant had been involved in 2008. For this purpose Ms Foster interviewed Martina Swainson on 20 September. Ms Swainson had been the claimant's line manager at the relevant time. From her statement (p.372-376) Ms Foster learned *inter alia* (p.348) that:

"Aspects of RH's behaviour (i.e. the child who was the subject of the social work) had concerned her, and she understood why Warren (i.e. the claimant) had wanted to explore this further. However the manner in which he had set out his report had not been helpful, in that he recorded having asked RH if he was sexually attracted to his mother, and thus could understand why this then affected the working relationship with DH (i.e. the mother of RH).

.....she had been concerned that Warren had not maintained appropriate professional (sic) boundaries in his contact with DH. For example, he shared information about his personal faith and family circumstances with DH. Whilst the use of self is a recognised social work tool, Martina said she had on more than one occasion, cautioned Warren to maintain boundaries and avoid over sharing. It was her view that Warren found it difficult to do so in the face of DH's persistent questioning. Martina had not been comfortable with aspects of the information being shared, describing Warren as being 'too open'. This is reflected in the information provided by DH."

20. As regards the report which the claimant had prepared for the children's panel hearing in relation to the child RH, Ms Foster found that it was "rambling and very difficult to read". She felt that in the way it was written the claimant had been "trying to be academic".

21. From a statement taken on 9 November from DH (mother of RH) Ms Foster reported further (p.348) that the claimant was said to have:

5 “(DH shared his strong Christian views with her; that he told her that her difficulties were a direct consequence of her having ‘indulged in sex before marriage’ and spoke at length of how good sex was for him and his wife as they had ‘saved themselves’ for marriage.

10 (DH also alleged that the claimant had) told her she ‘needed a good Christian man’ and took her to a Church in John Street where he introduced her to a number of people.

15 (she further alleged that the claimant had) shared inappropriate information about his family circumstances. She says he told her about his wife, that he had a daughter but was hoping that his wife would become pregnant again, and that they would have a son. She says he made reference to going to Glasgow for a weekend during which he and his wife would try and get pregnant;

20 (and further that the claimant) shared inappropriate information about work colleagues. She said he told her about a colleague called Julie, who had lost a baby at full term, and essentially ‘had to give birth to a dead baby, whom she named Lucy’. She said this was shared after she had commented that she did not like Julie thus consequently she was left feeling guilty and upset.....”

22. After hearing this, Ms Foster checked with other persons and learned that the information about the claimant’s colleague, allegedly shared with DH, was in fact correct. Ms Foster felt that it was inappropriate for the claimant to have shared such personal information. Whilst she felt that on occasions DH had been “over-egging” her information, she had a “core of credibility”.

23. Ms Foster also interviewed and took a statement on 29 October 2010 from a Mr Alan Ross who was a Children’s Rights Officer (independent of the department) who had had an involvement with DH and the child RH. He advised Ms Foster that in his first contact with DH she had expressed concern with regard to the service received from social work and specifically in regard to the claimant. Both DH and RH had been concerned about the claimant’s recommendation that RH be placed in an independent boarding school in Edinburgh.

24. Ms Foster also interviewed a Ms Katherine Smith, a team manager also with an involvement in the RH case who confirmed that the claimant had been keen on a placement at the private school. Ms Foster also looked at contemporary case

notes (p.405) which seemed to her to confirm this beyond the point at which it had been determined that he would not go to the school. Ms Foster noted that the claimant had not informed the school that the placement was no longer required.

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25. A further aspect of the statement Ms Foster obtained from DH in relation to the other part of Allegation 1 (see p.352) showed that DH was also alleging that the claimant had been virtually “stalking her”. However Ms Foster did not find herself able to verify that aspect of the allegations.

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26. Ms Foster’s conclusion in relation to Allegation 1 (see p.368) was firstly that the report which the claimant had submitted to the children’s hearing “was *excessively detailed and lacking in analysis and the terminology used was inappropriate*”. The CRC of course had already resolved that that was the case.
15 She felt unable to accept the claimant’s assertion that no one had raised the issue with him at the time, nor his explanation that he was carrying out a “dual role” as both outreach and social worker.

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27. At the time of Ms Foster’s investigation and in discussing the matter with the claimant, the claimant had not been provided with a copy of the report itself which was a document that he had prepared some two years earlier. In addition, being under suspension, he no longer had access to the respondent’s computer system. As to its quality, the claimant advised Ms Foster that as he did not have access to it he could not answer whether it was “good enough”.

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28. She also found it established that the claimant had continued to pursue the option of placing the child at Merchiston School after the children’s panel had ruled that out. She found the claimant had not clearly advised DH of this nor recorded the fact properly. She felt therefore that those parts of the allegation should be
30 referred to a disciplinary hearing.

29. In relation to the claimant’s relations with DH and RH he said that he had stopped exploring the option of going to school at Merchiston after being advised by a manager that there was no longer to be such an option. He also told Ms Foster

that he had only called round to the family home once shortly after the second hearing at the Children's Panel and that DH had told him her son did not want to meet him. The claimant had claimed he had only occasionally seen RH thereafter in the passing.

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30. However, she did not feel that the other aspect of DH's allegations could be substantiated i.e. in relation to the stalking allegation.

Allegation 2

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As noted above, this was to the effect that the claimant had failed to comply with a reasonable management instruction to carry out duties. For the purpose of this matter Ms Foster interviewed Susan Stewart, the team leader, and Lynne Mann, her line manager (see p.377-385 and p.390-394). Ms Stewart was the claimant's supervisor whilst he worked at the Deeside Family Centre.

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31. Ms Foster learned that as part of the claimant's duties Ms Stewart had allocated to him the case of a child (PG) as had been agreed at the return to work meeting. What was required to provide adequate support for the child was that the claimant, as allocated social worker, should have frequent contact. Ms Stewart told Ms Foster that the claimant had accepted this but maintained that he could not undertake any work without "reasonable adjustments" first being made to the workplace. These related to getting a room of his own in the building and updated software. Ms Stewart was of the view that these factors did not prevent the claimant carrying out these duties which involved going out to meet the relevant family. As Ms Foster reported (p.353), Ms Stewart –

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".....said it literally had got to the point that every day she would ask him if he planned to start the work that day, and he always replied that he would not until the reasonable adjustments were in place. Susan checked her diary during this interview and confirmed the work had been allocated to Warren on 17 June.....Because he was not doing the one:one work that he agreed that he would do, Susan decided to try and provide alternative support for the child. She therefore instructed Warren to refer the child to a Nurture Group; she said she made it clear to him that this was necessary because he had not provided the child with a service. She said she told

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him he was not doing his job, and he replied by saying he could not do his job until reasonable adjustments were in place.”

5 32. Ms Foster learned that eventually when Ms Stewart realised that the claimant was not going to provide the service as required, the child was referred to Camphill (a different location). The claimant completed that task.

33. Ms Foster gained further information from Lynne Mann (reported at p.353) as follows:

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“Lynne referred to an incident about a month prior to this interview (i.e. the interview with Ms Foster on 1 October) when some children had been accommodated and then, the next morning, transported to Deeside to be looked after until alternative arrangements could be made. She said Warren had been given the clear task to look after the children’s physical needs only. However, without being given any direction to do so, Warren was observed to be making phone calls about the children, saying that as the children had ‘foreign names’ staff would ‘not be able to communicate with them’. Lynne said Warren was told to stop making such phone calls and he did stop.”

34. Ms Mann also told Ms Foster that she had begun to feel unhappy at the prospect of the claimant having any direct client contact –

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“Because of his behaviour, which she described as ‘paranoid’ and that before going on leave she had left “strict instructions that the other team managers should support Susan should Warren direct any unpleasant behaviour towards her/colleagues.”

30 35. Eventually, Ms Mann did not wish the claimant to see any clients on his own.

35 36. Ms Foster came to see that the claimant’s behaviour was making others anxious as to how he was treating other members of staff. She also learned that Ms Mann had instructed the claimant to provide feedback in relation to group work sessions and that although he eventually did so it was only after having to be given repeated instructions to comply.

37. When Ms Foster interviewed the claimant about these matters he denied having refused to undertake work with the specific child and that he had in fact provided feedback as regards group work.

5 38. Notwithstanding the claimant's denials, Ms Foster came to the view that Susan Stewart was more credible in relation to the circumstances as narrated by her. She was also consistent with other witnesses relating to this and other matters. She therefore included in her report about this allegation (p.368):

10 *"...it is my reasonable belief that Warren did fail to comply with reasonable management instructions in that he did not undertake work as directed with the child BG. Susan Stewart describes asking on a daily basis to undertake the agreed tasks. It is my view that this should be referred to a disciplinary hearing."*

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Allegation 3

39. As noted above this allegation is that the claimant took away Minutes of a meeting from a desk at which Susan Stewart was working and did so with a view to making amendments.

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40. In relation to this matter Ms Foster gained information from her interviews with Susan Stewart and from an interview with Shona King, a Team Manager. She learned that part of the procedure in relation to the claimant's return to work was for progress to be reviewed at monthly meetings. Ms Stewart had taken the Minutes. She had been working on these Minutes on 25 August but had required to leave her desk which was in the open plan working area. She found that when she returned the Minutes had disappeared.

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30 41. She also informed Ms Foster that her colleague Shona King, who had been working at an adjacent desk, told her that she had not removed them but that she had observed the claimant at her desk 'looking for a key'. Ms Stewart then assumed that the claimant had removed the notes but also asked all other members of staff if they had removed anything from her desk. Everyone, including the claimant, had denied all knowledge.

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42. When Ms Foster discussed this matter with the claimant he denied removing the Minutes from Ms Stewart's desk, but stated that she had instructed him to pass a key to a colleague. The key had been on her desk. Ms Stewart recorded (p.364) according to what the claimant told her:

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"When the colleague (Shona King) arrived to collect the key, he could not immediately find it and remembered lifting some paperwork that had been lying on Susan's desk; he said he then replaced the papers without looking at them as he had considered them to be none of his business. Shona King had then pointed to a key lying at the corner of the desk thus he had given it to her, after which they both left the room. He said he was unhappy the Minutes had gone missing as the content would have been helpful to him in terms of securing reasonable adjustments."

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- 15 43. In relation to this matter Ms Foster's finding (p.369) was as follows:

"In relation to allegation 3, it is my reasonable belief that Warren removed the Minutes of the meeting, given they were on the desk but then disappeared subsequent to his looking for something else. I recommend that this should be referred to a disciplinary hearing."

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Allegation 4

44. As noted above, this allegation amounts to a deliberate misleading of Ms Stewart by the claimant on 8 September regarding whether new software was to be installed on his computer or that merely a review was taking place in that regard.

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45. For her information in relation to this matter Ms Foster again heard from Susan Stewart and Ms Lynne Mann. The issue of the claimant's software was one of the matters demanded by him as "reasonable adjustments" and to his knowledge was being arranged through his trade union representative. Ms Foster learned that on the day computer staff attended at Deeside the claimant told her that the staff were present to install new software. This caused Ms Stewart to have to apologise to the ICT staff as new software, although ordered, had not arrived and they then left the building.

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46. She told Ms Foster however that she had subsequently checked an e-mail from the trade union representative which stated that the relevant staff had been

asked to be present merely “to review the existing software support”. Ms Stewart said that she strongly believed that the claimant had “*manipulated the situation to ensure she could not check/have awareness of what equipment he already had*” (p.355); and that this view was reinforced when she subsequently found some of the equipment with which he had been issued was still in its unopened packaging.

47. Ms Mann confirmed to Ms Foster that this had arisen from one of the return to work meetings, held on 19 August.

48. When Ms Foster discussed this matter with the claimant he alleged that the ICT worker had appeared without having a clear idea of what he was there for. He said he could not recall the detail of what he had said to Ms Stewart and also claimed that he did not know himself the purpose of the visit and had not sought deliberately to mislead her. He denied having said that the worker was there to install new software.

49. As an issue of credibility Ms Foster preferred the version of the facts as spoken to by Ms Stewart. She felt that the claimant must have known why the ICT worker was present on the day in question since it had been arranged specifically through his union representative, and that because of the clash between the claimant and Ms Stewart he had been deliberately unhelpful. Thus she concluded in her report on this matter (p.369):

“...it is my reasonable belief that Warren misled his line manager and that the wider context of ongoing disagreements suggests this was deliberate. It is my view that this should be referred to a disciplinary hearing.”

Allegation 5

50. As noted above this allegation was a more general one of “causing concern to other members of staff and making them feel uneasy”; with a specific reference to returning his keys and fob on 9 September and indicating that he felt he was under suspicion.

51. Information gained by Ms Foster in relation to this matter came from her interviews of Shona King, Susan Stewart, Nicola Bonner and Lynne Mann. She found that this matter concerned a number of different issues and events giving rise to other members of staff at Deeside being concerned about the claimant's behaviour. These included:

- Because it began to be observed that the claimant would leave Deeside for lengthy periods of time, with none of his colleagues knowing where he was at any particular time, it was agreed that he should be directed to be much clearer about his whereabouts while working. Ms Stewart had therefore directed him to leave clear information about where he was going and the purpose of his absence. It was then learned that the claimant had approached another member of staff asking that she witness him taking a pen from the stationery cupboard and that someone else witness him leaving the building, saying that he was doing so in order to report the behaviour of his colleagues to the Police since their behaviour *“indicated they did not trust him and that this constituted a breach of law”* (p.357).
- Shona King, a team manager, had attended Deeside to support Ms Stewart whom she observed had become quite stressed by the claimant's behaviour. One of the things Shona King had then learned was that an administrative worker in the building had commented that she expected the claimant to *“turn up one day and shoot them all”*. Whilst this was largely said in jest it was seen by Ms King as indicating the tensions felt by the claimant's colleagues.
- Ms Stewart told Ms Foster that the claimant spent a great deal of time writing to senior colleagues regarding what he saw as his difficulties in relation to “reasonable adjustments”. Ms Stewart had found these to be lengthy and complex and also that a colleague in staffing, who had received a number of such e-mails from the claimant, *“had become alarmed by the frequency and intensity of content, thus he had been directed not to send her any more”* (p.357).

- 5 • Ms Foster was also advised by Ms Stewart that after there was found to be some confusion relating to the claimant's leave entitlement he had alleged that his leave sheet had been "intercepted and altered" and that after she had explained to him that she had made an amendment to show a new entitlement, the claimant's response to her had been "*there was some kind of corporate conspiracy against him*".
- 10 • Ms Foster further learned that in relation to the alleged "conspiracy" the claimant spoke with strong feelings and "real hatred" about a Mr Gavin Ritchie (his previous line manager) and a Ms Sarah Stewart; and that he was maintaining that certain individuals were colluding with each other against him on the grounds that she (Susan Stewart) was "best friends" with Anne Donaldson and Lynne Mann.
- 15 • Ms Stewart also reported that she had been accused by the claimant of stealing the referral which the claimant had written in relation to the transfer of the child BG to Camphill, when in fact she had simply stored it in a filing cabinet. When the claimant had made this accusation Ms Stewart said she found his demeanour to be "quite stroppy" and that he had said that she "*knew more about the conspiracy than she was letting on*". Ms Stewart had found his demeanour quite threatening. He had indicated to her that he was to report the missing referral to the Police and also to tell them that he had been asked to maintain a log of his activities/movements.
- 20 • On one occasion after being instructed to record his activities/movements, the claimant had responded by handing in his fob key "*as he had been accused of being a spy*". This caused inconvenience for others as having always then to let him in to the building, but in the end of the day he asked for it to be returned to him and it was given.
- 25 • Ms Stewart went on to say that she felt the claimant had been "*deliberately trying to intimidate her by making the allegations about conspiracies*" and that she felt uneasy, causing her to report to Shona King, her line manager.
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- Ms Stewart further advised Ms Foster that “*other colleagues were becoming ‘increasingly wary’ of Warren due to his behaviour within the work place.*” (p.358).
- Ms Foster learned from Nicola Bonner that on one occasion she had been asked by the claimant “*to accompany him out of the building so he would be able to verify he had in fact left the building.*” (p.359).

52. When Ms Foster spoke to the claimant himself about these various matters she noted his response which in her subsequent report (at p.365) she summarised as follows:

“Warren acknowledged that in hindsight this may have been a consequence of him talking to colleagues about his experiences. He said he wondered if they became anxious that they too might be treated in a similar fashion. In providing more context to his answer, Warren also addressed the following allegation.”

53. The latter comment was in relation to Allegation 6 the details of which are shown below.

54. Ms Foster set out her conclusion in relation to this allegation later in her report (p.369) as follows:

“In relation to Allegation 5, I accept that behaviour can be open to interpretation and that this could ordinarily best be resolved by way of counselling support guidance. This would be an appropriate resolution if this allegation stood by itself, but set within the context of allegations two and four, it seems unlikely that this would in fact lead to any resolution. I reasonably believe therefore that Warren knowingly made comments to other members of staff that would lead to them feeling uneasy and this should therefore be referred to a disciplinary hearing.”

Allegation 6

55. As noted above, this was to the effect that on 9 September 2010 at Linksfield Annexe the claimant had found a torn up confidential SERCO report belonging to

another member of staff which he then removed and some days later sent it by e-mail to that member of staff.

56. Ms Foster's information in relation to this matter was gained through interviews and statements from Martina Swainson, Shona King and Susan Stewart. The essence of the matter was that Ms Swainson had been contacted by Sheena Burrows, a family support worker, expressing concern that a confidential SERCO report relating to her had been removed by the claimant from a filing cabinet used by Gavin Ritchie at the Linksfield Office. Ms Burrows had advised Ms Swainson that she had been contacted by the claimant to say that he had taken the report thinking it was his own. It was torn up but only sellotaped back together, he said, when he realised his error. The claimant had then asked Ms Burrows what she wanted him to do with the report and it was agreed he would return it to her via the internal mail system.

57. Shona King told Ms Foster that at the time in question (9 September) the claimant had not had any reason for being back at the Linksfield Office, which had been closed, and he should not still have had a key. She felt there would be no reason for him to have gone into a filing cabinet. This had been one of the reasons for the claimant being directed to be much clearer about his whereabouts and to leave clear information about where he was going if he was to leave the Deeside office, and for what purpose. He was to be absent.

58. When Ms Foster spoke to the claimant about this matter she was given a version to the effect that he had been back at the now vacant Linksfield Office to collect a stereo which he had left there, this being, he said, with the consent of Susan Stewart. He said that he looked into an open drawer in a filing cabinet and found confidential information concerning clients and, according to Ms Foster's summary (p.365):

".....a torn up SERCO report and assumed it was about him as he was unaware of anyone else having been off long-term. He said he put the SERCO report into his pocket and gathered up all the other material for safekeeping. He said the drawer had been labelled with words along the lines of "to be collected by Shona King" so he decided to go to the Williamson Family Centre, where he thought she was now based....."

Warren said he did not even look properly at the SERCO report until a few days later. He therefore acknowledged he removed a confidential report but offered the above information as context.”

5 59. However Ms Foster was also advised by Shona King, the team manager, that she and colleague had carefully checked the cabinets at Linksfield before the time at which the claimant claimed to have found the paper work. She told Ms Foster that she was confident that there had been no reports or supervision notes left behind, as the claimant had maintained.

10 60. In considering the evidence on this matter Ms Foster found that she could not see precisely how the claimant had come into possession of the confidential SERCO on Sheena Burrows. He had never denied taking it from Linksfield but explained that he thought at the time that it was about him. She felt however that
15 regardless of whatever else might have been in the premises he would have seen at once that the report did not concern him. He found the information given by the claimant to lack credibility and that his conduct was quite unacceptable. She therefore recommended that this matter also proceed to a disciplinary hearing.

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Allegation 7

61. This related to a meeting on 10 September during which the claimant was said to have “maliciously accused” Susan Stewart of giving him false information and
25 going through his drawer without permission, and allegedly behaving in a threatening manner.

62. The detail of this came to Ms Foster from a further interview with Susan Stewart on 29 October. She had then told Ms Foster that at the meeting the claimant had
30 accused her of going into his desk drawer and removing paperwork, and then announcing that he was going to the Police to report the matter.

63. The claimant denied to Ms Foster that he had made any malicious accusation but had merely pointed out to Ms Stewart that she had given him inaccurate
35 information concerning a case. He denied accusing her of going through his

desk drawer but acknowledged that she might have inferred that such an accusation was being made whilst he was speaking about the referral which he had written relating to the case going missing. He said the discussion with Ms Stewart had not been heated.

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64. However Ms Foster concluded (p.369):

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“That it is my reasonable belief that Warren did accuse Susan Stewart of giving him false information but that this act was not malicious. Many of the witnesses’ statements make reference to a kind of paranoia being evident in Warren’s conduct and this may well have contributed to a sense of his behaviour being perceived as threatening. It is my recommendation that the matter be referred to a disciplinary hearing.”

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[Note: This particular matter was subsequently dropped from the disciplinary process]

Allegation 8

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65. This is where it is said that these various aspects of the claimant’s behaviour constituted breaches of various parts of the Code of practice of the Scottish Social Services Council (“SSSC”).

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66. The SSSC is a statutory body having responsibility for the maintenance of standards and the regulation of the social work workforce. In order to practice in Scotland social workers require to register with the SSSC and may be subject to disciplinary action taken by it. In the event of a finding of misconduct the SSSC may remove a social worker from the register and so exclude him or her from employment in that field. As part of its function in maintaining standards, SSSC issued a Code of practice for social service workers, breach of which might result in disciplinary action being taken.

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67. In the present case, Mrs Donaldson in her letter to the claimant of 16 September 2010 had expressed this allegation in general terms. Having completed the investigation, Ms Foster felt able in her report to set out the specific parts of the SSSC code which she found to have been breached (p.369-370), including:

- That by failing to explain to DH that Merchiston School was no longer being considered, *“it seems entirely predictable given what was already known about DH’s anxiety, that she would conclude this option was still being pursued and that she would then lose trust in”* the claimant. Ms Foster found that this would amount to a breach of paragraph 2.1 of the code which requires that a social worker be “honest and trustworthy”.
- That by sharing confidential information about work colleagues *“it is not unreasonable that DH would then question whether [the claimant] could be trusted with information about her”*. Ms Foster found this to be a breach of paragraph 2.3 of the Code namely – *“respecting confidential information.....”*
- That taking the child RH shopping during working time was not in keeping with the claimant’s role and thus breached *“the expectation that employees will ‘honour work commitments, agreements and arrangements”*”. Ms Foster found this to be in breach of paragraph 2.5 of the Code i.e. *“honouring work commitment, agreements and arrangements.....”*.
- That discussions regarding personal faith and suggestions of current difficulties being a consequence of having indulged in sex before marriage amounted to a breach of paragraph 3.8 of the Code; i.e. the obligation to recognise and use power responsibly – *“the power that comes from your work with service users and carers”*.
- That the claimant’s sharing of information with DH relating to one of his colleagues’ experience of stillbirth amounted to breaches of paragraphs 2.1 and 2.3 of the Code (see above) and called into question the claimant’s ability to treat colleagues with respect, being a breach of paragraph 6.5 of the Code – i.e. *“working openly and co-operatively with colleagues and treating them with respect.”*

68. In her report (at p.370) Ms Foster expressed the view that:

“...these are serious breaches of the standards expected of an employee and social services worker and as such should be referred to a disciplinary hearing.”

69. Ms Foster's ultimate conclusion in relation to all of the allegations which she had found to be established was expressed at the end of her report (at p.370) as follows:-

5 *"I therefore conclude that Warren's actions constitute gross misconduct. I believe they have had the effect of damaging the working relationship between him and the Council, to the point of making trust and continued working relationship impossible."*

10 Disciplinary Hearing

70. In line with Ms Foster's recommendation a disciplinary hearing was scheduled for 10 February 2011. However, two days before that the respondents received an 8 page letter from the claimant (p.407-414) setting out what he described as "*an outline of my main grievances*". This contained some 54 itemised individual complaints extending back to 2003 and up to the date of his letter. He sought a suspension of the disciplinary hearing until the grievance was dealt with. This request was granted.

20 71. The grievance process was then dealt with, including an appeal by the claimant, and concluded eventually with a letter to him of 2 September advising that none of his grievances was upheld (p.479-481).

25 72. The disciplinary process was then revived and hearings conducted on 5, 19 and 28 September 2011 before Ms Patricia Cassidy, Head of Communities, Culture and Sport. She had had no previous connection with any matters relating to the claimant nor did she have any responsibilities pertaining to the social work department.

30 73. Ms Cassidy had written to the claimant on 26 August (p.473) explaining the process and setting out the various allegations again. In setting out allegation number 1 the letter had unintentionally omitted the part of that complaint which concerned "unwelcome contact".

74. At all three of these meetings the claimant was permitted to be accompanied and assisted by a Mr Parry from the Aberdeen University Law Project who spoke on his behalf.

5 75. Each of the allegations which had been addressed in Ms Fowler's investigation report was dealt with in detail. Ms Foster was present and gave particulars of her factual findings in relation to each allegation. The claimant was asked to, and did respond, along with his representative, to each allegation which was then discussed in detail. Notes of each of the three meetings were taken (p.493-517).
10 The process was a lengthy one.

76. Ms Cassidy then considered the evidence along with the claimant's responses and representations. She noted the findings which Ms Foster's investigation had made, but regarded her own purpose as being to determine each allegation
15 independently.

77. By letter of 8 October (p.530-538) Ms Cassidy issued her findings. After setting out the 8 allegations again she began by setting out her decision which was in the following terms (at p.531):

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"Having given full consideration to the issues that emerged during the course of the disciplinary hearing, I am writing to confirm my decision that you be dismissed in accordance with the Council's disciplinary procedure on the grounds of a breakdown of trust and confidence in you."

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78. The letter then set out Ms Cassidy's various reasons in relation to each individual allegation.

Allegation 1 – The referral from the Social Work Complaints Review Committee

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79. As noted above this concerned the content of a report written by the claimant in relation to the supervision of a child RH, the content of that report and the claimant's relations with and conduct towards RH and his mother DH. As regards the first part of that allegation the complaints review committee had found that the
35 claimant's report was excessively detailed, lacking in analysis and contained

inappropriate terminology when referring to the complainer and her son (i.e. DH and RH). Ms Cassidy did not accept the claimant's explanation that at the relevant time he had been performing a dual role and had been asking for reasonable adjustments in relation to his dyslexia. She found that he had written an acceptable report previously and that he was an experienced social worker. She found therefore that she had a reasonable belief that the report was indeed as stated in the allegation which she therefore upheld.

80. At the first instalment of the disciplinary hearing on 5 September when allegation number 1 was discussed, the claimant had still not seen a copy of the report which he had prepared in 2008 and which had formed part of that particular charge. After the point was made by the claimant, Ms Cassidy sent a copy of it to him by e-mail of 15 September (p.486). The claimant then requested a postponement of the second meeting scheduled for 19 September, but this was declined by Ms Cassidy who advised him (p.487):

"I appreciate that you are requesting more time to read the hearing report, however we dealt with that allegation at the first hearing on 5 September. Therefore there is no need to postpone.

The confidential hearing report was sent you with the permission of the Director of the Social Care and Wellbeing to address issues raised by you in the first part of the disciplinary hearing, namely that you had no recollection of the content of the report in question. I do not intend to revisit this having dealt with that allegation, but wanted to ensure that you had a copy of the report, as it appeared to be causing you some concern that you could not remember the detail.....

There has already been two weeks since the first part of this disciplinary hearing and I would be concerned about this becoming more protracted and the potential impact on your wellbeing. Due to other commitments, I have very little availability over the next couple of weeks and would be reluctant to delay this any further."

81. The second part of that allegation related to the claimant's conduct towards RH and DH, the detail of which is noted above.

82. In that regard Ms Cassidy found that it would have been expected of the claimant to reassure DH that a placement at Merchiston School was not available, but instead he advised that a place was still available.

83. As regards the last part of allegation 1 (unwelcome contact with the complainer DH), unintentionally omitted from the letter of 26 August, Ms Cassidy had felt that it required exploring. She was aware that Ms Foster had felt that that part could not necessarily be established, but Ms Cassidy felt that there had been a volume of evidence about the matter before the Social Work Complaints Review Committee. In any event it was discussed at the first disciplinary meeting on 5 September with the claimant responding to that part in some detail.

84. Ms Cassidy found that on the basis of the statements made by DH and the claimant's own acceptance of various contacts having indeed taken place, she found that he did continue to make contact, that his recollection of events contained inconsistencies and thus that he had indeed made "unexpected and unwelcome contact" with DH. Allegation 1 was therefore upheld.

Allegation 2 – Failure to comply with Management Instructions

85. Based on the evidence before her and after taking into account responses made by the claimant, Ms Cassidy found on the facts that she agreed with Ms Foster's finding that following repeated management requests to undertake a particular piece of work, the claimant had simply failed or refused to do so. She found that there was no adequate excuse for this failure to comply and she therefore upheld this allegation.

Allegation 3 – Removal of Written Minutes from the desk of Susan Stewart

86. Having regard to all the available information Ms Cassidy concluded that it was unlikely that anyone else had reason or opportunity to remove the notes from the claimant's line manager's desk and accordingly on balance she believed that he had done so. She therefore upheld the allegation to that extent, but found that she had not sufficient evidence to uphold the part of the allegation which alleged that the claimant's purpose had been to amend the notes.

Allegation 4 – Misleading Line Manager Stewart regarding ICT Installation

87. The detail of this allegation is set out above and Ms Cassidy noted that at the hearing the claimant had asserted that he was confused as to the purpose of the visit of the IT officer.

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88. However taking into account all other evidence available Ms Cassidy concluded that the claimant had been aware of the true situation as the visit had been arranged through his trade union representative and on balance he therefore believed that the claimant had deliberately misled his line manager. She upheld this allegation.

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Allegation 5 – Causing concern to other members of staff

89. Again the various details are set out above. In her letter of 6 October Ms Cassidy's finding was as follows:

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“Although, as everyone has agreed, behaviour is open to interpretation, several of your colleagues have stated that your behaviour caused concern and unease for other members of staff. For instance, in a witness statement a colleague cites the example of your asking her to witness you taking a pen from the stationery cupboard and that you indicated that you were going to report them to the Police. This caused such concern that a more senior manager came to the office to provide support. This constitutes unacceptable behaviour by an Aberdeen City Council employee. I uphold this allegation.”

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Allegation 6 – Removing confidential SERCO Report on another staff member

90. Ms Cassidy found that this allegation was essentially admitted by the claimant although he said he thought it had been his report. She found that the claimant also admitted that what he had done was wrong and she therefore upheld the allegation stating that it constituted a breach of trust and confidentiality.

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Allegation 7 – Maliciously accusing Line Manager of giving false information

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91. Having heard the circumstances of this matter and the claimant's responses she found that she could not uphold this allegation stating that she did not believe that the claimant's actions were malicious.

5 Allegation 8 – Breach of SSSC Code of Practice

92. As noted above this allegation consists of introducing the SSSC Code of Practice which is applicable to all social workers, and the applicability of its terms to the other various allegations. Having considered the matter and the whole evidence Ms Cassidy found that the claimant had:

10 “

- *Continued your involvement in the complainer's case following the transfer of the field work team and continued to make unwelcome contact;*
- *Shared confidential information about work colleagues and yourself inappropriately;*
- *Removed the confidential occupational health report belonging to a colleague and hand written minutes from your manager's desk; and*
- *Treated colleagues with a lack of respect and caused them alarm”.*

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20 93. Ms Cassidy commented that she would not expect any employee of the respondents, especially a qualified social worker, to share information and behave in that manner. She then set out the various parts of the SSSC Code of Practice which she considered to have been breached (p.537).

25 94. Ms Cassidy concluded that by taking allegations 1, 2, 4, 5, 6 and 8 together there had been a breakdown of trust and confidence in the claimant and confirmed her decision to dismiss. The claimant was to receive 12 weeks pay in lieu of notice. He was advised of his right to appeal.

30 The Appeal

95. Having been advised in Ms Cassidy's letter of 6 October 2011 of his right of appeal (at p.538), the claimant wrote on 25 October (p.541) to exercise that right

and elected (as was his right) to have it heard by the Appeals by Employees Committee. He said in that letter:

5 *“I would request an appeal as I believe that I was unfairly dismissed, the penalty being unduly severe and inconsistent.....”*

10 96. The Appeals Committee took the form of a sub-committee of the full Council consisting of 9 of the elected councillors. The appeal was determined eventually (and in an unusual way – see post.) on 19 April 2013, i.e. 1 year and 6 months later. The causes of this extra ordinary delay were various, but in brief the sequence was as follows.

15 97. The arrangements for and administration of the Appeal Committee hearings were carried out by Mrs Fiona Smith, a support officer in the respondent’s legal service. Her first communication with the claimant was by letter of 28 October (p.543) when she advised that the procedure required him to complete a Form 1 of appeal in order that he provide information on the grounds of the appeal and also what remedy he was seeking from the committee.

20 98. Although there were further communications by e-mail between them, by 5 December Mrs Smith had not received the claimant’s Form 1 and wrote him to ask if he still wished to proceed (p.552). She advised that if the form was not with her by 14 December she would seek to close the file.

25 99. The claimant advised her by e-mail of 12 December that he would not be in a position to lodge the form until the new year. She wrote again on 11 January to say that she would require it by 20 January. She then extended this again to 27 January 2012.

30 100. Mrs Smith received the form eventually on 27 January (p.564-607). It consisted of some 43 pages.

35 101. Mrs Smith’s intention originally had been to have a hearing of the appeal before Christmas 2011 but with the above sequence of events she sought then to hold it before the end of March 2012. However the volume of other cases already fixed

did not permit that. The difficulty was there were then to be council elections to be held on 3 May after which a new appeals committee would require to be formed.

5 102. Thereafter Mrs Smith sought to arrange a date for the hearing of the claimant's
appeal as soon as possible. However the claimant then provided a document
(p.627-630) setting out numerous areas whereby he said particular arrangements
would be required in order to provide "appropriate accommodations or
reasonable adjustments" in order to accommodate his dyslexia at such a hearing.
10 Mrs Smith then considered these various requests and drew up what she thought
might be required. However this met with no agreement from the claimant so that
it was decided to try to identify a professional, an education psychologist
recommended by the respondent's education service, who could advise as to
what adjustments would be appropriate.

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103. However the claimant did not agree with the individual who the council proposed
undertake the task and accordingly the claimant was invited to confirm the
adjustments which Mrs Smith had previously draw up. She wrote to that effect on
6 June 2012 (p.665). She accompanied this with a schedule which she had
20 drawn up (p.667-670) in which she set out her suggestions designed to meet
some 17 different requested "adjustments" called for by the claimant.

104. Mrs Smith did not receive a response from the claimant until August by which
time she had become very concerned that the appeal had remained outstanding
25 for so long. Frustrated by the lack of agreement on various matters from the
claimant, Mrs Smith decided to seek to avoid further delay by appointing an
independent educational psychologist to access and report on the claimant's
accessibility requirements. She identified him as a Mr Charles Gibb of the
Education Psychology Practice in Edinburgh with a view to his undertaking an
30 assessment. She hoped that this would be acceptable to the claimant (p.683-684
written on 20 September 2012).

105. The claimant's response to this suggestion was to lodge a freedom of information
request under the Data Protection Act for details of contractual arrangements

which the respondents had or may have with Mr Gibb. He also said he would not consent to the use of Mr Gibb and as an alternative suggested a Mr van Blerk.

- 5 106. In a further letter of 30 November 2012 to the claimant Mrs Smith recognised that
"it is now some 13 months since your appeal against dismissal was initially
submitted. I have been attempting to agree with your reasonable accessibility
arrangements since May 2012; however, as yet this has not been concluded. As
such, it is now imperative that this matter is resolved without further delay." She
went on to propose one of two options – firstly that Mr Gibb consent to an
10 assessment being carried out by Mrs Gibb; or secondly, that the accessibility
arrangements which she had set out in the earlier documents sent to the claimant
on 6 June simply be adopted.
- 15 107. In response the claimant sent an e-mail of 5 December advising that he had
"never been averse to option 2 of your letter"; but went on to ask for a meeting
to discuss the actual practicalities.
- 20 108. After various attempts then by Mrs Smith to arrange different times for the
claimant to meet (including one on 14 January 2013 where he simply did not turn
up) they eventually met on 21 January. They discussed the table of adjustments
and identified that six days would be required to hear the appeal, with the
committee hearing evidence for 2 hours on each day. Before that meeting
ended, and before the discussion could turn to the issue of the proposed
adjustments, the claimant asked if it could be postponed. Mrs Smith then agreed
25 with him to meet again on 28 January. Mrs Smith made a note of the contents
(p.731-734) attempting to note all the points made by the claimant.
- 30 109. Eventually dates were agreed whereby all parties would be free to attend. These
comprised 6 separate days between 15 and 26 April 2013 to sit each day
between 2 and 4pm.
110. As regards documents for the hearing, the respondent's normal procedure is for
these to be lodged at least 8 working days prior to the commencement of the
hearing. However at the claimant's request Mrs Smith allowed 4 weeks – i.e. no

later than 20 March. However the claimant then asked for an extension of time and she agreed to one of one week.

5 111. In the period then between 20 and 27 March the claimant sent Mrs Smith ninety-nine e-mails (see p.765-767), almost all of which had other documentation attached. In order to prepare the documentation for the appeal hearing Mrs Smith required to open and print all of that documentation. She found that it amounted to some 2,200 pages which she paginated and separated into 4 separate bundles of which she then required to produce some 15 copies and
10 have them delivered to the members of the committee. She found this a most onerous and time-consuming task.

112. On the first day of the appeal hearing (15 April 2013) the meeting was due to start at 2pm. However at 12.50pm that same day Mrs Smith received an e-mail
15 from the claimant advising that he had not been well and had been to see his G.P. that morning. He attached a "fit to work note" which he said meant that he could not attend before Friday 19 April which was the third scheduled day. Mrs Smith had no time available to cancel the members of the committee who, when they met, had no alternative but to adjourn until the following Friday (19 April).

20 113. On that date the claimant arrived late but eventually matters got under way. It was then, that the process took an unexpected turn.

25 114. The representative of the claimant's employing department, Mrs Selbie from the legal services department, advised the committee that she wished to raise a preliminary issue. She referred to the amended response form (Form 2) responding on behalf of the department to the claimant's Form 1, (p.862), and in particular to the additional ground which had been added and copied to the claimant on 17 April 2012, which had stated as follows:

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"6. The appellant, by his correspondence and actions, has demonstrated a lack of trust and confidence in the council which would preclude any continuing contract of employment. In these circumstances, reinstatement is not an option."

115. Although that statement in the amended Form 2 had been sent to the claimant on 17 April the year before, there had been no indication to him that this was to be taken as a preliminary issue with the consequence that, if the committee were to agree, the appeal could then be dismissed on the above grounds without the committee requiring to consider and determine whatever the merits or otherwise of Ms Cassidy's decision to dismiss might be.

116. The claimant was taken aback and unprepared for matters to be dealt with in this way.

117. A summary of the basis of this approached to be taken by the respondents at the appeal had been included also in the amended Form 2 (at p.869) as follows:

"27. The appellant has complained about his line manager, Susan Stewart; about his over manager Anne Donaldson; about the children's services manager Susan Devlin, about officers in human resources and legal services – all of whom he says were involved in bullying and harassment of him and were trying to get rid of him. He has raised numerous freedom of information and subject access requests, indicating that he does not think the employer has been open and candid with him in disclosing documents or information. He has made complaints to the information commissioner's office the documents have not been fully disclosed. He has raised mostly lately a grievance with the chief executive, asking that matters previously investigated should be reinvestigated by her, as the previous investigations were not impartial or properly carried out. The appellant has asked that no one in social care and wellbeing should consider any complaints or grievances made by him, as they are not impartial.

In all these circumstances, the appellant has clearly shown that he has no trust in the council as an employer, and thus employment within social care and wellbeing or any other service of the council would be impossible to implement. A basic level of trust and confidence must exist between employer and employee for there to be a possibility of employment. That does not exist in the appellant's case."

118. Mrs Selbie addressed the committee at some length on this matter and pointed to various pieces of correspondence said to support the proposition that, even if the appeal were to be successful on its merits, continued employment was not possible because of the claimant's view of his employers. Notes were taken throughout by Mrs Smith (p.837-853). In her submissions to the committee Mrs Selbie referred to 11 different sources where the claimant had made remarks or

used expressions relating to his line managers and others where he had been critical of them particularly in relation to Susan Stewart and Mrs Donaldson about whom he had also lodged a grievance.

5 119. In response, and in particular whilst responding to questions from the members of the committee, the claimant denied that he did not trust the council as a whole but did say that he could not feel able to go back to work under the same line management as he had at the Deeside Centre. He said, *inter alia*, that there were good people in the social work department and he trusted 80% of them. He maintained that with that qualification he could certainly return to work as a social worker and would not have "trust issues".

10 120. After these various exchanges, the committee, consisting on that day of six members, retired to consider the matter. Thereafter the hearing reconvened and a motion was made to accept the preliminary point which had been made and simply dismissed the appeal. An amendment was tabled to the effect that the preliminary point should be dismissed and that the committee should continue to hear the appeal. On a majority of four to two the committee accepted the preliminary point and dismissed the appeal. That ended the process.

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Submissions

Submissions for the Respondents

25 121. Mrs Selbie presented a comprehensive written note of her submissions and the tribunal is grateful to her in that regard. These narrate the details of the evidence at some length and, given our factual findings above, we can perhaps be forgiven for extracting only the main points which formed the skeleton of the submissions.

30 122. Firstly, as regards the investigation stage, Mrs Selbie submitted that the process had been fair and thorough and carried out by Ms Foster in a reasonable manner. Indeed the respondent's conduct throughout the disciplinary process was fair and reasonable.

123. It was further submitted that the disciplinary hearing was also conducted fairly. The claimant had had a full opportunity to be heard and the respondents had made adjustments in order to accommodate his stated difficulties.

5 124. The claimant had been given the opportunity to appeal, of which he had availed himself. The sanction of dismissing the appeal, and indeed the earlier decision of Ms Cassidy had been within the band of reasonable responses.

10 125. However, as a result of his own actions, the claimant had caused a complete breakdown of the trust and confidence required between an employer and employee. As a result of that breakdown in trust, the dismissal was for “some other substantial reason”, namely a terminal loss of trust (***Ezsias v. North Glamorgan NHS Trust*** [2011] UKEAT 0399/09).

15 126. In any event there had been a failure on the part of the claimant to mitigate his loss and indeed further he had contributed to a high extent by his own conduct to the decision to dismiss.

Submissions for the Claimant

20 127. The tribunal is also grateful to Mr Cameron for his helpful written outline of his submissions. Again we shall refer here to the main points only.

25 128. Mr Cameron referred firstly to section 98 of the Employment Rights Act 1996 (“ERA”) to the effect that the first matter to be considered was whether the respondents had established one of the stated potentially fair reasons for dismissal. He submitted that on the facts of the present case there was a significant degree of confusion and inconsistency on the respondent’s part surrounding the “reason” for the dismissal. Firstly, at the point of suspension Mrs
30 Donaldson had spoken of the claimant’s “breakdown in trust in management”.

129. At the stage of investigation the reason for the suspension appeared to have been converted into an issue of misconduct. There were ample references to

that throughout Ms Foster's investigation. This conflation of reasons remained a constant theme.

- 5 130. At the time of dismissal, although the disciplinary hearing bore the hallmarks of a misconduct process, the actual reason given by Ms Cassidy in the dismissal letter was "a breakdown of trust and confidence." It was submitted therefore that there was doubt about whether Ms Cassidy had any real clarity as to the reason why she dismissed the claimant.
- 10 131. Before this tribunal the respondent now presents the reason as being the claimant's loss of trust and confidence in the respondents (rather than the other way round). This was therefore a case of an employer using SOSR to cloak the true reasons for dismissing the claimant and this could not amount in the circumstances to a substantial reason sufficient to pass the test in section 98(1) or (2) of the ERA.
- 15 132. On looking beyond that aspect of the matter, and in relation to the reasonableness test under s.98(4), Mr Cameron submitted that there were a number of procedural flaws, occurring at each stage of the process. Firstly, it was submitted that the investigation stage suffered from Ms Foster not being experienced in dealing with such matters. She was unclear about the difference between misconduct and performance/capability.
- 20 133. Secondly, Ms Foster appeared to reach a concluded view on the matter herself, rather than simply saying whether there was "a case to answer". However this was compounded by her attendance throughout the disciplinary hearings thus producing a serious risk that Ms Cassidy would be influenced.
- 25 134. Most significantly at this stage, the claimant was never shown the report which formed part of the basis of allegation number 1. It can be seen that because of that the claimant was unable to answer all aspects of that matter.
- 30 135. In relation to allegation 3 ("the missing minutes"), Ms Foster had allowed the impression to proceed through to the disciplinary hearing that the claimant had

been “rifling” amongst papers on the desk of Susan Stewart, when, as cross-examination showed, she did not actually have any evidence from any other witness that that had been the case.

5 136. At the stage of the disciplinary hearing with Ms Cassidy, again, the claimant was not shown the report which underpinned the first part of allegation 1 until shortly before the day of the second part of the hearing, by which time it was too late because Ms Cassidy would not revisit the issue.

10 137. As regards the part of allegation 1 which dealt with inappropriate behaviour towards the child RH and his mother DH, Ms Foster had felt that because of the passage of time these allegations would probably not be established and should not be taken further. The issue was omitted from the invitational letter to the disciplinary hearing (p.475). However, Ms Cassidy chose to reopen the matter in
15 the course of her hearing.

138. As regards the appeal stage, Mr Cameron set out a number of criticisms. The first of these was what he described as “a fundamental failure by the respondent” in respect that in fact no substantive appeal was ever held whereby the claimant
20 was able to set out the grounds on which he disputed his dismissal. The committee had merely made an internal decision not to hear the appeal on its merits. This was fundamental in respect that the appeal was a right belonging to a dismissed employee. It was “their appeal” and it is fundamental for them to be allowed to say why the sanction was wrong.

25 139. In addition the claimant had had no prior warning that the issue about reinstatement would be taken as a preliminary point. He had thus been taken by surprise. In any event, it was not for the respondent’s management to state unilaterally that the claimant had lost trust and confidence – only the claimant
30 could speak to that. Further, the content of the documents to which the appeal committee was taken did not amount to sufficient evidence of there being a complete breakdown in relations, and certainly not with any of the other departments of the respondent’s organisation.

140. In addition, unlike an employment tribunal, it was not for the respondent itself to decide that reinstatement was not an option or that the appeal would have no purpose. The appeal committee had wrongly concentrated on an issue of remedy rather than on the merits of the dismissal.

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141. Under a heading of "Substantive Unfairness" Mr Cameron's written submission made various points in relation to each of the individual allegations of which the respondents had found the claimant guilty. In relation to these evidential points we refer to the written submissions themselves.

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Relevant Law

142. In any complaint of unfair dismissal to which section 98 of the ERA applies, and where the fact of dismissal is not disputed, the first task of an employment tribunal is to consider whether it has been satisfied by the employer that the reason for the decision to dismiss was one of the potentially fair reasons contained within section 98(1) and (2). These possible reasons are:

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- One related to the employee's conduct;
- One related to the employee's capability;
- Redundancy;
- One where continuation of the contract would be illegal; or
- Some other substantial reason justifying dismissal.

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143. The onus of establishing one or other of these reasons is upon the employer and if the burden is not discharged by them, then the tribunal must find the dismissal to have been unfair. What the employer requires to establish is that the reason which existed in his mind at the time he decided to dismiss was some set of facts or circumstances which fall within one of the categories set out above. From time to time an employer may make a mistake and attach the wrong label to the facts and circumstances known to him at the time of dismissal. An employment tribunal may require to make a distinction between these two, but to consider carefully whether such a mistake is genuine or whether it amounts to a deliberate

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attempt to conceal the true reason. (**Abernethy v. Mott, Hay & Anderson** [1974] ICR 323).

- 5 144. Care also requires to be exercised when the reason put forward by an employer at an employment tribunal hearing is that of "SOSR". As noted above that can on occasions be used to conceal some other inadmissible reason, but equally it can sometimes be put forward as being what was truly the *effect* of some other potentially fair reason.
- 10 145. However if that burden is discharged the next step is for the employment tribunal to consider whether in terms of section 98(4) ERA the employer has acted reasonably in treating the particular reason as sufficient to dismiss the employee having regard to the whole circumstances of the case including the size and administrative resources of the employer and matters of equity and the
- 15 substantial merits. This stage will encompass issues such as whether the employers had carried out a reasonable investigation into the circumstances such as to provide them with a genuine belief that the reason giving rise to the decision to dismiss was well-founded (**British Home Stores v. Burchell** [1978] IRLR 379).
- 20 146. In addition an employer will only be regarded as having dismissed fairly if he has carried out a fair procedure and if, looking at the matter objectively and without substituting their own view, the tribunal determines that the sanction of dismissal fell within the range of reasonable responses open to a reasonable employer, bearing in mind that one employer might reasonably take one view whilst another
- 25 quite reasonably take a different view (**Iceland Frozen Foods v. Jones** [1982] IRLR 439).

Conclusions

30 The Reason for Dismissal

147. As noted above the first matter to be addressed by the employment tribunal was as to whether they had been satisfied by the respondents and that the reason for the dismissal was one of the potentially fair reasons lying within sub-sections (1)

and (2) of s.98 of the ERA. In the majority of proceedings involving a complaint of unfair dismissal this question does not usually cause much difficulty. In her submissions Mrs Selbie said that the potentially qualifying reason was a substantial one of kind justifying dismissal (SOSR) because the respondents had lost trust and confidence in the claimant.

148. Firstly, it is not sufficient for an employer simply to assert that there was a substantial reason for deciding to dismiss. Part of the burden on the employers is to establish the factual basis by means of acceptable evidence.

149. Mr Cameron was right to raise this issue since on the basis of the respondent's position they did not seem to be stating it with complete clarity. As noted above, the correct approach for this tribunal was to identify what the facts and circumstances actually were in the mind of Ms Cassidy (who made the decision to dismiss) *at the time of dismissal*. The tribunal therefore analysed the subject matter of each of the various allegations against the claimant and, having applied the above approach, it became clear to the tribunal that all of the allegations levelled against the claimant related to his behaviour.

150. The one exception to that could be said to be the first part of Allegation no.1 which referred to the report written by the claimant for submission to the children's panel in 2008 as being "*excessively detailed and lacking in analysis.....*" (p.493). Plainly that has a reference to the *quality* of the report and thus the claimant's capability in writing it.

151. However, that same report was criticised also for "*inappropriate terminology when referring to the relationship between the complainer and her son*". That kind of thing then merges with elements of conduct; but more significantly in Allegation no.1 the other two parts plainly refer to the claimant's conduct i.e. that even after the decision of the children's panel the claimant continued with his involvement in the case by firstly, continuing to pursue an option of placing the child at Merchiston School and, secondly, making unexpected and unwelcome contact with the complainer. The detail of the content being referred to there is as set out by us above. These two matters were not concerned with the written report.

152. The remaining allegations plainly relate to the claimant's conduct. An analysis of the individual 'findings' made by Ms Cassidy in her outcome letter of 6 October 2011 (at p.535-537) shows more clearly the conclusions which she reached, namely:

- Continued involvement in the DH case following the transfer of the field work team and continuing to make unwelcome contact;
- Sharing confidential information about work colleagues inappropriately;
- Failing without good excuse to comply with reasonable management instructions;
- Removing a confidential occupational health report belonging to a colleague and minutes from a manager's desk; and
- Treating colleagues with a lack of respect and causing them alarm.

153. In bringing these together (at p.536) Ms Cassidy expressly stated that she "*would not expect an employee of Aberdeen City Council, especially a qualified social worker, to share information and behave in this manner*" (our emphasis).

154. She did slightly confuse matters by stating thereafter (at p.537) that she was "*of the view that taking allegations 1, 2, 4, 5, 6, 8 together, they amount to a breakdown of trust and confidence in you and accordingly hereby dismiss you from your employment at Aberdeen City Council.*"

155. To us, having analysed Ms Cassidy's whole findings and heard her evidence, the plain meaning is that she found the claimant's behaviour as demonstrated by these six remaining allegations had the effect of the Council losing trust and confidence in him as an employee. The whole cause of that therefore was the claimant's conduct.

156. When cross-examined in her evidence about the dismissal letter referring to "a breakdown of trust and confidence", Ms Cassidy explained that the reason for this was that she had been advised by the Council's HR Department that this

“took precedence over gross misconduct”. If that is correct, then we can only say that such advice is patently misconceived and indeed it is difficult to know what it means in the context of the claimant then presenting a complaint of unfair dismissal.

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157. In any event, Mr Cameron had submitted that that passage of evidence cast doubt on whether Ms Cassidy was deciding matters for herself and whether she had any clarity as to why she really was dismissing the claimant. However in our perception there was no real doubt in Ms Cassidy’s mind about what she found concerning the claimant’s behaviour.

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158. The question needed to be asked: “what was it that caused the loss of trust and confidence?” The answer patently was the claimant’s conduct, and accordingly that is the true reason for the dismissal and it is one which is potentially fair.

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159. Indeed employers generally would be well advised to avoid the use of the expression “loss of trust and confidence” where the underlying problem is an employee’s capability or conduct. It is liable to cause confusion in the context of complaints of unfair dismissal. It may be of course that if behaviour does have the *consequence* of an employer no longer having confidence that it will not continue or not be repeated, then it would be relevant to the issue of whether dismissal was a reasonable sanction; but that does not make the loss of trust and confidence the reason itself. Alternatively, it is best confined to what we might call true SOSR reasons (e.g. a business reorganisation or an irretrievable clash of personality or whatever) where the real reason which results in such loss of trust and confidence is not one which falls into one or other of the other potentially fair reasons.

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160. In relation to similar terminology in **A v. B** [2010] IRLR 844, Mr Justice Underhill (then President of the EAT) said, at paragraph 31:

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“We have already observed that we do not regard that language as helpful. We have observed a growing trend among parties to employment litigation to regard the invocation of ‘loss of trust and confidence’ as an automatic solvent of obligations: it is not.it is necessary to identify

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why [certain facts] are said to have, in effect, made it impossible for the respondent to continue to employ the claimant.”

5 161. When one comes to the appeal process of course, as noted above, that matter was made to stand on its head, i.e. that whereas in her dismissal letter Ms Cassidy referred to a loss of trust and confidence on the part of the respondents in the claimant, the appeals committee decided to dismiss the appeal on a preliminary issue to the effect that there was a loss of trust and confidence on the part of the claimant in the respondents. We shall deal with that aspect of the process later, but meantime for present purposes it is sufficient for us to have found, as we have, what the facts, circumstances and beliefs were in the mind of the employer *at the time of dismissal* (***Abernethy v. Mott, Hay & Anderson*** (supra), ie, at the point when Ms Cassidy made her decision. Those facts and circumstances were fully aired in the proceedings before us and they plainly demonstrate the reason for the decision to dismiss taken by Ms Cassidy as being one related to the claimant’s conduct. The respondents attached the wrong label. It was therefore a potentially fair reason, and is thus subject to consideration of the case under s.98(4) on the question of whether the respondents acted reasonably in deciding to dismiss in the circumstances.

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Reasonableness

25 162. The issue here is an objective one, i.e. whether the respondent acted reasonably in treating the reason (which we have found to be one relating to the claimant’s conduct) as “*sufficient for dismissal*”. In this regard, and taking matters in chronological order, we firstly considered the stage of investigation which is of course an integral part of the disciplinary process, particularly in cases such as the present case being related to matters of conduct. As noted above, Mr Cameron on behalf of the claimant had certain criticisms.

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35 163. It was said that Ms Foster who conducted the investigation had actually gone on to reach a concluded view on the whole matter. She had concluded in her report (see p.370) that the claimant had committed “*serious breaches of the standards expected of an employee.....and as such should be referred to a disciplinary hearing*”. Her ultimate conclusion, as we noted above, went on to include:

5 *"I therefore conclude that Warren's actions constitute gross misconduct. I believe they've had the effect of damaging the working relationship between him and the council, to the point of making trust and continued working relationship impossible."*

164. We agree that for someone whose principal function is to ascertain the facts and say whether there is a case to answer, Ms Foster should have stopped there. It was not her function to form and convey a judgment as to whether the relevant
10 conduct constituted gross misconduct or not, and especially not to decide whether a continuing working relationship was possible.

165. However this on its own was not necessarily fatal to the fairness of the entire process. Mr Cameron's concern, particularly since Ms Foster was in attendance
15 at the disciplinary hearing, was that Ms Cassidy (who was to take such decisions) may have been influenced by what Ms Foster said should happen. That depended on other evidence and we found that in that regard when Ms Cassidy was pressed on the matter she plainly was not influenced. She stated quite clearly in cross-examination that her purpose of deciding officer was to determine
20 the whole facts and circumstances independently and that whilst she had regard to Ms Foster's investigation report she was not unduly influenced by it and certainly did not take into account her conclusions. We accepted that evidence.

166. This was also demonstrated by the fact that Ms Cassidy decided to include an
25 aspect of the matter which Ms Foster had discarded (the third part of Allegation 1) and to reject an allegation (no. 7) which Ms Foster had recommended be included.

167. On another matter, Mr Cameron was correct to point out that in the investigation
30 stage in relation to Allegation no. 1, the claimant was not shown the report which he had prepared for the children's panel in the case relating to the child RH and his mother DH.

168. We agree that that was not satisfactory, but we also bore in mind that this was a
35 fact-finding exercise, not a disciplinary hearing. There is no rule to the effect that

all points need to be put to the claimant for a response during the investigatory stage. Indeed there is no rule that the affected employee be spoken to at all. It is only after the investigation is completed and prior to a decision being made that fairness demands that the employee be given a proper opportunity to respond to the various allegations. An investigation can be reasonably and fairly carried out without necessarily speaking to the employee at all.

169. Mr Cameron also criticised Ms Foster for finding in relation to Allegation no. 3 (“the missing minutes”) that the claimant had been “rifling” amongst papers on the desk, when she had no actual evidence from other witnesses to that effect.

170. However, upon checking the matter we noted that in Ms Foster’s report (at p.364) she had noted that in conversation with the claimant he had told her himself that when looking for a key on Susan Stewart’s desk “*he could not immediately find it and remembered lifting some paperwork that had been lying on Susan’s desk; he said he then replaced the papers.....*”. In other words the information about moving the papers about on the desk came to Ms Foster from the claimant himself. It seemed to us therefore it was reasonable for Ms Foster to make that factual finding.

171. In any event the correct legal test for the assessment of an investigation is that set out in ***British Home Stores v. Burchell*** (above), i.e. that the investigation be a sufficient and reasonable one in the circumstances. It was clear from the evidence that Ms Foster’s investigation was indeed extensive, not least in terms of the number of witnesses who were interviewed and the volume of information gathered was comprehensive to say the least. On any objective view there was quite sufficient evidence gathered to entitle Ms Foster to conclude that there was a case to answer so that the matter be put forward to a disciplinary hearing.

172. In relation to the disciplinary hearing conducted by Ms Cassidy, again we agree to an extent with Mr Cameron’s criticism – at least in relation to the first of the three instalments of that hearing – that the claimant was still not shown a copy of the report which underpinned the first part of Allegation 1. It was only after the first of the disciplinary hearing meetings and after the claimant made a specific

request that a copy was provided to him. However when the hearing resumed for the second meeting Ms Cassidy appeared to bar any further discussion about it. We were concerned about this but it transpired during the course of Ms Cassidy's evidence that at that first stage she did not have a copy of the report either; and, in addition, she did not call upon the claimant to answer any detailed questions about the report or about inappropriate terminology in it.

173. In any event we noted that this was the part of the subject matter of Allegation 1 which had already been resolved by the Social Work Complaints Review Committee (see p.180). Ms Cassidy regarded that committee as a responsible public authority which had carried out its own independent investigation and had made a robust conclusion. She considered that that in itself carried considerable weight and accordingly did not feel the need to look into all of the detail of that in order to test the reliability of their conclusion. Ms Cassidy reasonably found that sufficient for it to form the basis of her belief in the truth of what was said about the report.

174. As regards the other part of Allegation 1 (the claimant's conduct in relation to RH and DH) the committee had asked that they be investigated. Ms Cassidy had sufficient actual evidence as noted above. That was quite a separate matter from the content or style of the claimant's own report and was rightly regarded as the more serious aspect of Allegation 1.

175. We also noted, as Mr Cameron again had pointed out, that the third part of Allegation 1 ("inappropriate continuing contact") had not been thought by Ms Foster to be supported by sufficient evidence and she had omitted it from the list of matters which she had recommended proceed to a disciplinary hearing. However Ms Cassidy revived the matter, that being suggested as operating unfairly for the claimant. However it is plain that the matter was discussed and comments made by the claimant about what had happened at the time. As we observed earlier, this was another aspect of the independent approach to all of the evidence taken by Ms Cassidy indicating that she was not influenced by any prior opinions expressed by Ms Foster.

176. There are fundamentals of natural justice which ought to be carried out in any conduct case prior to a decision to dismiss being taken. These are reflected in the relevant parts of the ACAS Code of Practice and include:

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- That prior to the hearing at which an employee is required to respond to the allegations, he should be informed in advance of the case against him;
 - At the hearing an employee should be given a reasonable opportunity to put forward his own case and answer any allegations as well as bring forward any other evidence which he wishes.

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177. Mr Cameron had also made submissions about each of the individual conclusions that Ms Cassidy made about the various allegations. The various points made in relation to each allegation really amounted to an assessment of the evidence which was before Ms Cassidy and what conclusions she reached about each.

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However we examined each allegation with particular reference to the evidence which Ms Cassidy had in order to support her conclusions. We found no case in which relevant evidence had not been before her nor indeed any case where it could be said that she could not possibly have reached the conclusion which she did based on that evidence. For us to go further would have involved engaging in

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an impermissible substitution of our view of the evidence for that of Ms Cassidy and accordingly we draw back from commenting further on that aspect of Mr Cameron's submissions.

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178. The overall assessment of this tribunal in relation to the disciplinary hearings conducted by Ms Cassidy was that the process was carried out fairly. Having said that, we recognised the validity of some of the points made by Mr Cameron (as above). Of course there are some procedural flaws which can be of sufficient significance to vitiate the validity of a process, rendering it unfair. However it is by no means the case that all procedural imperfections have that result. The

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purpose of the tribunal is to assess the fairness of the disciplinary process as a whole and having done so, this tribunal considered that, *up to the point of Ms Cassidy's decision to dismiss*, notwithstanding the imperfections referred to above the respondent had acted reasonably in treating the claimant's conduct as sufficient to dismiss. In other words, that decision lay within the range of

responses open to a reasonable employer, given the serious nature of the accumulation of all the claimant's misconduct. That would have been the case whether or not the first part of Allegation 1 (the manner in which the report had been written) were included or not.

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179. In the assessment of this tribunal however when the disciplinary process reached the stage of the appeal, our assessment took a different turn.

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180. An appeal stage in the present context is as much a part of the disciplinary process as any other part. Again, having regard to the content of the ACAS Code of Practice on discipline and grievance procedures, the process should provide employees with an opportunity to appeal. In the present case such an opportunity is also embedded in the respondent's own written disciplinary procedures. In these the matter is expressed in the following way (p.792):

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- *An employee has the right to appeal any disciplinary action taken.*
- *All appeals are heard at head of service level or above with the exception of appeals against a final written warning or dismissal, where the employee has the option of having their appeal heard by the Council's Appeals by Employees Committee.*

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181. In the present case the claimant chose the second of these options – an appeal in front of the relevant committee. The process leading up to the eventual convening of that committee is described above and took an extraordinarily long time. However, no doubt given the various reasons lying behind such delay, no issue was taken by the claimant. For present purposes the focus is solely on what happened on 19 April 2013 when a hearing actually took place.

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182. We have described the events of that day above and they can be summarised merely by stating that the committee in effect decided not to hear the appeal which of course was to be intended as an assessment of the grounds upon which the claimant was to seek to establish that the dismissal should not stand, but instead accepted the basis of a preliminary submission made on behalf of his management that there was sufficient evidence to show that the claimant had lost

“trust and confidence” in the council to such an extent that even if the appeal were to succeed, it would be impossible for him to be reinstated in his employment.

5 183. The effect of that was that no substantive appeal was ever held whereby the claimant was able to set out the grounds on which he disputed that there was a sufficient basis for the decision to terminate his employment.

10 184. We have to say that this tribunal regarded that as a fundamental failure on the part of the respondent. Whichever entity, whether in individual or a committee, is to hear an appeal against dismissal, the most fundamental aspect of that part of the process is to hear from the dismissed employee as to why on the merits of the matter he considers the sanction of dismissal to have been wrong.

15 185. In this case, in what must have taken him an indeed take him a considerable length of time, the claimant had set out his written grounds at prodigious length and had brought together an enormous collection of documents all for the purpose of putting his case about the merits of the matter in front of the committee. This is surely a matter which is essential to natural justice –as is confirmed expressly at page 33 of the 2011 ACAS Guide which was issued to supplement the statutory guidance provided by the Code of Practice.

20 186. Furthermore, the opportunity to appeal is the right of the *employee*; it is *his* appeal and, given its fundamental purpose, it is not for the employer to tell *him* that it is not worth hearing him because it (the employer) considers that he has lost trust and confidence in the employer. That is effectively what happened here and the result was to usurp the fundamental purpose of the claimant’s appeal.

25 187. The injustice was compounded by the fact that he was not informed that the respondent’s point was to be taken as a preliminary matter, with the result that he was surprised by it and unprepared to respond.

30 188. If, hypothetically, the claimant’s appeal had been allowed to be heard and had been successful in relation to the merits of the dismissal, then the tribunal can

understand that there may have been considerable discussion on where and with what duties within the council the claimant would then have continued to work. However, misgivings about that kind of thing could not ever justify the complete removal of the claimant's right to present the grounds of his appeal at all.

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189. This tribunal was unanimous in concluding that this was a procedural flaw of such significance that it could not be said that the respondents had acted reasonably within the terms of s.98(4) of the ERA. On that ground therefore the tribunal concluded that this dismissal was unfair.

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Remedy

190. The claimant sought financial compensation. For the purpose of calculating the claimant's loss to the date of the hearing, parties had agreed a schedule of loss (p.58 – 59) to form the basis of a compensatory award.

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191. Subject to certain qualifications the claimant would also be entitled to a basic award the amount of which as again agreed between the parties would be £5805. Both of these types of award may however be subject to adjustment by the consideration of certain factors.

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192. In relation to the compensatory award, the basic principle is as set out in s.123(1) of the ERA:

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“123(1).....the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.”

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193. Stemming from the well-known House of Lords decision in **Polkey v. A & E Dayton Services Ltd** [1988] ICR 142, an employment tribunal, where there have been flaws in procedure, is obliged to consider whether, if the procedure had been conducted properly, the result would have been any different, i.e. whether dismissal would or would not still have taken place and assess in percentage

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terms the chances of that being so. That is an aspect of the just and equitable requirement in s.123(1).

194. This of course is a wholly hypothetical and indeed speculative exercise.
5 Notwithstanding, the tribunal requires to appreciate that a degree of uncertainty is an inevitable feature of the exercise and the mere fact that an element of speculation is involved is not a reason for not carrying out the exercise (**Software 2000 Ltd v. Andrews** [2007] ICR 825).

10 195. In dealing with this particular matter in oral submissions, Mrs Selbie submitted that there would indeed have been no difference in outcome if the appeal before the appeals committee had been heard in full. This was because there was really nothing which affected what was in any event a justifiable dismissal and there was no evidence to suggest that the appeal body would have taken a different
15 view.

196. In response, Mr Cameron said that the outcome may well have different because there were a number of other flaws occurring before the appeal stage, for example the claimant not having seen the 2008 report to the children's panel in
20 relation to Allegation 1, and Ms Foster making conclusions which went beyond her basic purpose as investigating officer. In addition, some of Ms Cassidy's conclusions were flawed.

197. Since the tribunal found that the only substantial procedural flaw related to the
25 hearing or non-hearing of the claimant's appeal (and, as we have stated above, it was by some measure a significant flaw) our function is to contemplate a scenario whereby the appeal committee did not hear and decide the matter on the basis of the preliminary issue put forward by the claimant's former management, or at least did not decide upon it until after hearing the substance
30 or the merits of the claimant's appeal and his grounds for proposing that the decision to dismiss was unjustified. The question then becomes: on the balance of probabilities what is the decision of the appeal committee likely to have been if it had heard the claimant's appeal?

198. In that hypothetical situation, as well as hearing from the claimant, plainly the committee would have been considering also the content of both Ms Foster's investigation report and, more particularly, Ms Cassidy's grounds for dismissal together with all the evidence which she had had before her and the transcripts of the hearings which she held. It would therefore have had before it all of the material which caused Ms Cassidy to make the decision to dismiss. It would have seen that Ms Cassidy had formed the genuine belief on the evidence before her that the claimant had been guilty of several types of misconduct. In particular the committee would have seen that:

- In relation to his dealings with the clients DH and RH he had continued his involvement in the case even after the decision of the children's panel and the course of that had continued to make unwelcome contact and had also shared confidential information about a work colleague;
- He had failed to comply with reasonable management instructions to carry out his duties;
- He had removed a confidential occupational health report which related to one of his colleagues and had also removed minutes of a meeting from his manager's desk; and
- In a number of different ways he had treated colleagues with a lack of respect and had caused them alarm.

199. There was no evidence before us which could justify any suggestion that these keys factors would not have remained unaltered, nor any evidence that at such an appeal hearing the claimant would have been able to put forward anything additional or different from what he had already said to Ms Cassidy.

200. In these circumstances the tribunal felt that it was an inescapable conclusion that even if the appeal committee had heard the claimant's appeal properly it was almost bound to have considered that in the whole scope of the case there were issues of such seriousness, linked clearly to various aspects of the claimant's conduct that dismissal would not only still have lain within the range of reasonable responses, but would probably indeed have been regarded still as the most appropriate response. The decision to dismiss therefore would have been

fair, and there was nothing in the evidence to suggest the probability of the imposition of some lesser penalty. In these circumstances therefore the tribunal concluded that the so-called "*Polkey reduction*" required to be assessed at 100%, the effect of which is to eliminate any compensatory award.

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201. This result renders moot any further potential adjustments to the compensatory award by the application of other factors. However, Mrs Selbie also asked the tribunal to consider the issue of the extent of contributory conduct on the part of the claimant, and whilst that is no longer of any relevance in relation to any compensatory award, a basic award may be affected by such a factor (s.122(2) of the ERA).

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202. This also requires to be assessed in percentage terms and again is a highly unscientific exercise to carry out. On one view, it might be thought that in such dismissals, whilst it is always the conduct of the employee concerned which gives rise to the disciplinary process and to dismissal, that is merely to state it as a *sine qua non*.

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203. We consider that the correct position was that we were to consider whether the claimant's own conduct had caused or contributed to the dismissal, such conduct requiring to be of a blameworthy nature, and if so by what proportion it would be just and equitable to reduce the amount of the basic award.

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204. It is in this context that an employment tribunal requires to move into the area of considering for itself whether the claimant was guilty of blameworthy conduct. For this purpose we again reviewed all of the evidence in relation to the various allegations and we were driven to the conclusion that on the basis of that evidence we would indeed have come to the same conclusions as did Ms Cassidy. We discounted the first of the three elements in Allegation 1 (considering that it does appear to relate more to a matter of capability) but we found ourselves clear in our belief that he had been blameworthy by reason of his conduct in relation to the remainder of Allegation 1, and also blameworthy in his conduct in relation to Allegations, 2, 4, 5, 6 and 8. The elements of refusing to carry out reasonable instructions, removing a colleague's occupational health

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report and conducting himself in such a bizarre manner as to cause alarm among his colleagues were indeed examples of particularly serious misconduct. These and other features of his misconduct constituted the entire cause of the dismissal. It seemed to us that the only just and equitable reduction would be again one of 100%.

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205. Our conclusion therefore in relation to the whole case is that there was an unfair dismissal but for the reasons given above no monetary compensation of any kind should be awarded.

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Employment Judge Christie

Date of Judgment: 29 May 2015

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Entered in Register and Copied to Parties: 29 May 2015