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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105666/2022 (V)

Public Final Hearing held in Aberdeen ET (by CVP) on 7-9 March 2023

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Employment Judge Tinnion

Mr. Saul R. Tait

Claimant
Represented by
Ms J. Forrest (Solicitor)

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Highland Health Board

Respondent
Represented by
Mr. R. Davies
(Solicitor)

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JUDGMENT

1. The Claimant's complaint of unfair dismissal (ss.94-98 of the Employment Rights Act 1996) is not well founded and is dismissed.
2. The Claimant's complaint of wrongful dismissal (breach of contract/notice pay) is not well founded and is dismissed.

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REASONS

30 **Pleadings**

1. By an ET1/Paper Apart presented on 20 October 2022, Claimant Saul Tait presented complaints of (i) unfair dismissal (ii) wrongful dismissal. The Claimant's dismissal by letter dated 17 May 2022 and the reason for it - his conduct towards colleague AD on 6-7 May 2021 - were not in dispute.

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2. By its ET3/Paper Apart, the Respondent denied both claims.

Issues

3. The parties agreed a list of issues [38], which the Tribunal addresses below.

Evidence

5 4. The claim was heard on 7-9 March 2022. The Tribunal heard evidence from
the following witnesses: Mr. Tait (Claimant); June McKay (HR officer); Gavin
Sell (dismissing officer); and Louise Bussell (appeal officer). The Tribunal was
satisfied all witnesses sought to give their honest, best recollection of events
(in the event, most key facts were agreed). A joint production of just over 500
10 pages was provided, references to which are made in square brackets. Both
parties made written closing submissions.

Findings of fact

5. The Tribunal makes the following findings of fact (and any contained in the
other sections of this Judgment) on the civil balance of probabilities.

15 Parties

6. Respondent Highland Health Board (the "**Board**") provides health services in
Scotland.

7. In 1999, Mr. Tait commenced employment with the Board. In May 2021, the
20 time of the index events which resulted in his dismissal, the Board employed
Mr. Tait as a Band 5 Learning Disability Staff Nurse in Willows Ward, New
Craigs Hospital, Inverness - a small (6-bed) mixed-sex learning disability
assessment and treatment unit. Willows Ward treats patients with learning
disabilities.

25 Events

8. On 6 May 2021, Mr. Tait worked an overnight shift which ended the next day.
Working alongside him that evening were colleagues AD

(Rehabilitation/Nursing Assistant), J McMullan (Rehabilitation Assistant) and J McKim (Rehabilitation Assistant). Nothing of note involving patients happened during that shift - in that sense, the shift was an ordinary one.

- 5 9. AD is a practicing Muslim who came to the UK in his early 20s. Mr. Tait knew that. Prior to 6 May 2021, Mr. Tait and AD worked together on amicable, collegial terms.
- 10 10. On 6 May 2021, elections for the Scottish Parliament took place, alongside a number of other UK elections. In those circumstances, the Tribunal finds it was not unreasonable or surprising for Mr. Tait to seek to raise the Scottish elections with his colleagues during the course of the shift.
11. During the course of the shift, however, late at night (the precise time is not material), it is now not in dispute that in the context of a discussion with AD (which admittedly may have been more of a monologue from Mr. Tait) about the Scottish elections, Mr. Tait said the following to AD:
- 15 a. *“Do you have Mohammed’s phone number”;*
b. *“You know the one, you are worshipping him”;*
c. *“Phone him to see if you can vote for him, if he’s in the election”;*
d. *“Are you enjoying your citizenship, I hope you do”.*
- 20 12. It is also not in dispute that Mr. Tait should not have said remarks (a)-(c) to AD, and that it was foolish, wrong and misconduct on his part for him to have done. However, the Tribunal finds that it was not Mr. Tait’s purpose in making these remarks to violate AD’s dignity, or to create a hostile environment for him. They were crude, insensitive remarks which Mr. Tait, had he thought for one moment about the offence they might cause AD, would not have said.
- 25 13. AD was upset by these remarks. He left the scene, and later returned to raise them with Mr. Tait. Mr. Tait, realising the offence he had caused, apologised.

14. By email on 8 May 2021, AD complained to Mr L Grainger about Mr. Tait's remarks and conduct on the 6-7 May nightshift. AD's email ended: "*I am writing this due to my concerns that Saul should not be left to work unsupervised. I am also very hurt about the remarks he has made to me and my faith.*" [107-108].
- 5
15. By letter dated 20 May 2021 [80-81], Ms. H Carr (Interim Head of Service - Health Learning Disability) notified Mr. Tait that she had appointed Mr. I Thompson (Head of Service – Quality Assurance) to conduct an investigation into the following allegations that on the 6-7 May 2021 night shift Mr. Tait had harassed colleague AD on the grounds of race and religion by:
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- a. saying to AD "*Do you have Mohammed's phone number*" (**Allegation #1**);
 - b. saying to AD "*You know the one, you are worshipping him*" (**Allegation #2**);
 - c. saying to AD "*Phone him to see if you can vote for him, if he is in the election*" (**Allegation #3**);
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 - d. saying to AD "*Are you enjoying your citizenship, I hope you do*" (**Allegation #4**);
 - e. acting aggressively/intimidatingly by pointing his finger in AD's face (**Allegation #5**).
- 20
16. Although not well worded (the letter failed to draw a clear distinction between factual allegations and misconduct allegations premised on factual allegations), the letter suggested that by this conduct Mr. Tait may have failed to (1) adhere to the NHS Highland Best Practice Guidelines, Privacy, Dignity and Respect within NHS Highland (2) meet the professional standards detailed in the Nursing and Midwifery Council (**NMC**) Code. The letter stated
- 25
- Mr. Tait would have the right to be accompanied at the investigatory meeting, and had the right to provide a written statement giving his account of events.

Investigation

17. J McKim. On 15 May 2021, J McKim prepared a statement [109] stating:

5 *"...at about 23.25 when we were all sat in the office AD came into the office and shut the door. He said if JM and myself would stay. He then began to talk to ST and stated he felt they were friends and that he could take most things and see them as a joke but when it comes to his religion he takes this very seriously. AD then went on to say that ST had said some things which ST questioned and did not seem certain about. Ad mentioned that ST had asked for Mohammed's*
10 *phone number so that he could let him know that AD was a f*kwit. ST seemed unsure that he had said this and then apologised for upsetting him ...*

15 *I did ask AD if he was okay when we were alone in the office. This was following the initial talk which I had left during. AD was very calm but said he could take most things and talked a little about his past and things he had lived through but some things he could not let go especially when it disrespects his beliefs or words to that effect.*

ST and AD doubled up often throughout the remaining shift which gave me the impression whatever had happened [had] been sorted out ..."

20 18. J McMullan. On 15 May 2021, J McMullan prepared a statement [110] stating:

25 *"It was voting day in Scotland ... AD and myself went into the office to fill out some paperwork. During this time Saul came walking across from the treatment room into the office and said to AD and myself 'did you two vote today?' Both myself and AD replied that we had not voted. Saul returned to the treatment room. A few minutes later Saul came back into the office smiling and in a joking manner said to AD "Do you enjoy your citizenship?' AD replied "yes, I enjoy it very much, what has that to do with anything.' ... AD and myself left the office at this point*

and went into the kitchen for something, I can't remember exactly what for, but we laughed at what had just happened.

5 *When AD and I returned to the office Saul came to the office also. Saul said to AD 'do you have Mohammed's phone number?' AD replied Mohammed who and Saul said "your God that you worship'. AD asked Saul what did he mean and why did he want to know that. I can't remember exactly Saul's reply but I remember AD had got very upset at this time and Saul stated that he was only joking with him. I left the office because I felt uncomfortable and went out the back door for*
10 *some air because the ward was so warm. AD was clearly upset and started talking to Saul about what had just been said. At this point I returned to the ward to let them talk.*

15 *Later on AD approached me and said he would like to speak to Sal and asked could I be present while he did to which I agreed. In the office Saul, AD, Julie and myself were present. AD said to Saul that he felt he could not continue his shift that night. Saul asked AD was he feeling ill. AD replied that physically he was able to work but mentally he was not because of the previous event. Saul at this point told AD if he had offended him in any way he was really sorry. AD told Saul he had offended him and he didn't expect to hear Saul saying as a nurse*
20 *in charge. Saul once again stated how sorry he was and he had no intention of offending AD and it was clear by Saul's face and reaction that he hadn't meant to cause AD such distress ... I don't remember much more of that conversation other than the fact that Saul continued*
25 *to state how sorry he was. By the end of their conversation AD accepted Saul's apology and the matter was dropped. AD told Saul the matter was now forgot about and the rest of the shift carried on as normal."*

19. On 21 July 2021, J McMullan attended an investigatory meeting with Mr.
30 Thomson, [119-124]. She stated she was unaware of any previous concerns about Mr. Tait and nothing prior to this incident concerned her. She said as

5 people got to know Mr. Tait they realise he is joking and trying to wind them up. She confirmed she witnessed Mr. Tait asking AD whether he enjoyed his British citizenship [121]. She said Mr. Tait was laughing when he said this, but thought it was an inappropriate thing to say, and said "*you could have cut the atmosphere with a knife*". She confirmed Mr. Tait asked AD if he had Mohammed's phone number [121]. She said at some point Mr. Tait knew he had overstepped the mark and gone too far. Her view was that it had been a joke by Mr. Tait that went wrong, and Mr. Tait had been looking for a debate. She stated she and J McKim had been witnesses (at AD's invitation) when 10 AD told Mr. Tait that mentally he didn't think he could work the rest of the shift, and didn't expect the nurse in charge of the shift to speak to him like that. When AD confirmed Mr. Tait had offended him, Mr. Tait apologised numerous times, said he was sorry if he had offended him, and said he hadn't meant to. She stated that Mr, Tait looked like he had tears in his eyes, and her 15 impression was that Mr. Tait was thinking to himself he had taken it too far. She stated that by the time they left the office, Mr. Tait and AD were laughing and joking, and continuing a conversation about fishing trips. She said Mr. Tait said to AD that if he wanted to report the situation he wouldn't hold it against him, to which AD replied he wouldn't be reporting it because they had 20 spoken about it and sorted it out between them. She viewed Mr. Tait's behaviour as racism, but accepted it may not have been intentional.

20. S Tait. By email on 18 June 2021 [89, 87-88], Mr. Thompson invited Mr. Tait to attend an investigatory meeting on 24 June 2021. On 26 August 2021, Mr. Thompson and Mr. Tait conducted that meeting [131-141] (Mr. Tait having 25 been signed off sick from 16 June 2021 [82])). Mr. Tait was accompanied by his union representative, M McRae. Prior to the 26 August meeting, Mr. Tait had submitted a written statement [142-145] in which he accepted he may have said Allegations #1 and 4 [143], but denied Allegation #5 (finger-pointing) [143]. Mr. Tait denied harassing AD on any grounds, and denied 30 behaviour inconsistent with the standards in the NHS bullying and harassment policy. Mr. Tait's statement did not specifically address Allegations #2-3.

21. Allegations #1 and #4. At his investigatory interview, Mr. Tait said he could not remember his exact words, but accepted Allegations #1 and #4 sounded like comments he may have made [133], and subsequently accepted he had actually said Allegation #1 [134]. Mr. Tait stated those comments were not jocular, and he had been seeking to engage AD in a serious conversation [134]. Mr. Tait stated AD's reaction to the comments was to say he was "*cut down*" [134]. Allegations #2-3 were not specifically put to Mr. Tait, and Mr. Tait does not appear to have addressed them. Mr. Tait stated with hindsight, "*he recognised that it was appalling what had come out of his mouth*" [134]. Mr. Tait suggested he had been at a heightened state of anxiety during the shift which had affected his ability to communicate clearly and succinctly [133]
22. By letter dated 2 September 2021 [92], Mr. Thompson thanked Mr. Tait for attending the 24 June investigatory meeting, and enclosed a note of the meeting, which he asked Mr. Tait to check.
23. AD. On 1 July 2021, Mr. Thomson conducted an investigatory meeting with AD [111-118]. AD confirmed the incidents took place, and gave background information. AD stated he did not want Mr. Tait to lose his job, and hoped Mr. Tait could "*learn and grow up*" [113]. AD stated he did not find anything funny about Mr. Tait's comments, although he had told AD he was joking. AD stated Mr. Tait knew what he was doing [117].
24. P Page. On 21 July 2021, P Page (Senior Charge Nurse, Willow Ward) attended an investigatory meeting with Mr. Thomson [125-130]. Ms. Page had been on leave and was not a witness to the incident. She stated she had not ever heard Mr. Tait making comments related to race or religion in front of her. She explained the circumstances which had caused AD to write a statement about what had happened. She stated Mr. Tait's behaviour was not how she would expect colleagues in a professional environment to conduct themselves. She ended by saying Mr. Tait was a "*bit bombastic*", had positive qualities, and could be supportive of team members.

25. Report. Mr. Thompson prepared an Investigation Report, completed on 3 September 2021 and submitted on 24 September 2021, which had 8 appendices (**Report**). After summarising the evidence, Mr. Thomson concluded (1) there was evidence to uphold Allegation #1 [102] (2) there was evidence to uphold Allegation #4 [102] (3) noted the evidence about Allegation #5 (finger-pointing) was contradictory, but held there was evidence that AD was subject to a level of intimidation on the subject of his voting intention on the evening of 6 May 2021. Based on the foregoing, Mr. Thomson concluded there was evidence to conclude that Mr. Tait had breached the NHS Highland bullying and harassment policy [104] and provisions of the NMC code [104]. He recommend that the case be referred to a formal disciplinary hearing under the Board's conduct policy [105].
26. On 27 October 2021, P Page met with Mr. Tait and told him what the Report's findings were. By letter to Mr. Tait dated 1 November 2021 [154-156], Ms. Page notified Mr. Tait in writing of the Report's findings, conclusions and recommendations. Her letter stated that if Mr. Tait was dissatisfied with the investigation that he could request a review of the process (but not the investigation outcome). Mr. Tait did not request a review of the process.

Disciplinary hearing

27. It took time to agree a date for the disciplinary hearing [159-167]. By letter dated 3 March 2022 [168-170], Mr. Tait was invited to attend a disciplinary hearing on 21 March 2022 chaired by Mr. G Sell to consider Allegations #1-5 and the allegation that by that conduct Mr. Tait had breached the NHS Highland bullying and harassment policy and NMC code regarding professional standards. The letter enclosed a copy of the Report and its appendices. The letter stated Mr. Thomson would present his findings, which Mr. Tait could question him about. The letter mentioned Mr. Tait's right to provide a written statement of case. The letter informed Mr. Tait of his right to be accompanied. The letter informed Mr. Tait of the possible outcomes of the hearing, which ranged from no case to answer to dismissal. The letter stated

“Any sanction by the disciplinary panel will take into account the seriousness of the allegations against you and any mitigation that is offered” [170].

28. By email on 4 March 2022 [172], union representative Ms. MacRae forwarded a detailed 9-page statement of case [174-182], which was forwarded to Mr. Sell [173]. In it, Mr. Tait eventually admitted Allegation #1 and possibly also Allegation #3 [179, para. 2.6.2.3], did not address Allegation #2, in relation to Allegation #4 claimed he could not recollect the conversation but suggested if he had said it that demonstrated his acceptance and inclusion of AD as someone eligible to vote [177, para. 2.3.5], denied Allegation #5 (aggressive/intimidating behaviour), denied harassing AD on grounds of a protected characteristic [181, para. 4.3], denied breaching the NMC code [180, para. 2.8.3], accepted his behaviour on 6-7 May 2021 had been inappropriate [181, para. 4.4], and offered as mitigation (1) working nightshifts may affect decision-making (2) no issues had been raised regarding Mr. Tait’s previous comments (3) support from colleagues (4) his apology to AD (5) his making clear to AD that he would understand if AD needed to go home or report the situation (6) Mr. Tait’s disciplinary record [181, paras. 3.1-3.5].
29. The disciplinary hearing had to be rearranged, and Mr. Tait was informed of the new date, 10 May 2022 [279-281, 282-284]. On 10 May 2022, the disciplinary hearing was finally held, chaired by Mr. Sell, supported by J Davies (Professional Advisor) and V McCluskie (HR). Mr Thomson attended, supported by J Davidson (HR). Mr. Tait attended supported by M. MacRae. The hearing was recorded, and a transcript generated [286-314]. After introductions and an explanation of procedure, Mr. Thomson put the management case [287-291] and was subject to detailed questioning by Ms MacRae [291-294]. AD attended, and was subject to detailed questioning by Ms. MacRae [294-302]. P Page attended, and was subject to detailed questioning by Ms. MacRae [302-306]. Ms. MacRae was given the chance to make closing submissions, which she did and in which she denied Mr. Tait had harassed AD because of race or religion [306-307], and was questioned by Mr. Thomson [307-308]. Mr. Sell and Mr. Davies asked questions of Mr.

Tait [308-313], during which Mr. Tait mentioned that before the index incident he had suffered a head injury and been 'blue-lighted' to hospital with concussion. Mr. Sell asked Mr. Tait what his view now was of his behaviour back at the time of the incident [311]. Mr. Tait's reply [311] was to recognise he had upset people which hadn't been his intention, and stated he needed to be more guarded and try to pick up cues better [311] – at this point, Mr. Tait did not apologise for his behaviour. At the end, Mr. Thomson summarised the management case [313], in terms that Mr. Tait's behaviour initially did not constitute harassment but eventually did become harassment when he brought in race and religion. Ms. MacRae summarised Mr. Tait's case [313], stating Mr. Tait had admitted he said things he was not proud of, but what had happened would not reasonably be considered gross misconduct because it had been unintentional. The meeting was adjourned.

30. After deliberating on the issues, Mr. Sell's decision was to uphold most of the allegations and dismiss Mr. Tait. By letter dated 17 May 2022 [315-319], Mr. Sell stated there was evidence to support Allegations #1-4, but there was insufficient evidence to support Allegation #5. So far as harassment is concerned, Mr. Sell found that Mr. Tait's behaviour on 6 May 2021 and before then was unwanted conducted related to AD's protected characteristics that were offensive and humiliating. Mr. Sell concluded there was evidence to support the allegation that Mr. Tait's conduct was not consistent with the NHS Highland's bullying and harassment policy [317]. Mr. Sell also concluded Mr. Tait's conduct might be deemed unprofessional conduct under the NMC code of conduct [318]. Mr. Sell mentioned the mitigation which had been put forward, but noted that at the disciplinary hearing Mr. Tait had not reassured him or the other members of the panel that he had reflected on his behaviour or would not cause harassment to his colleagues again. He determined the allegations sufficiently serious that it could not be outweighed by the mitigation offered. Mr. Sell stated that he deemed C's conduct to be gross misconduct and was dismissing him. The letter informed Mr. Tait of his right of appeal.

31. At the ET hearing, Mr. Sell accepted that when he dismissed Mr. Tait he did not know of Mr. Tait's clean disciplinary record or length of service. The Tribunal finds that neither Mr. Sell nor his advisers took those matters into consideration when determining what the appropriate disciplinary sanction for Mr. Tait's misconduct should be.

Appeal

32. By letter dated 23 May 2022 [320-321], Ms. MacRae submitted a summary appeal against Mr. Tait dismissal, which was subsequently supplemented by detailed, broad-ranging grounds of appeal [349-3363] which included allegations that (1) Mr Thompson had demonstrated bias and a failure to investigate objectively (2) it had not been proven that Mr. Tait had harassed AD on grounds of race or religion (3) the outcome/sanction of dismissal was too harsh in the circumstances. Mr. Tait's grounds of appeal did, however, admit that "*the broad content of the conversations on the evening of 6-7 May 2021 were not contested*" [354, para. 3.4.1], ie, Allegations #2-3 as well as Allegations #1 and #4 were now also effectively admitted.

33. In response, a management response to Mr. Tait's appeal against dismissal was prepared [368-374] intended to provide a point-by-point rebuttal.

34. On 12 August 2022, Mr. Tait's appeal was heard. In attendance were Ms. L Bussell (Chair), supported by K Black and J Gilmore, Mr. Sell, supported by V McCluskie, and Mr. Tait, supported by Ms. MacRae. Again, a recording of the hearing was made, which was subsequently reduced to a transcript [432-465] too lengthy to summarise. Ms. MacRae made an extended opening statement, but accepted (when it was put to her) that Mr. Tait had said to AD what he was accused of saying: "*Ok, let's be clear, what is not being contested is that Saul made the comments that hasn't been contested*" [441]. At the end, Ms. MacRae succinctly summarised Mr. Tait's case on appeal: "*the situation we have is that Saul made those remarks which were not appropriate but a reasonable employer would look at that as less significant than the [disciplinary] panel would have appeared to have done. And the sanction and*

the outcome were not appropriate for the reasons we have already discussed.” [465].

35. After conferring with her panel members, Ms. Bussell decided to dismiss Mr. Tait’s appeal. By letter dated 19 August 2022 [467-470], Ms. Bussell notified
5 Mr. Tait of this decision and gave her reasons why. Summarising, Ms, Bussell (1) accepted there had been some failings in the original investigation, and Mr. Thomson had been “*overly expressive in style*” at the disciplinary hearing (2) stated Mr. Tait and Ms. MacRae were given the opportunity to fully present their case (3) stated she focussed only on the events of 6-7 May 2021
10 (4) noted Mr. Tait’s acceptance he had made the comments referenced in the allegations (ie, Allegations #1-4) (5) noted the NHS Scotland conduct policy defines gross misconduct to include abuse of a fellow employee and significant or persistent bullying and harassment of a fellow employee (6) concluded the comments Mr. Tait accepted making related directly to AD’s race and religion, and therefore fell within both of these two definitions of gross
15 misconduct (7) stated she did not believe the sanction of dismissal was unduly harsh (8) stated she did not believe a pattern of behaviour was required to reach the threshold of gross misconduct.

36. Mr. Tait’s dismissal had a catastrophic effect on his health and confidence.
20 He has been referred to a ‘fitness to practice’ panel, which is taking a very long time, and there is now serious doubt whether Mr. Tait will ever be able to return to his former nursing career, notwithstanding his long record of exemplary service with the Board, regardless of the panel outcome.

25 Relevant law

37. Section 98(4) of ERA 1996 provides (in relevant part):

(1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

(a) *the reason (or, if more than one, the principal reason) for the dismissal,*
30 *and*

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

(2) *A reason falls within this subsection if it ...*

5 **(b)** *relates to the conduct of the employee ...*

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

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

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

15 38. The fairness of the dismissal must be judged based on the facts and circumstances before the employer at the time of dismissal. A dismissal will be unfair if, and only, *considered as a whole* the dismissal fell outside the band of reasonable responses open to the employer at the time – the Tribunal must not focus solely on the substantive or procedural fairness of the
20 dismissal.

39. When considering whether a dismissal for misconduct was fair, the Tribunal should consider (a) whether the respondent genuinely believed the employee was guilty of the misconduct (b) whether the respondent had in its mind reasonable grounds for that belief at the time of dismissal (c) whether at the
25 time the respondent had formed a belief in the employee's guilt, it had carried out as much investigation into the matter as was reasonable in all the circumstances.

40. The test "*all the way through*" is reasonableness - the employee is not required to be "*sure*", nor is there any requirement that guilt be proven "*beyond*

reasonable doubt". British Home Stores v Birchell [CB/1980] ICR 303. The range of reasonable responses test applies to the question of whether the investigation into the misconduct was reasonable in all the circumstances. Sainsbury's Supermarkets v Hitt [CB/2002] EWCA 1588, para. 31.

- 5 41. In determining whether a dismissal was fair, the Tribunal is entitled to take into account the ACAS Guide to Discipline and Grievances At Work.

Relevance of length of service, disciplinary record to disciplinary sanction

- 10 42. An employment tribunal, applying the objective standard of the reasonable employer, is entitled to take the view that a clean disciplinary record over many years is a matter an employer should regard as a factor in an employee's favour. Bandara v BBC [2016] UKEAT/0335/15 at para. See also Strouthos v London Underground Ltd [2004] EWCA Civ. 402 at paras. 29-31 (there will be conduct so serious dismissal is an appropriate response no matter how long an employee has served; however, considering whether dismissal is an appropriate response is a matter of judgment, and length of service is a factor which can properly be taken into account; ET did not err when it took into account, in determining that dismissal was outwith the range of reasonable responses, the fact the employee had been employed for 20 years with no relevant previous warnings).

20 Discussion / conclusions

43. The Tribunal's conclusion on the issues identified in the parties' agreed list of issues [38] are as follows:

Unfair dismissal

- 25 44. Issue #3 (Genuine belief in conduct relied upon for dismissal). The Tribunal is satisfied Mr. Sell decided to dismiss Mr. Tait and Ms. Bussell decided to dismiss Mr. Tait's appeal against dismissal based on their beliefs and understandings at the time about Mr. Tait's conduct on 6-7 May 2021. In both

cases, those decision-makers were satisfied Allegations #1-4 were true. At the disciplinary hearing, Mr, Tait admitted Allegations #1 and #4, and at the appeal hearing Ms. MacRae admitted Allegations #2-3 were also true. Allegation #5 was disputed but ultimately not upheld. The Tribunal emphatically rejects Mr. Tait's pleaded case that "*the Respondent did not have a genuine belief in the Claimant's conduct*" [23, para. 46].

45. Issue #2 (Reasonable grounds for belief in Claimant's misconduct). The Tribunal is satisfied Mr. Sell and Ms. Bussell had reasonable grounds for believing Mr. Tait was guilty of misconduct in relation to his conduct on 6-7 May 2021, as alleged in Allegations #1-4:

- a. Mr. Tait accepted Allegations #1 and #4 were true at his disciplinary hearing;
- b. Ms. MacRae accepted Allegations #1-4 were true at the appeal hearing;
- c. Mr. Tait accepted misconduct in relation to Allegations #1-4 (indeed, Mr. Tait's case is that once he realised the upset his remarks had caused AD he immediately apologised to him) - "*he recognised that it was appalling what had come out of his mouth*" [134];
- d. the suggestion Mr. Tait's conduct could not reasonably be characterised as misconduct because it was not intentional is meritless, as harassment (as a matter of law) can take place because of the effect the unwanted conduct has on its victim, the applicable definition of harassment in the NHS Workforce bullying and harassment policy [46, para. 1.3.2] mirrored the statutory definition in s.26 of the Equality Act 2010, and nothing in the Board's policies constrained the definition of harassment to mean only instances of intentional harassment;
- e. Mr. Sell and Ms. Bussell's conclusion that by his conduct on 6-7 May 2021 (Allegations #1-4) Mr. Tait had harassed AD was not only reasonable but plainly correct – Mr. Tait accepted making offensive, unwelcome remarks to AD which upset AD. Given the repeated references to Mohammed in

Allegations #1-3, it is obvious Mr. Tait was referring to AD's religion (neither Mr. Tait nor Ms. MacRae ever suggested to the contrary).

46. Issue #1 (Whether reasonable investigation carried out). Looked at in the round, the Tribunal is satisfied the Board carried out a reasonable investigation into Allegations #1-4 and the investigation fell within the range of reasonable investigations open to it at the time:

- a. the Board appointed an investigator who it was never suggested had a prior bias against Mr. Tait rendering him unfit to conduct the investigation;
- b. Mr. Tait was informed of the factual allegations against him, in response to which Mr. Tait had the opportunity – which he exercised – to state his case in writing to the Board about what happened on 6-7 May 2021 on 3 occasions;
- c. the Board obtained written accounts of what happened from AD [107-108], eye witness J McKim [109] and eye-witness J McMullan [110];
- d. Mr. Thomson interviewed most key witnesses – AD [111-118], J McMullan [119-124], and Mr. Tait [131-141] (as well as P Page) – and, in the Tribunal's judgment, asked reasonable questions of those witnesses;
- e. Mr. Thomson prepared an investigation report [93-105] which fairly summarised the evidence gathered, and reached a reasonable conclusion that Mr. Tait had a case to answer at a disciplinary hearing in respect of Allegations #1-4 (the Tribunal was not convinced by Mr. Thomson's reasoning in respect of Allegation #5, but that finding ultimately did not matter as Mr. Sell did not uphold that allegation);
- f. the Board's investigation elicited admissions from Mr. Tait in respect of Allegations #1 and #4 by the time of the disciplinary hearing, and admissions in respect of Allegations #2 and #3 by the time of the appeal.

47. Paragraph 46 of Mr. Tait's Grounds of Claim contains at least 18 criticisms of the investigation. The Tribunal's duty to give reasons does not oblige it to

address each and every such criticism, and notes Mr. Tait's failure to exercise his right to challenge Mr. Thomson's investigation at the time – a right Mr. Tait was informed of in writing [154-156]. With that said, the Tribunal's conclusions in respect of what it considers to be the most weighty criticisms are as follows:

- 5 48. First, the Tribunal agrees it was wrong for Mr. Sell to have based a finding that Mr. Tait had engaged in unwanted conduct towards AD based on conduct prior to 6 May 2021 (Mr. Sell denied he did this but the wording of his dismissal letter, over which considerable care would have been taken, is to the contrary) – Mr. Tait's conduct prior to 6 May 2021 was not a factual basis upon which
10 the disciplinary hearing was convened [279-281], and if that conduct was to form an important part of the Board's case for disciplinary action and ultimately dismissal, Mr. Tait should have been told that in writing before the disciplinary hearing. However, the Tribunal is satisfied this defect was cured on appeal, as it accepts Ms. Bussell's evidence that she dismissed his appeal
15 based squarely (and solely) on Mr. Tait's conduct on 6-7 May 2021.
49. Second, the Tribunal rejects the criticism that the Board failed to conduct an adequate investigation because Mr. Thomson did not interview Ms. McKim [23, para. 46(c)]. Ms. McKim provided a written account of what happened, and there was never a dispute about the fact Mr. Tait did ultimately apologise
20 to AD before AD make a formal complaint about the incident. The Tribunal rejects the criticism that the investigation failed to establish there was an intimidating or hostile environment for AD [46, para. 46(b)] – Mr. Tait's misconduct spoke for itself (hence Mr. Tait's apology), and plainly had created a hostile, unwelcome, upsetting environment for AD during the shift.
- 25 50. Third, the Tribunal accepts – and the Board accepted at the time – that Mr. Thomson had overstepped the mark at the disciplinary hearing by conducting at least as much of an advocacy role as a neutral presenter of the facts uncovered during his investigation. However, the Tribunal accepts Mr. Sell was able to put that aside and focus on the substantive case Mr. Thomson
30 was presenting, and was not improperly influenced by the manner in which Mr. Thomson presented the management case.

51. Issue #4 (whether dismissal procedurally fair). Looked at in the round, the Tribunal is satisfied Mr. Tait's dismissal was procedurally fair and fell within the range of reasonable disciplinary responses open to the Board at the time:

- a. the Board did conduct an investigation without unreasonable delay to establish the facts of what happened on 6-7 May 2021;
- b. different people were responsible for the investigation (Mr. Thomson), the disciplinary hearing (Mr. Sell), and the appeal (Ms. Bussell);
- c. the Board allowed union representative Ms. MacRae to accompany Mr. Tait at his investigatory interview [131];
- d. Mr. Tait was informed in writing of the allegations against him, and had sufficient notice to prepare his answer and response to those allegations, which he did;
- e. Mr. Tait/Ms MacRae were provided with copies of the investigation report, supporting evidence, and relevant policies;
- f. although it took too long for the disciplinary hearing to be held, that was not by design, and the Tribunal is satisfied Mr. Tait did not suffer any material prejudice because of the delay;
- g. Mr. Tait and Ms. MacRae both attended the disciplinary hearing, an explanation of the procedure was given, Mr. Thomson went through the evidence, and was questioned about it, and Mr. Tait and Ms. MacRae had the chance to question the witnesses who attended, including AD;
- h. at the disciplinary, Ms. MacRae was allowed to – and did – put and sum up Mr. Tait's case, responded to views expressed at that hearing, and had time both during the hearing and during breaks to confer with Mr. Tait;
- i. after the disciplinary, Mr. Sell notified Mr. Tait of the outcome, with reasons explaining his decision, and informed Mr. Tait of his appeal rights;

- j. the Board's policies gave examples of acts it considered might be acts of gross misconduct, and it was one of those examples (harassment) which was applied to determine that Mr. Tait's remarks to AD on 6-7 May 2012 had constituted gross misconduct;
- 5 k. Mr. Tait's appeal was heard without unreasonable delay and decided impartially by someone not previously involved in the case;
- l. Mr. Tait and Ms. MacRae attended the appeal hearing, and Ms. Macrae again put and summed up Mr. Tait's case;
- 10 m. Mr. Tait was informed of the outcome of his appeal within a reasonable period of time after the appeal hearing, and was given a substantive explanation why his appeal had been unsuccessful.
52. For the avoidance of doubt, the Board's disciplinary process was not perfect, and mistakes were made. The Tribunal has already adverted to the fact the invitation letter to the disciplinary hearing failed to draw a clear distinction
15 between the factual allegations and the allegations of misconduct premised on those allegations. However, notwithstanding that defect, it does appear Mr. Tait and Ms. MacRae both understood the case Mr. Tait had to meet. In determining whether Mr. Tait was guilty of harassment, Mr. Sell appears to have taken into account allegations of prior misconduct which did not form
20 part of the written case against him. As noted above, the Tribunal is satisfied this defect was satisfactorily addressed and remedied at the appeal stage.
53. Issue #5 (whether decision to dismiss fell within range of reasonable responses). Subject to one matter discussed further below, the Tribunal is satisfied Mr. Tait's dismissal for the conduct identified in Allegations #1-4 fell
25 within the range of reasonable responses open to the Board at the time, based on the evidence before it, the way in which Mr. Tait put his case, and Mr. Tait's own conduct at the disciplinary hearing:
- a. Mr. Tait ultimately admitted Allegations #1-4;

- b. Mr. Tait's remarks to AD were not wanted by AD, and greatly upset him (enough so that AD did not believe he was mentally fit enough to continue his shift that night, a view Mr. Tait did not disagree with at the time);
- c. Allegations #1-3 plainly related to AD's religion;
- 5 d. Allegation #4 likely related to AD's ethnic/national origin, and the fact he had come to live in the UK in his 20s;
- e. Mr. Tait's remarks to AD in Allegations #1-3 fell squarely within the policy definition of harassment [46, para. 1.3.2] (Allegation #4 is less clear);
- f. in Mr. Sell and Ms. Bussell's judgment – which the Tribunal considers was
10 reasonable – Mr. Tait's remarks to AD constituted a single serious incident of harassment [46, para. 1.3.4];
- g. Mr. Sell and Ms. Bussell acted in accordance with that policy in treating Mr. Tait's remarks to AD as gross misconduct [46, para. 1.3.4];
- h. given it was a reasonable for Mr. Sell and Ms. Bussell to find Mr. Tait guilty
15 of gross misconduct, it was reasonable for dismissal to be one of the disciplinary sanctions open to them at the time to address that conduct;
- i. in determining that dismissal was the appropriate disciplinary sanction, Mr. Sell was entitled to take into consideration what he perceived (at the disciplinary hearing) to be a fundamental lack of insight by Mr. Tait into
20 his own conduct that day [311, para. 414] [313, paras. 450-451];
- j. Mr. Sell did consider alternatives to dismiss, including employment elsewhere in the Board or in a different banding or role [319], and rejected them on grounds which the Tribunal considers reasonable;
- k. Ms. MacRae was satisfied the appeal hearing was conducted fairly;
- 25 l. whatever criticisms Mr. Tait and Ms. MacRae have of the disciplinary hearing and Mr. Thomson's conduct at it, the Tribunal having read the lengthy transcript of that hearing is not satisfied it was conducted unfairly.

54. The Tribunal reminds itself it is not appropriate for the Tribunal to determine whether it would have made the same decision as the Board, based on the same evidence. It will provide cold comfort to Mr. Tait to note that while dismissal was a reasonable sanction, the Tribunal is satisfied that a final written warning and an opportunity to prove he could be trusted not to repeat such behaviour would also have been a proportionate response to Mr. Tait's misconduct at the time – the Tribunal does not accept Mr. Tait's conduct on 6-7 May 2021 was so bad that dismissal was the only possible reasonable response. The Tribunal is also satisfied that it would have been outwith the range of reasonable responses for the Board to have dismissed Mr. Tait for Allegation #4 if that was the only allegation proven.
55. The matter which most concerned the Tribunal about the substantive fairness of Mr. Tait's dismissal was Mr. Sell's ignorance of Mr. Tait's long service and clean disciplinary record when he decided to dismiss Mr. Tait. In determining whether dismissal is a reasonable response, it is usually appropriate for an employer to consider, as part of the mix of relevant factors, an employee's service record and prior disciplinary record (which is not to say those factors, even if favourable, will prevent dismissal being a reasonable outcome). The Tribunal notes the following:
- a. Mr. Tait's statement of case prior to the disciplinary hearing highlighted his long service [174, para. 1.1] and clean record [181, para. 3.5];
 - b. at the disciplinary hearing, neither Ms. MacRae's opening submissions [306, para. 346] nor closing submissions [313, para. 460] made explicit reference to Mr. Tait's service record or disciplinary record;
 - c. Mr. Sell's dismissal letter did not mention Mr. Tait's lengthy service record or disciplinary record as potential mitigating factors [318], and in his oral evidence Mr. Sell accepted he had not been aware of those matters;
 - d. Mr. Tait's statement of case for his appeal referred to his unblemished employment record over 22 years [359, para. 4.1.13] [362, para. 6.3.2];

- e. at the appeal hearing, Ms. MacRae mentioned Mr. Tait's unblemished employment record for over 22 years [437, 440];
- f. at the appeal hearing, when Mr. Sell discussed potential mitigating factors [452] he did not mention Mr. Tait's service record or disciplinary record;
- 5 g. Ms. Bussell's letter dismissing Mr. Tait's appeal made no mention of his service record or disciplinary record.

56. Based on the above, the Tribunal is not satisfied the Board (Mr. Sell at the disciplinary, Ms. Bussell at the appeal) gave reasonable consideration to Mr. Tait's length of service or clean disciplinary record before dismissing him.

10 57. That being said, the Tribunal ultimately has to make a judgment about the fairness of Mr. Tait's dismissal *as a whole*. When looked at *as a whole*, the Tribunal is satisfied the Board followed a reasonably fair disciplinary procedure and that Mr. Tait's dismissal for the conduct at issue (Allegations #1-4) fell within the range of reasonable responses open to it at the time.
15 Having heard from Mr. Sell and Ms. Bussell, the Tribunal is satisfied Mr. Sell would still have chosen to dismiss Mr. Tait and Ms. Bussell would still have chosen not to uphold Mr. Tait's appeal against dismissal based on their sincere view about the seriousness of Mr. Tait's misconduct even if they had given significantly greater consideration to Mr. Tait's unblemished service
20 record and clean disciplinary record.

58. Issue #6 (whether Claimant entitled to declaration on unfair dismissal, compensation). For the reasons given above, the Tribunal's judgment is that Mr. Tait's dismissal for the misconduct at issue fell within the range of reasonable responses open to the Board at the time, hence was not unfair.
25 The claim of unfair dismissal is not well founded, and Mr. Tait is not entitled to compensation or declaratory relief.

59. Issue #7 (whether remedy should be reduced due to Polkey or contributory conduct). Strictly speaking, these issues do not arise for determination. If they did, however, the Tribunal's judgment would have been that if a fair

disciplinary procedure had been followed there is a 100% chance Mr. Tait would have been fairly dismissed for the conduct at issue. It would also have been the Tribunal's judgment that Mr. Tait caused and/or contributed to his own dismissal by the conduct identified in Allegations #1-3 by a factor of 100%. For those reasons, had Mr. Tait's unfair dismissal claim succeeded, the Tribunal would not have awarded him either a basic award or a compensatory award, and he would have been limited to declaratory relief.

Wrongful dismissal

60. Issue #8 (whether Claimant was wrongfully dismissed insofar as he alleges he did not commit a repudiatory breach of contract). For the reasons set out below, the Tribunal is satisfied that Mr. Tait's conduct referred to in Allegations #1-3 constituted a repudiatory breach of contract on his part entitling the Board to summarily dismiss him without notice or payment in lieu of notice.

61. First, it is not in dispute that Allegations #1-3 are true, ie, Mr. Tait said to AD what he is alleged to have said to AD in those allegations.

62. Second, the Tribunal has seen a copy of the terms and conditions of employment Mr. Tait signed 6 February 2001 [42-44]. Nothing in those terms excludes the existence of an implied term of trust and confidence in Mr. Tait's employment contract. The Tribunal infers that Mr. Tait's employment contract with the Board therefore likely did contain an implied term obliging both Mr. Tait and the Board not to, without reasonable and proper cause, engage in conduct calculated or likely to destroy or seriously damage the necessary relationship of trust and confidence between employer and employee.

63. Third, in the Tribunal's view, Mr. Tait's conduct in Allegations #1-3 was conduct likely to serious damage the necessary relationship of trust and confidence between the Board and Mr. Tait.

64. Fourth, Mr. Tait did not have reasonable and proper cause for that conduct.

65. Fifth, a breach of the implied term and confidence is almost always a repudiatory breach of the employment contract by the party in breach, in this

case Mr. Tait. There is no reason in this case not to conclude that by the conduct in Allegations #1-3 Mr. Tait had committed a repudiatory breach of this implied term in his employment contract entitling the Board to summarily dismiss him for that conduct.

5 66. Sixth, in concluding that the Board was entitled to summarily dismiss Mr. Tait for the conduct identified in Allegations 1#-3, the Tribunal is also satisfied that Mr. Tait's conduct towards AD constituted harassment related to religion under s.26 of the Equality Act 2010 for which AD could have brought a successful claim against the Board in ET proceedings and been awarded
10 substantial damages in compensation for injury to feelings. It is the Board's good fortune that AD chose not to do so (so far as this Tribunal is aware). This fortifies the Tribunal's judgment that by the conduct identified in Allegations #1-3 Mr. Tait committed a repudiatory breach of his employment contract.

15 67. Seventh, the Tribunal is not satisfied that Mr. Tait's conduct in Allegation #4, considered on its own, was a repudiatory breach of the implied term of trust and confidence or any other term of Mr. Tait's employment contract.

20 **Employment Judge: Tinnion**

Date of Judgement: 26 April 2023

Date sent to Parties: 26 April 2023