EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4106901/2023

Hearing held in Glasgow on 29 February (pre-reading) and 1, 4, 5, 6 and 7 March 2024

Employment Judge M Whitcombe

Dr Richard MacCallum	**Claimant** **Represented by:** **Ms H Hogben (Counsel)**
Forth Valley Health Board	**Respondent** **Represented by:** **Mr J Anderson (Counsel)**

JUDGMENT

The judgment of the Tribunal is as follows.

(1) The claimant was unfairly dismissed.

(2) It would be just and equitable to reduce both the basic and the compensatory awards for unfair dismissal by 15% because of the claimant's contributory conduct.

(3) It would not be just or equitable to reduce the compensatory award further to reflect the chance that the respondent would have dismissed if it had followed a fair procedure.

REASONS

Introduction and background

1. This is a claim for unfair dismissal arising from events which occurred in late 2016. The claimant was formerly employed by the respondent health board from 1 May 2004 until 5 June 2023 as an Emergency Department Consultant based at Forth Valley Royal Hospital in Larbert. The functions and duties of a health board are well-known. The respondent provides healthcare services in the Clackmannanshire, Falkirk and Stirling areas. The claimant was suspended on full pay for more than 6½ years from 22 November 2016 until 7 June 2023, when he was dismissed without notice for gross misconduct.

2. In broad terms, the matters which the respondent found to have amounted to gross misconduct were communications with a patient by phone call and text and a visit to that same patient's home address without any reasonable work-related or other legitimate reasons.

3. An appeal took place on 19 January 2024, after the commencement of these proceedings on 8 November 2023. The claimant's appeal against dismissal was unsuccessful and the decision to dismiss was confirmed in a letter dated 2 February 2024.

Scope of this hearing

4. By virtue of a case management order made by consent on 23 January 2024, the scope of this hearing was confined to issues of:
    a. liability
    b. "***Polkey***" reductions to reflect the chance of a fair dismissal in any event (if appropriate); and
    c. contributory fault (if appropriate).

5. If any other issues of remedy arise then they will be dealt with at a further hearing. The claimant no longer seeks reinstatement or reengagement and so the remedy sought would be limited to compensation.

Issues

The reason for dismissal

6. Both sides agree that the claimant was dismissed for reasons of conduct. That is a potentially fair reason for dismissal falling within section 98(2)(b) ERA 1996.

The fairness of dismissal

7. Not all the allegations of unfairness set out in the grounds of claim were pursued during the hearing or in closing submissions. Other arguments became more prominent and were added during the hearing by way of an uncontested amendment of the claim.

8. By the end of the hearing, the live issues arising under section 98(4) ERA 1996 could be summarised as follows:

    a. whether the respondent undertook as much investigation into matters as was reasonable in all the circumstances of the case (***BHS v Burchell*** [1980] ICR 303, EAT);

b. whether the respondent had reasonable grounds for a belief in the claimant's guilt (***BHS v Burchell*** [1980] ICR 303, EAT);

c. whether the decision to dismiss fell within the range of reasonable responses open to the respondent;

d. the following issues of procedural fairness:
    i. whether the completion of the disciplinary process was so delayed that it made the dismissal unfair;
    ii. whether the outcome of the disciplinary process was predetermined;
    iii. an alleged failure to address deficiencies in the approach of the investigating panel ("the Hardman panel") to the evidence before them;
    iv. an alleged failure to allow the claimant to challenge or re-open the findings of fact made by that investigating panel at the disciplinary stage ("the Roberts panel") and/or the appeal stage ("the Croft panel");
    v. reliance on the claimant's dishonesty when deciding to dismiss, despite that not having been one of the charges;
    vi. a failure to clarify the allegations of gross misconduct or that one of the possible sanctions could be summary dismissal;
    vii. a failure to clarify the process which would be used at the disciplinary stage;
    viii. the involvement of Sandra Drinkeld at two different stages of the process.

e. If the dismissal was unfair, the existence of any contributory fault, and whether it would be just and equitable to reduce compensation because section 122(2) ERA 1996 and/or section 123(6) ERA 1996 applied.

f. If the dismissal was unfair, whether it would be just and equitable to reduce compensation to reflect the chance that the dismissal would have occurred anyway, even if the respondent had followed a fair procedure (***Polkey v AE Dayton Services Ltd*** [1988] ICR 142, HL and section 123(1) ERA 1996).

Evidence

9. I was provided with a joint file of documentary evidence running to 504 pages, including a small number added during the hearing. I had limited the size of that file to 750 pages without further order. That did not appear to have caused any problem. Only some of those 504 pages were referred to during the hearing.

10. Evidence in chief was given by reference to witness statements, confirmed on oath or affirmation. None of the witnesses gave any additional oral evidence in chief. All witnesses were cross-examined.

11. The respondent called the following 7 witnesses in the following order:

a. Elaine Bell (Associate Director of HR);
b. Alasdair Hardman, an advocate in private practice, who chaired the "Investigating Panel" set up pursuant to Annex C of NHS Circular No.1990 (PCS) 8;
c. Dr Andrew Murray, the respondent's Medical Director and Responsible Officer, who oversaw the claimant's continuing suspension;
d. Sandra Drinkeld, HR Manager for Corporate Services, who provided HR support at the sanction (Roberts) hearing;
e. Ralph Roberts (Chief Executive of NHS Borders), who chaired the panel which took the decision to dismiss the claimant;
f. Amanda Croft (Interim Chief Executive from 11 September 2023), who chaired the claimant's appeal hearing;
g. Kevin Reith (Interim Director of HR from 31 July 2023), who provided

HR support at the appeal.

12. The claimant also gave evidence and was the sole witness called on his side.

13. I thought that all the witnesses generally gave their evidence in a helpful and straightforward way. All of them were apparently credible and I did not get the impression that any of them were deliberately exaggerating, deflecting questions or trying to mislead me. However, that did not mean that I shared their subjectively honest views of the facts in every respect. At times Elaine Bell appeared determined to stay "on message" regarding issues of delay, whatever was put to her.

Facts

Approach

14. Where facts were disputed, I made my findings on the balance of probabilities, in other words, the "more likely than not" basis that applies to almost all issues in civil litigation. If I decided that a fact was more likely to be true than untrue, then for the purposes of this judgment it was treated as being true. The converse also applies. I make that clear because it has two important consequences:

    a. If I did not accept the evidence of a particular witness on a particular point, that does not mean that I thought they were lying. It just means that I thought they were unlikely to be correct. Those are very different things.

    b. Fact finding in an Employment Tribunal is careful, but it is not meant to be carried out to a criminal standard of proof. At times, the claimant's evidence and arguments seemed to proceed on the basis that only something much closer to certainty could properly support a finding of guilt, and his former representative expressly criticised the Hardman

panel for applying a standard of proof on the balance of probabilities.

Policies and procedures

15. The respondent had collectively agreed "*Guidance for Managing Issues Regarding the Conduct and Competence of Consultant and Other Career Grade Doctors and Dentists*". The version adopted on 22 August 2012 applied at the relevant time. I will refer to it as "the Guidance". Further details of the provisions of Appendix 1 relating to suspension are set out below.

16. Additionally, matters of professional competence and conduct were subject to the processes set out in national NHS Circulars 1990 (PCS) 8, 1990 (PCS) 32, PCS (DD) 1994/11, PCS (DD) 1997/7 and PCS (DD) 2001/9. I will refer to the first of those as "the Circular".

17. The procedure to be adopted under the Circular depended on the nature of the allegation of misconduct. Paragraph 5 contained relevant definitions. By the time of this hearing it had become common ground that the allegations against the claimant were properly categorised as "*Professional Conduct: Performance or behaviour of practitioners arising from the exercise of medical or dental skills.*" Annex C set out the "*Procedure for Serious Disciplinary Cases*" and was commonly referred to by witnesses and representatives at the hearing as "*Annex C procedure*". It applied where the outcome of disciplinary action could be the dismissal of the medical or dental practitioner concerned. I will deal with specific provisions of the Annex C procedure below, but section 18 ("Timetable") anticipated that the time taken from the decision that there was a *prima facie* case to the submission of the investigating panel's report to the Health Board should not exceed 32 weeks.

18. The respondent's "*Management of Employee Conduct Policy*" was developed in partnership with trade unions and professional organisations. Annex C (not to be confused with Annex C of the Circular, above) defines misconduct as "*any type of behaviour or conduct at work that falls below the standard*

required by the employer or is in breach of organisational policy."

19. The same Annex defines acts of gross misconduct as "*those which are so serious in themselves, or have such serious consequences, that the relationship of trust and confidence, which is needed between the employer and employee, has been damaged irreparably*". It goes on to give the usual non-exhaustive list of examples. The one referred to at this hearing was, "*Unprofessional conduct as defined by reference to generally accepted standards of conduct or ethics within a staff group.*"

Allegations and suspension

20. On 16 November 2016 the respondent received a complaint from two daughters of an ex-patient ("the patient"). The respondent met with the daughters on 17 November 2016. In broad terms, the complaint alleged that an inappropriate relationship had developed between the claimant and the patient following her presentation at the Emergency Department at Forth Valley Royal Hospital on 9 October 2016 and her subsequent overnight admission for observation. The complaint alleged that the relationship quickly became sexual, that text messages were exchanged between the claimant and the patient, and that the claimant had visited the patient's home.

21. Later on 17 November 2016, the claimant was asked to meet with Elaine Bell (HR) and the then Medical Director, Tracey Gillies. The claimant was told not to work that weekend and to return to work on 22 November 2016. On 22 November 2016 the claimant was suspended by Tracey Gillies.

22. Appendix 1 of the Guidance sets out the procedure for dealing with suspension of medical staff on any grounds.

    a. Paragraph 6 requires the HR Director to inform the Scottish Government Health Department ("SGHD") when any doctor is suspended, giving their name, speciality, date of suspension and reasons for suspension. The HR Director is obliged to provide monthly

progress reports including information on progress to date, the reasons for any delay in resolving the case, an explanation of how it is proposed to overcome those delays, the costs incurred and the anticipated date of conclusion of the disciplinary process.

b. Paragraph 7 requires that the clinician must be advised in writing of the anticipated duration of the investigation. Paragraph 8 notes that suspension isolates practitioners from their normal organisational support mechanisms. A designated contact will be responsible for keeping the suspended practitioner updated on the progress of the investigation.

c. Paragraph 10 requires that the particulars of the allegations should be investigated and clarified within 10 days, or else the practitioner should be told why and informed when further information will be provided.

d. Paragraphs 11 and 12 require that there must be provision for review of the suspension as the investigation continues, and that at each such review careful consideration should be given to whether the interests of patients, other staff, the practitioner or the needs of the investigative process continue to necessitate suspension. The process must consider the option of the practitioner returning to limited or alternative duties if possible. The review should normally be undertaken “at least every 2 weeks” and the outcome reported to the Medical Director, The HR Director, the Chief Executive and the appropriate Committee of the Board.

e. Additionally, under paragraph 14 a doctor can request a review of their situation by writing to the HR Director, stating the reasons why they feel their suspension should be lifted. The HR Director and Medical Director will then undertake a review of the reasons for suspension and the current status of the investigation, informing the doctor of their decision within 2 weeks from the date of the doctor’s letter.

f. Paragraph 15 provides for additional monthly reporting requirements to the Chief Executive, Medical Director and HR Director if the investigation has not been completed within 3 months of the date of suspension outlining the reasons for delay, how long the investigation

is expected to continue and a plan for completion.

g. Finally, paragraph 18 states, "*Whilst it is impractical to lay down strict time limits for the overall duration of suspension, it should be kept to an absolute minimum in all cases.*"

23. The respondent did not adhere to that procedure. On 28 February 2017 the claimant wrote to Dr David Lyn, his designated contact, complaining about a lack of contact over the first 100 days of his suspension, the fact that his participation in CPD had been blocked, and that there had been insufficient reviews of his suspension. Dr Murray carried out reviews from 17 January 2019 until April 2021 but could not remember why they seemed to stop at that point. I find that the reviews carried out for just over 2 years by Dr Murray were the only formal reviews of suspension carried out by anyone, and that even those reviews were insufficiently frequent to comply with the respondent's own guidance, since they were not "at least every 2 weeks".

Progress of the investigation

24. Dr David Cumming was appointed Investigating Officer on 29 November 2016.

25. The respondent's Medical Director reported the claimant to the General Medical Council ("GMC") on 31 January 2017 and a separate regulatory investigation into the claimant's fitness to practise followed.

26. So far as the respondent's own procedure was concerned, a "Preliminary Enquiry" was held on 3 February 2017 to obtain the claimant's initial response to the allegation. On 22 February 2017 Dr Allan Bridges, the respondent's Associate Medical Director, wrote to the claimant with the outcome of that Preliminary Enquiry. It wrongly categorised the allegations as "personal misconduct". The effect of that categorisation would have been that Annex C procedure did not apply to the rest of the process. The claimant challenged that classification on 28 February 2017.

27. On 15 March 2017, following media coverage, a new complaint was made by a second individual. It alleged an inappropriate relationship between the claimant and another female patient. However, the allegation was unfounded and did not lead to any further disciplinary action against the claimant.

28. On 21 June 2017 the respondent accepted that the categorisation of the original allegations had been wrong and reclassified them as "Professional Conduct", such that Annex C procedure would apply from that point onwards.

29. A third complaint came to light in August 2017. It was alleged that the claimant had sexually assaulted the patient within the hospital on the night of 9 October 2016. The police were involved and the claimant was charged with sexual assault. In September 2017 the police asked the respondent to pause their own investigations with certain witnesses. On 15 January 2018 the police informed the respondent that it could proceed with its own investigations.

30. The investigation into the allegations against the claimant was conducted by Dr Henry Robb, Associate Medical Director, and Elaine Vanhegan, with HR support from Elaine Bell. Dr Robb wrote to the claimant on 7 July 2017 to notify him of the identity of those on the investigating panel and of the fact that Dr Robb anticipated some delays due to the summer holiday period. He wrote again on 15 November 2017 to apologise for further delay, which he attributed to the need to investigate the alleged sexual assault. A 38 page investigation report was sent to the claimant's representatives on 19 September 2018. The claimant and his representatives criticised the report and those involved in its preparation.

31. It was not until March 2019 that the respondent began making arrangements to hold the "investigatory hearing" described in paragraphs 9-11 of Annex C. It might more accurately be described as a fact-finding hearing, given the status of its findings in the rest of the disciplinary process. On 18 April 2019 the claimant was invited to an investigation panel hearing due to sit on 22 and

23 May 2019. However, those dates were cancelled because of the claimant's ill health. A fit note indicated that the claimant would not be fit for work (which seems to have been equated with fitness to attend the hearing) for 3 months. Before the end of that 3 month period the respondent became aware that dates for the MPTS fitness to practise hearing had been set. It decided to postpone the investigation hearing on health grounds until after the MPTS process had finished.

MPTS process

32. The MPTS hearing began on 27 November 2019 and the final decision on impairment and sanction was delivered on 4 March 2020. The MPTS panel found that the claimant had sent certain text messages to the patient, who he was aware was a vulnerable individual with a history of alcohol abuse. The panel found the text messages to be overly familiar and not of a clinical nature. They were sent in the evening and signed with an "X". Having considered GMC guidance, "*Maintaining a professional boundary between you and your patient*", the MPTS panel found that the claimant had failed to maintain appropriate professional boundaries and that fellow professionals would regard the messages as "deplorable", notwithstanding that the messages were not sexually motivated. The panel found that the claimant's actions undermined public confidence in the profession, and that a member of the public aware of the facts would consider the claimant's actions to have been a serious breach of professional standards. The MPTS therefore found that the sending of text messages amounted to serious misconduct.

33. However, the panel did not find that the claimant's actions in relation to making phone calls to the patient amounted to misconduct, even though they had been ill-advised.

34. The MPTS panel was clearly impressed by the claimant's insight, reflective learning and remediation, and concluded that the risk of repetition was low. The claimant had identified failures and weaknesses in himself and in his

approach. The claimant had attended a "*Maintaining Professional Boundaries*" course over 3 days in 2017 and a further day in 2018. He had produced a teaching presentation based on his own experience called, "*How I got myself into this mess*" to teach junior colleagues the dangers of breaching professional boundaries. For those reasons, the MPTS panel concluded that the public interest did *not* require a finding of impairment to maintain public confidence in the profession at that time. Fitness to practise was not impaired.

35. While that finding did not preclude the panel from issuing a warning, it declined to do so on the basis that a warning was not in the public interest and would have been disproportionate. The basis of that conclusion was that the claimant had developed a sufficient level of insight into his failings, was genuinely remorseful, had offered to apologise to the patient and her family, was of previous good character, was unlikely to repeat the behaviour in the future, had undertaken sufficient remediation and had provided positive, relevant and appropriate references and testimonials.

Respondent's reaction to MPTS outcome

36. Andrew Murray, Medical Director, decided on 5 March 2020 that the claimant should remain on paid suspension, despite the MPTS outcome. His reasoning was that "*the MPTS process is not the same as our process and their deliberation is in their context, not ours*", so the Annex C process should continue. That appears to confuse the question whether the Annex C process should continue to its conclusion with the question whether there was a proper basis on which to maintain the claimant's suspension while that happened. The claimant was notified of that decision in a letter dated 16 March 2020, which also linked the decision to "*a duty of care to members of the public*". The respondent committed to ensure that the "*position will be regularly reviewed*".

37. The respondent also corresponded with the chair of MPTS Dame Caroline

Swift (retired High Court Judge and former counsel to the Shipman Inquiry). Later, on 19 August 2020, Andrew Murray wrote to an official of the GMC seeking "*the contact details of whomever the most appropriate person is within the GMC so I can formally request they consider the outcome and contextual information of this case and review their decision not to appeal. I wish to confirm that this is also the view of my Chief Executive and Director of HR. We are collectively very concerned about this ruling and the subsequent GMC decision. In my letter requesting reconsideration, should the GMC confirm they will not appeal, I would be looking for the reasoning within the response.*"

38. In a board minute dated 25 August 2020 Cathie Cowan (then Chief Executive) noted that "*The decision made by the MPTS is therefore not relevant – their decision on fitness to practice* [sic] *is different from the decision which NHS Forth Valley might find itself making on the appropriate sanction for misconduct by an employee.*"

39. The GMC did not appeal the conclusions of the MPTS panel, whether regarding the findings of misconduct, the decision regarding impairment or the decision not to impost any sanction. Unlike the GMC, the respondent had no standing to appeal, even if it was displeased by the outcome.

Resumption of the respondent's investigation

40. The respondent paused all of its "employee relations activity" from March 2020 until September 2020 because of the Covid-19 pandemic. There was a further pause in activity from January 2021 until March 2021 for the same reason. Elaine Bell said that by March 2021 the "*HR Department were again managing a significant backlog of cases and other HR business*", but she did not explain why no effort was made to prioritise the claimant's case, given that he had, by then, been suspended for around 4½ years.

The Investigating Panel (Hardman)

41. As noted above, Annex C procedure applied to "*serious disciplinary cases involving the professional conduct and professional competence of all hospital medical and dental staff…where the outcome of the disciplinary action could be the dismissal of the medical or dental practitioner concerned.*" The claimant's case fell into the "professional conduct" category.

42. Under the heading "*Inquiry*", paragraph 9 requires an "*investigating panel*". The chair must be legally qualified. The precise composition would vary depending on the nature of the allegations, but no member of the panel should be associated with the hospital in which the practitioner concerned worked. In professional conduct cases the rest of the panel must usually be divided equally between professional and lay persons. The panel is provided with formal "*terms of reference*".

43. Paragraph 11 provides that "*the investigating panel should meet in private and seek to establish all the relevant facts of the case*". It therefore has a fact-finding role, not just an evidence gathering role.

44. Pursuant to paragraph 12 of the Annex C procedure, preliminary meetings took place on 4 and 28 June 2021 to discuss arrangements for the full investigation hearing. Alaisdair Hardman, Advocate, attended as the chair of the panel. Ken McGuire, Advocate, appeared for the respondent and Laura Donald (solicitor) and a trainee from the same firm attended for the claimant. Sandra Drinkeld was present as a notetaker.

45. The stated purpose of the meeting was to agree the witnesses who would be called and the documents that would be required. On behalf of the claimant, Laura Donald had a clear view on that and had also discussed matters with Mr McGuire. I accept Mr Hardman's evidence that he did not involve himself in decisions about the evidence to be called, his approach was to make that a matter for the legal representatives on each side. The claimant's representative exercised her professional skill and judgment in that regard

and, through her, the claimant had a full and free opportunity to call the evidence that he considered relevant. Under paragraph 11 of Annex C the panel had a power to ask for other witnesses to be called, but Mr Hardman saw no reason to exercise that power. Neither of the representatives asked him to.

46. The evidence was heard by the full panel of Alasdair Hardman, Maureen McKenna (Executive Director of Education, Glasgow City Council) and Dr John Thomson (Vice President (Scotland) of the Royal College of Emergency Medicine).

47. The representatives originally agreed that 10 days and up to 12 witnesses would be required, which would have been an extraordinarily long internal hearing. However, it appears that the witness list shortened and ultimately evidence was heard from 5 witnesses including the claimant over three days on 4, 5 and 6 October 2021. The legal representatives made written and oral submissions on 26 October 2021.

48. Paragraph 13 of the Annex C procedure requires the panel to present its report in two parts:

    a. the first part should set out the panel's findings and all the relevant facts of the case but contain no recommendations as to action;
    b. the second part should contain a view as to whether the practitioner is at fault and should explain the basis on which that finding has been reached. At the Health Board's request the report *may* contain recommendations as to disciplinary action, but that is not mandatory and it was not the approach taken in this case. The investigating panel should not be given any disciplinary powers itself.

49. Paragraph 14 of Annex C provides that the panel should send both sides a copy of the first part of their report, allowing a period of 4 weeks for the submission of any proposals for the correction of facts. Once that procedure has been completed, "*the facts as set out in the panel's report should be*

accepted as established in any subsequent consideration of the case." Both Ms Donald and Mr McGuire made submissions regarding the correction of facts. The submissions made on behalf of the claimant stretched to 58 paragraphs and re-attached the 116 paragraphs of written submissions made at the hearing. They went far beyond suggested corrections of fact, and criticised "the quality of the report" and its reasoning. In effect, the claimant's submissions attempted to re-argue the case.

50. The panel sent its investigation report to the respondent on 13 December 2021.

51. The Part 1 conclusions were as follows.

a. The claimant made a phone call to the patient on 9 November 2016 and/or 3 phone calls to her on 17 November 2016, and did so intentionally without a reasonable work-related or other legitimate reason for making the calls.

b. The claimant sent a text message to the patient on or around 13 November 2016, and/or 3 text messages to her on or around 14 November 2016, without a reasonable work-related or other legitimate reason for sending them.

c. The claimant visited the patient at her home address on one occasion between 10 October 2016 and 17 November 2016 without a reasonable work related or other legitimate reason for making that visit.

d. The claimant did *not* visit the patient at her home address and engage in conduct of a sexual nature with her on or around 14 November 2016.

52. The Part 2 conclusion was that the claimant's actions had been inappropriate and that he was at fault. That finding was based on:

a. the claimant's role as a Consultant in A&E Medicine;

b. the fact that his role was to oversee the patient's care from 4pm until midnight on 9 October 2016;

c. a "personal relationship" was formed within one week after the

claimant's role in caring for the patient ended;

d. that relationship continued by way of telephone conversations, text messages and at least one visit to the patient's home, until an exchange of texts was discovered by the patient's daughters on 14 November 2016;

e. while a friendly relationship would not have been inappropriate in proper circumstances, it was inappropriate for the claimant to allow the relationship to continue in the circumstances which applied. The patient appeared to the claimant to be vulnerable. The professional relationship was very short, beginning and ending on 9 October 2016 but the personal relationship followed on almost immediately. Reference was made to GMC guidance "*Maintaining a professional boundary between you and your patient.*"

f. Appropriate actions would have included immediately advising the employer, or a senior colleague, of an initial approach by the patient, and then distancing himself from such contact.

g. If the claimant wished to assist the patient after his professional duty of care had ended then that could have been achieved by appropriate contact with her GP. There was no professional justification for the continued contact which occurred.

The Sanction Panel (Roberts)

53. By 2 February 2022 the respondent had decided that its CEO (Cathie Cowan) and HR Director (Linda Donaldson) would form the independent panel tasked with selecting the appropriate sanction and proposed a meeting on 25 February 2022. That hearing was postponed because the claimant's representative was not available. The claimant's lawyers challenged the involvement of Cathie Cowan and Linda Donaldson on the basis that (among other things) their impartiality was compromised by their interest in an appeal by the GMC against the MPTS panel findings (see above).

54. On 25 February 2022 the respondent proposed a new panel formed of Paul

Howie (Chief Executive, Scottish Ambulance Service), Dr Graham Foster (the Respondent's Director of Public Health) and Kenny Tracey (Medical Staffing Lead, NHS Greater Glasgow and Clyde Health Board). An attempt to re-arrange the hearing for 4 April 2022 was unsuccessful because the claimant became unfit to attend a hearing for three months. The claimant was suffering from atrial fibrillation, especially at times of stress.

55. On 26 August 2022 Dr Chris Kalman (Consultant Occupational Physician) suggested to the CEO that matters should be delayed until early 2023. However, it should be noted that he also said, "*This case has now gone on for some six years, and throughout that period I have attempted to advise on the need for timeous action to bring it to a completion as soon as possible. It is therefore with significant reluctance that I would now advise that matters should be delayed still further.*" The claimant was eventually signed off sick until 25 February 2023. Suggested hearing dates on 27 or 28 February 2023 were unsuitable for the claimant's MDDUS representative, and once allowance was made for the claimant's own annual leave from 2 March until 28 April 2023 it was not possible to arrange the rescheduled sanction hearing until 23 May 2023. It went ahead on that date.

56. The claimant was represented at this stage of the process by Dr Susan Gibson-Smith of the MDDUS. She wrote to Mr Roberts on 15 May 2023 saying, "*Mr MacCallum and I note that your letter does not set out the allegations to be considered at the Hearing. Although we may surmise what they are, to avoid any confusion it would be appropriate for the allegations to be clearly set out in the letter*". On 18 May 2023 Ralph Roberts replied stating that the relevant misconduct was set out in the conclusions of the "fact-finding panel" (i.e. the "investigation panel" chaired by Mr Hardman). He also pointed out that the relevant matters were no longer merely "allegations" since they were established facts for the purposes of the Annex C procedure. He apologised for having used the inaccurate term "allegations" in the invitation letter.

57. Ms Howie had become unavailable to chair the hearing, so the panel was chaired by Ralph Roberts (Chief Executive, NHS Borders). He said that he would be "*supported by*" Sandra Drinkeld (one of the respondent's HR Managers) and Dr Juliette Murray (the respondent's Deputy Medical Director) who would provide "*professional advice*". It was explained later that Dr Murray's role was "*to provide a professional medical management perspective as she is professionally responsible for medical staff, including Consultants, as part of her role.*"

58. Prior to the hearing, 16 pages of written summary submissions were sent to the panel on behalf of the claimant.

59. The outcome letter was dated 5 June 2023 and the decision contained within it was effective from 7 June 2023. While it is expressed as the decision of a panel with three members, at points Mr Roberts refers to "*my decision*" or states "*I have considered…*". Having listed carefully to his oral evidence, I find that all three members of the panel contributed to the decision, but that Mr Roberts took the lead. The outcome letter recites the submissions made on behalf of the claimant at some length. I will not repeat them here.

60. The reasoning and conclusions of the sanction panel regarding the claimant's criticisms of procedural fairness can be summarised as follows.

    a. The sanction panel rejected the argument that the facts remained for the sanction panel to determine, and that the findings of the Annex C investigatory hearing should simply be treated as "established by the panel".
    b. The process followed under Annex C met the minimum requirements of the ACAS Code of Practice. The processes followed by the Investigating Panel were "sufficiently robust" and therefore its factual findings were accepted.
    c. There was no lack of fair notice of the allegations. Not only had they been clarified in correspondence, but the claimant and his representatives had been in possession of the Investigating Panel

findings since just after 13 December 2021. That report clearly set out conclusions on the facts, a conclusion that the claimant was at fault, and reasons for those findings.

d. There was no lack of fair notice of the potential level of misconduct either. The invitation letter set out a range of possible sanctions up to and including dismissal, and the Annex C process only applied to cases where a potential outcome of disciplinary action was dismissal. Further, the claimant's representative had stated during the process that the sanction of dismissal would be unfair and would be challenged both internally and externally, demonstrating an awareness of that possible outcome.

e. The sanction panel was independent, impartial, and had no previous knowledge of the circumstances and events which led to the disciplinary process. Its conclusions were not predetermined.

f. The role and findings of the MPTS panel were different.

61. In a separate section, headed "**Observations on Honesty**", the sanction panel contrasted the claimant's fluency and eloquence when speaking about his experience, personal development and the impact of the process on him, with a lack of "fluidity", stopping and starting several times when discussing the events involving the patient. The panel's joint view was, "*we were not convinced that you were being truthful to us*" but it is clear from the context that the finding went a little further than that: they thought that the claimant had been dishonest. There was also a rather oblique reference to the conclusions of the investigating panel regarding the claimant's credibility and the plausibility of some of his explanations.

62. In a section headed "**Assessment of the seriousness of the conduct**", the letter expressed the view that a personal relationship had been formed between the claimant and the patient, as evidenced by a text to the patient's daughter in which the claimant described them as "*friends"*. That relationship began only 4 days after the patient was released from hospital and continued until discovered by members of the patient's family, despite the availability of

support from CADS and the patient's GP. The panel regarded it as more serious than "*blurred boundaries*" and they were concerned that the claimant had not escalated matters to a colleague or a manager.

63. On mitigation, the letter says, "*overall I did not find that your mitigation substantially detracted from the seriousness of the conduct*". Having reviewed "Good Medical Practice", the GMC's core guidance document for doctors, and having taken professional medical advice from Dr Murray, Mr Roberts concluded that the claimant had used his professional position to pursue an improper emotional relationship with a vulnerable patient and had failed to maintain public trust in the profession and in himself.

64. The panel clearly felt that despite the claimant's assurances there was a risk of recurrence. The risk of recurrence, the seriousness of the offence, the claimant's dishonesty and the breakdown of trust and confidence between the claimant and the respondent meant that sanctions short of dismissal such as a warning or redeployment were neither appropriate nor commensurate. The conclusion was that the claimant was guilty of gross misconduct and that dismissal was the only appropriate sanction. The claimant was therefore dismissed without notice with effect from 7 June 2023.

Appeal

65. By a letter dated 15 June 2023 the claimant appealed the decision to dismiss him. The appeal was heard on 19 January 2024 by a panel consisting of Amanda Croft (the respondent's Interim Chief Executive), Kevin Reith (Interim Director of HR), Dr Scott Williams (Deputy Medical Director) and Stephen McAllister (non-executive board member). There was also a notetaker. The claimant was represented by Martyn Ramsay, Regional Secretary of the BMA for the West of Scotland. Both sides presented written material to the panel, which included the claimant's grounds of appeal.

66. Neither the claimant's representative nor management decided to call any

witnesses at the appeal hearing. By the end of that hearing the claimant confirmed that he had been given enough time to present his case and that he had said everything that he wanted to.

67. The appeal panel rejected the appeal and its reasons can be summarised as follows.

a. The appeal panel were not prepared to revisit the findings of the Annex C investigating panel (Hardman). The process adopted by that panel was robust and fair.

b. The allegations, the factual findings, the purpose of the sanction hearing and the reason for dismissal had all been clearly set out and communicated. Further, the claimant and his representative had admitted during the appeal that they understood them. There had not been any failure to follow a fair process in those respects.

c. The process followed at the sanction hearing had been fair, and no particular process for that hearing had been prescribed by Annex C itself. It had been reasonable for the respondent to adopt the current conduct policy, which had been agreed nationally. The position taken by the claimant's representatives, that the respondent should simply have applied Annex C, did not take matters further because Annex C was silent on the relevant issue.

d. The claimant's misconduct had been properly categorised by the sanction panel as "gross misconduct", in that it was unprofessional as defined by reference to generally accepted standards of conduct or ethics within a staff group. The MPTS decision had similarly said that "fellow professionals would consider [the claimant's] behaviour to be deplorable." The appeal panel took the same view.

e. As for delay, "*the process* [had] *clearly not been perfect*", but there had been attempts to progress matters in good faith and to consider all aspects of the case. No conclusion is expressed as to whether the delay had reached an unreasonable level or had made the process unfair.

f. The document headed "Hearing Process May 2023" was only

marginally different from the terms of Annex C, and Mr Roberts had applied the correct approach to the findings of the investigating panel.

g. Sandra Drinkeld's involvement at an earlier meeting as part of the Annex C investigation process had been limited to that of a notetaker and she had no recollection of it until it was raised at the appeal. While it had been a procedural breach it was minor, inadvertent and had not prejudiced Sandra Drinkeld's view of the case. It did not cause unfairness.

h. The issue of the claimant's honesty had only come up during the sanction hearing, so it could not have been part of a prior charge. The sanction panel's conclusion on honesty had been reached "*as part of a broader reflection on the evidence you presented, and that this was a legitimate aspect of the employer decision making process on appropriate sanction.*" There could not have been any advance notice of it.

i. The sanction panel had drawn appropriate inferences about the existence of a personal or emotional relationship between the claimant and the patient. The finding that the claimant had not informed a manager was not a major part of the decision.

j. There was no prejudgment of the appeal. The respondent's unwillingness to enter into mediation or settlement discussions prior to the appeal did not support that inference.

Annex D / Paragraph 190 appeal

68. The claimant did not exercise his right of appeal under Annex D of the Circular, which was based on a revised version of paragraph 190 of the Terms and Conditions of Hospital Medical and Dental Staff Scotland. It allows an appeal to the Secretary of State by sending him or her a notice of appeal "*at any time during the period of notice of termination of his employment*." That would probably now have to be read differently to reflect the devolution of health matters in Scotland, and it would also raise interesting questions where a medical or dental professional was dismissed without notice, but

since no right of appeal of this sort was exercised I do not need to say any more about it.

Legal principles

The reason for dismissal

69. The respondent has the burden of proving a potentially fair reason for dismissal. In this case it is agreed between the parties that the reason for dismissal related to the conduct of the claimant, and therefore fell within section 98(2)(b) ERA 1996.

Fairness – general principles

70. Where the employer has proved a potentially fair reason for dismissal, the test of fairness and reasonableness derives from s.98(4) ERA 1996:

…the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

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

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

71. Prior to a change effected by the Employment Act 1980, the employer also had the burden of proving fairness, and some of the older authorities must be read with that in mind. The test of fairness now contained in s.98(4) ERA 1996 does not impose any burden of proof on either party.

72. Whether the employer acted reasonably is a question of fact, not law, and

tribunals have a wide discretion to base their decisions on the facts of the case before them and on good industrial relations practice, without regard to a lawyer's technicalities (***UCATT v Brain*** [1981] ICR 542, CA). The reference to "*equity and the substantial merits of the case*" shows that the word "*reasonably*" is to be construed widely (Lord Simon in ***Devis v Atkins*** [1977] ICR 662, HL).

73. It is well-established at Court of Appeal, Court of Session and EAT level that a tribunal must not substitute its own view for that of the hypothetical reasonable employer. The law recognises that different reasonable employers might respond in a range of reasonable ways to a given situation. The correct approach is for the tribunal to assess the reasonableness of the decision to dismiss by reference to a band, or range, of reasonable responses (see e.g. ***Iceland Frozen Foods Ltd v Jones*** [1983] ICR 17, endorsed in many cases including ***Foley v Post Office*** [2000] ICR 1283, CA, which ended a brief but important challenge to the previous orthodoxy).

74. The process must always be conducted by reference to the objective standards of the hypothetical reasonable employer (Mummery LJ in ***Foley*** at 1293 B). If *no* reasonable employer would have dismissed, then the dismissal is unfair. If *some* reasonable employers would have dismissed, then the dismissal is fair.

75. The "range of reasonable responses" test applies not only to the selection of sanction or the ultimate decision to dismiss, but also to the procedure by which that decision was reached (***J Sainsbury plc v Hitt*** [2003] ICR 111, CA).

76. Reasonableness is assessed on the basis of facts or beliefs known to the employer at the time of dismissal, which for these purposes will normally include any internal appeal process (***O'Brien v Bolton St Catherine's Academy*** [2017] ICR 737, CA, ***West Midlands Co-operative Society Ltd v Tipton*** [1986] ICR 192, HL).

77. Compliance with an employer's own procedures will be an important indicator of fairness, and the converse is also true. However, compliance with or breach of internal procedures is certainly not *determinative* of fairness (see ***Fuller v Lloyd's Bank plc*** [1991] IRLR 336, EAT, ***Sharkey v Lloyds Bank plc*** [2015] All ER (D) 199 (Dec) and ***NHS 24 v Pillar*** UKEAT/0005/16)). The tribunal must assess the overall gravity of any procedural shortcoming.

Principles of fairness in dismissals for misconduct

78. The classic test in ***British Home Stores v Burchell*** [1980] ICR 303, EAT remains good law, if allowance is made for the change in the burden of proof since then (see above). The three-part test raises the following issues:

    a. whether the employer did have a belief in guilt (in practice, this is little different from the need to prove a potentially fair reason for dismissal);
    b. whether the employer had reasonable grounds on which to sustain that belief;
    c. whether the employer carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

79. There is no hard and fast rule as to the level of inquiry the employer should conduct to satisfy the ***Burchell*** test. Much will depend on the circumstances, including but not limited to the nature and gravity of the case, the state of the evidence and the potential consequences of an adverse finding to the employee. The more serious the allegations against the employee and the more serious the potential effect on them, the more thorough the investigation conducted by the employer ought to be (***A v B*** [2003] IRLR 405, EAT), so an investigation leading to a warning need not be as rigorous as one likely to lead to dismissal. The fact that an employee, if dismissed, might never again be able to work in their chosen field is a relevant factor. Serious criminal allegations must always be carefully investigated, and the investigator should put as much focus on evidence that may point towards innocence as on that which points towards guilt. That is especially so when the employee is

suspended and cannot communicate with witnesses. The point was developed by the CA in ***Salford Royal NHS Foundation Trust v Roldan*** [2010] ICR 1457. If found guilty the employee in that case faced criminal charges and a risk of deportation. That reinforced the ET's finding that procedural errors rendered the dismissal unfair.

80. The ACAS Code of Practice on Disciplinary and Grievance Procedures sets out some of the basic practical requirements of fairness that will be applicable in most conduct cases. It is not legally binding but it is admissible in evidence and I must take its provisions into account where they are relevant.

Delay

81. Investigations should be carried out without unreasonable delay. The ACAS Code emphasises the importance of establishing facts and putting allegations to the employee promptly before recollections fade (see paragraphs 4, 5 and 11). For example, in ***RSPCA v Cruden*** [1986] ICR 205, EAT a delay of 7 months before commencing disciplinary proceedings made the dismissal unfair, even though the employee suffered no prejudice. However, in ***Christou v London Borough of Haringey*** [2012] IRLR 622, the EAT upheld a decision that dismissals were fair despite an 18 month delay between the alleged misconduct and the relevant disciplinary proceedings. The Court of Appeal upheld that decision on other grounds without referring to the delay point. Those decisions demonstrate that the effect of delay on fairness is fact sensitive and will vary from case to case.

82. The ACAS Code of Practice also suggests that suspensions with pay should be "as brief as possible" and should be kept under review (paragraph 8).

Appeals

83. Paragraphs 26 to 29 of the ACAS Code of Practice recommend that employees should be provided with an opportunity to appeal disciplinary

action taken against them. Fair appeals are an integral part of procedural fairness and while unfairness in an appeal will not inevitably lead to a finding of unfair dismissal, it will be a relevant matter. Appeals can be relevant in another way too: defects in pre-dismissal procedures or in a disciplinary hearing might be rectified by a suitable appeal. In those circumstances the tribunal's task is to assess the fairness of the whole disciplinary process, including the appeal (***Taylor v OCS Group Ltd*** [2006] ICR 1602, CA). The procedural fairness, thoroughness and impartiality of the appeal stage will all be important, but it is not helpful to resolve the question by a crude categorisation of the appeal as being either a "review" or a "rehearing".

Human rights

84. Initially, it appeared that the claimant intended to rely on arguments based on Article 6 of the ECHR. I raised ***Turner v East Midlands Trains Ltd*** [2013] ICR 525, CA, with the representatives. While there might be scope for some exceptions to the ***Turner*** reasoning where a public sector respondent is itself under a duty to give effect to Convention rights, human rights arguments were not pursued by the claimant in closing submissions. I therefore proceed on the ***Turner*** basis, that the test in s.98(4) is broad and flexible enough to give effect to Convention rights when they are engaged and where they impact on the disciplinary process followed by the employer.

85. The claimant's submissions referred to several authorities dealing with investigations and the requirements of procedural fairness in a regulatory context. However, regulatory tribunals operate within a different legal framework and they do not apply s.98(4) ERA 1996 at all. I doubt whether the principles in those cases add anything of significance to the principles in ***A v B*** or ***Rolden*** (considered above), but if they do, then I follow in preference the authorities directly concerned with the application of s.98(4) ERA 1996.

Contributory fault

86. There are two relevant statutory provisions.

a. Section 122(2) ERA 1996 provides that where the tribunal considers that any conduct of the claimant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the *basic award* to any extent, the tribunal shall reduce or further reduce that amount accordingly.

b. Section 123(6) ERA 1996 provides that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the *compensatory award* by such proportion as it considers just and equitable having regard to that finding.

87. The language of section 122(2) is therefore less restrictive than that of section 123(6), which requires causation before any reduction can be made. When applying section 122(2), the tribunal must identify the conduct which is said to give rise to possible contributory fault, decide whether that conduct is culpable or blameworthy and decide whether it is just and equitable to reduce the amount of the basic award to any extent (***Steen v ASP Packaging Ltd*** [2014] ICR 56, EAT).

88. Reductions in the compensatory award depend on findings that the conduct was culpable or blameworthy, that the conduct caused or contributed to the dismissal, and that it would be just and equitable to reduce the award by the proportion specified (***Nelson v BBC (No.2)*** [1980] ICR 110, CA). Any reduction must be based on my own findings and view of the conduct concerned, so there is no deference to the respondent's view or to any hypothetical reasonable range of views on those questions (***London Ambulance Service NHS Trust v Small*** [2009] IRLR 563, CA).

"***Polkey***" reductions

89. The question whether a fair and reasonable procedure would have made any difference to the outcome is reflected in compensation rather than the finding of fairness or unfairness under s.98(4) ERA 1996 (***Polkey v AE Dayton Services Ltd*** [1988] ICR 142, HL).

90. Importantly, the issue is what the respondent would have done, and not what a hypothetical fair employer would have done (***Hill v Governing Body of Great Tey Primary School*** [2013] ICR 691, EAT).

91. The tribunal must draw on its industrial experience and construct, from evidence rather than speculation, a working hypothesis about what would have occurred if the employer had behaved differently and fairly (***Gover v Propertycare Ltd*** [2006] ICR 1073, CA, Buxton LJ, approving the analysis of HHJ McMullen QC in the EAT). However, any assessment of future loss is by way of prediction and therefore involves a speculative element, so tribunals are neither expected nor allowed to opt out of their duty merely because the task is difficult and may involve some speculation (***Thornett v Scope*** [2007] ICR 236, CA).

92. In ***Software 2000 Ltd v Andrews*** [2007] ICR 825, EAT, Elias P reconciled the authorities in the following way.

    a. There will be circumstances in which the nature of the evidence is so unreliable that a tribunal might reasonably decide that no sensible prediction can properly be made, and that the attempt to reconstruct "what might have been" is riddled with too much uncertainty.
    b. However, the tribunal must have regard to any material and reliable evidence even if there are limits to the extent to which the tribunal can confidently predict what might have been. A degree of uncertainty is an inevitable feature of the exercise and an element of speculation is not a reason for refusing to have regard to that evidence.
    c. Put another way, the issue is not whether the jigsaw can be completed,

but rather whether there are sufficient pieces for some conclusions to be drawn.

93. Similarly, in ***Contract Bottling Ltd v Cave*** [2015] ICR 146, EAT, Langstaff P emphasised that the exercise would necessarily involve imponderables, but that did not mean that the tribunal should not grapple with the issues as far as it could.

Submissions

94. Both sides made their submissions primarily in writing, adding to them orally on the final day of the hearing. The claimant's written submissions ran to 23 pages and 112 paragraphs. The respondent's written submissions ran to 18 pages and 79 paragraphs. I am very grateful for both, but in those circumstances little useful purpose would be served by adding to the length of this judgment by setting them out again, even in summary form. Instead, I will deal with the main points as sub-headings in my own reasoning and conclusions.

Reasoning and conclusions

Generally relevant factors

95. The respondent is a large employer with considerable resources. It has an extensive HR department and can call on specialist employment advice from NHS Central Legal Office when it needs to. The Covid-19 pandemic had a serious impact on almost every employer, but the disruption was especially acute and prolonged in the health service for obvious reasons.

96. The claimant is a highly intelligent man. That is obvious from his medical specialism and rank. He has also obtained a first class law degree while suspended from his employment with the respondent. He has not found it difficult to scrutinise the evidence of alleged misconduct on his part or the

reasoning of the key decision makers in this case. He has been able to subject the procedure to intense scrutiny and to put forward detailed criticisms of it. Additionally, he has been supported by a team of lawyers and other specialist representatives. At different points in the internal procedure he was represented by Dr Susan Gibson-Smith of the MDDUS, Laura Donald, Partner in BTO solicitors and clinical defence specialist and Martyn Ramsay of BMA Scotland. The claimant is represented by a different firm of solicitors in the proceedings before this Tribunal. At every stage, long and detailed written submissions have been made on the claimant's behalf.

Grounds for a belief in guilt

97. I will deal with the charges separately. I will adopt a similar approach to that adopted by the investigating panel, dealing first with whether the relevant facts were established, and second with whether those facts showed that the claimant had been at fault.

98. First, the phone calls on 9 November 2016 and 17 November 2016.

    a. The claimant accepted that a call had been made from his hospital phone to the patient on 9 November 2016. The claimant's explanation was that he must have made the call accidentally by bumping his phone and causing it to redial the number of a recent call. In my judgment the investigating panel was reasonably entitled to regard that explanation as implausible and had reasonable grounds for a belief in guilt. The context was of telephone and text contact between the claimant and the patient from his mobile phone at around the same time. The claimant had already discussed personal matters with the patient by phone and he had previously returned one of her calls on 14 October 2016. His suggestion that he might have bumped the phone was speculative.

    b. The claimant accepted that he attempted to call the patient on 3 occasions on 17 November 2016. The claimant's explanation was that he had been trying to inform the patient that, contrary to a previous

conversation, he would not be using her as an anonymised case study for training purposes. Once again, I find that the panel was reasonably entitled to regard that explanation as implausible and that they had reasonable grounds for a belief in guilt. There would not have been any need for such a courtesy call, given that the study was anonymised anyway. That was especially so given that, by then, allegations of sexual misconduct had been made against the claimant and he knew that.

c. No other explanation had been given for making the calls. The panel had reasonable grounds for concluding that there was no reasonable work-related or other legitimate reason for the contact in those circumstances. That conclusion was strengthened by the claimant's statement in a text exchange with the claimant's daughter on 14 November 2016 that they were "friends".

99. Next, the text messages, with one allegedly sent on or about 13 November 2016 and three on or about 14 November 2016.

a. The claimant accepted sending one of the 14 November texts, and also certain other texts which were not the subject of charges. The claimant admitted sending a text to one of the patient's daughters and another to the patient herself saying that her daughter had made contact. In relation to the remaining texts, the claimant maintained that he had intended to send them to others, including his sister. The claimant blamed his own error or a malfunction of his phone.

b. The panel had reasonable grounds for finding that explanation implausible. The background was of accepted text and phone exchanges between the claimant and the patient on previous occasions. The claimant accepted that a phone conversation had strayed into personal matters including an upcoming holiday. The texts were consistent with those admitted exchanges. There were reasonable grounds for a belief in guilt.

c. The claimant suggested that three messages were sent: one to ask the patient to stop texting him, one to encourage her to return to

abstinence and to support her through her drinking and one more to inform the patient that her daughter had been in contact. The panel had reasonable grounds for finding those to be unacceptable explanations given that the claimant should only have been concerned with the patient's welfare during a short period in A&E.

100. Next, the alleged home visit between about 10 October and 17 November 2016.

a. The panel had established concerns about the claimant's credibility in relation to other charges.

b. The patient's neighbour saw a man who she did not recognise visiting the patient's home for about 55 minutes between 1200 and 1300 some time after 7 November 2016.

c. She observed that the man drove a black VW car. The claimant accepted that he had access to a black VW car at the relevant time.

d. While it would have been reasonable for the panel to rely on all the above factors it was *not* reasonable to rely on anything said by the patient to her neighbour about the identity of the visitor, since the panel had already found that the patient's evidence was not reliable.

e. I am not as troubled by the discrepancy between the identification of the vehicle by the neighbour as a black VW Golf or Polo, whereas the claimant's vehicle was a black VW Fox. They are all VW hatchbacks of different sizes and the colour was consistent. The panel was reasonably entitled to give that limited vehicle identification some weight.

f. However, overall, I do not think that the panel had reasonable grounds for a belief in guilt. Once facts that the neighbour learned from the patient are excluded, the evidence amounts only to establishing that an unknown man had once visited the patient at home for 55 minutes, and that the unknown visitor drove a car of the same make, colour and broad type as one available to the claimant. In my judgment that was insufficient to amount to reasonable grounds for a belief in guilt. There were many possibilities, and one of them was that the claimant had

been the mystery visitor, but there was insufficient evidence to support a reasonable conclusion that the claimant was *likely* to have been that visitor. This was a very serious charge and ***A v B*** or ***Roldan*** principles apply to the assessment of the evidence of guilt.

101. My finding is therefore that there were reasonable grounds for a belief in guilt in relation to the phone calls and text messages, but not in relation to the home visit. The panel rejected the allegation of sexual misconduct.

102. I now turn to the question whether there were reasonable grounds for the panel to conclude that the claimant had been at fault. In my judgment there were. There was no proper work-related or other legitimate reason for those communications and given the patient's obvious vulnerability and the need to maintain proper professional boundaries, they should not have taken place. A personal relationship had been allowed to form within about one week after the claimant's legitimate professional contact with the patient had ended. It continued until discovered by the patient's daughters. Even leaving aside the home visit charge, there were reasonable grounds for the panel to conclude that the claimant had been at fault.

Investigation

103. The process adopted by the respondent entailed fact finding by a panel chaired by an advocate in independent practice. He is and was an experienced legal professional specialising in employment law, well-versed in the ***Burchell*** test and principles of procedural fairness. Under his guidance, the panel adopted a careful and forensic approach to the evidence they heard. All three members of the panel contributed to the decision and it was unanimous. Notably, the panel did not find the allegation of sexual misconduct proved, which they rightly regarded as the most serious of the allegations made within their terms of reference.

104. Annex C provided for an elaborate and relatively formal procedure going far

beyond the minimum requirements of the ACAS Code of Practice. In my assessment it was sufficient to satisfy the requirements of authorities such as ***A v B*** and ***Roldan*** (above). Questions of fact and guilt were separated from questions of sanction. The first two issues were considered by one panel and the third issue was considered by a separately constituted panel. Both panels had HR support and specialist medical expertise.

105. The claimant submitted that the failure to call the patient was a serious flaw in the investigation, but I do not agree. The witness list was discussed and agreed in advance. The claimant had been represented by a specialist solicitor who had neither called the patient to give evidence to the investigating panel, nor suggested that the investigating panel should call the patient themselves (such that the claimant could, in principle, have cross-examined the patient). At the time, the claimant and his representative were content to proceed with the process without live evidence from the patient. Additionally, the MPTS panel had found the patient to an unreliable witness and the investigating panel knew that. Mr Hardman said that the panel's inability to assess the credibility or reliability of the patient meant that they placed little reliance on the patient's evidence in relation to details. That was to the claimant's advantage. The findings of the panel barely relied on anything that the patient had said. In those circumstances, it was well within the reasonable range of investigations to find facts without hearing live evidence from the patient.

106. I do not accept the claimant's submission that a reasonable investigation necessarily required further forensic investigation of the patient's phone or phones. The basis of that submission is that the phone examined by the police had one number, whereas the screenshots of texts considered by the panel were from another number. Mr Hardman explained convincingly why no further forensic examination was required: the panel was dealing with calls which the claimant admitted making. Their enquiry therefore focussed on the reasons given by the claimant for making them, including but not limited to error.

107. Overall, I find that the procedure for the investigation of facts carried out by the Investigating Panel fell well within a reasonable range.

Procedural fairness - predetermination

108. If Chief Executive Cathie Cowan, HR Director Linda Donaldson or Medical Director Andrew Murray had acted as decision makers at the investigatory stage, the sanction stage or the appeal stage, then the process would have been tainted by their prejudgment of the claimant's position. Their joint interest in requesting that the GMC should reconsider its decision not to appeal the findings of the MPTS panel indicated that they had formed (at least) a preliminary conclusion as to the claimant's conduct, his fitness to practise and the appropriate sanction. While those issues are not the same as the question whether the claimant was guilty of misconduct in an internal disciplinary process, they were sufficiently closely related that the impartiality of those senior managers was compromised. The original plan for Cathie Cowan and Linda Donaldson to sit on the sanction panel was therefore problematic. However, the respondent accepted the claimant's challenge to their involvement and ensured that the sanction hearing and the appeal hearing were conducted by others instead.

109. In my assessment, there is no cogent evidence of prejudgment or bias on the part of any member of the investigation panel, the sanction panel or the appeal panel, as those panels were eventually constituted.

110. Dealing specifically with Sandra Drinkeld's involvement, I accept her evidence that she had forgotten about her attendance at the preliminary meetings in June 2021 connected with the investigating panel stage, and that her role on those occasions had been limited to notetaking and drawing up a list of follow up actions. She had not been a decision maker. Further, those preliminary meetings did not hear evidence from witnesses, consider documents or make any factual findings. Their purpose was for the

representatives and Mr Hardman to deal with case management issues. Paragraph 12 of Annex C describes them as, "*the procedure at the hearing and rules regarding the admission of evidence*".

111. The "Management of Employee Conduct Policy" dated 14 October 2016 states at paragraph 6.2.4 that "*to ensure impartiality, panel members, including the Chair, must have had no prior involvement in the case*." In breach of that policy, Sandra Drinkeld did have some prior involvement in the case before sitting on the sanction panel. However, in my assessment that involvement amounted only to a technical breach which had no substantial adverse impact on fairness. I accept that she was not consciously influenced by anything that she heard at those preliminary meetings because at first, she did not remember them. Additionally, it is highly unlikely that she could have been subconsciously influenced given that those meetings did not hear evidence. During cross-examination I asked the claimant's representative to put to Ms Drinkeld the claimant's case on the unfairness caused by her prior involvement. Nothing was put, beyond the fact that it was a breach of paragraph 6.2.4 (above). That also supports my conclusion that this was a purely technical breach of procedure which did not undermine the fairness of the process.

112. I do not accept the claimant's submission that prejudgment or bias resulted from Elaine Bell's involvement. She was not a decision maker or HR advisor at any of the investigating, sanction or appeal hearings. While she did prepare a note summarising her view of the effect of the Annex C procedure, I do not think that it misrepresented that procedure or amounted to undue influence over the decision makers. It was appropriate advice. The policy of the Annex C procedure was that facts and fault should be established by the Investigating Panel, and that the Sanction Panel should proceed on that basis when considering sanction. The Annex C wording is, "*the facts as set out in the panel's report should be accepted as established in any subsequent consideration of the case*". Elaine Bell's advice was that the Annex C report "*is to be treated as having established the facts; the role of the panel at this*

stage will not be to revisit or re-open a debate about the facts". I think that is a minor difference of wording, especially if viewed in a practical industrial relations context. The exercise was not one of statutory interpretation or strict contractual construction by lawyers. The situation was one in which a HR manager was seeking to give practical advice on the application of a procedure.

Procedural fairness - delay

113. The disciplinary process was so seriously delayed that it fell well outside a reasonable range of procedures. The total time from the claimant's suspension until the conclusion of the appeal against dismissal exceeded 7 years. I have already referred to relevant provisions of the ACAS Code of Practice. The suspension in this case could not be described as "as brief as possible".

114. The timetable set out in Annex C itself also provides for a much shorter process than that which occurred: "*The time from the decision that there is a prima facie case to the submission of the panel's report to the Health Board should not exceed 32 weeks*". Further, the periods set out in Annex C are not indicative or typical periods, they are supposed to be seen as the normal maximum periods for each stage.

115. While that 32 week figure does not include:

a. the time taken for the "prima facie case" decision to be made;
b. the time taken for the health board to decide on sanction;
c. the time taken for a fair appeal;

those stages should only reasonably have taken a few weeks each. In the absence of exceptional circumstances, a reasonable application of Annex C procedures should have been completed within a calendar year, and if matters slipped at one stage then a reasonable health board would ensure that time was caught up if possible and that the situation was not aggravated by further slippage at other stages. I do not propose to dissect the 7 years

that the process took. I think it is sufficient to say that all reasonable health boards applying Annex C would have completed it before the end of the 2017 calendar year, barring genuinely exceptional circumstances. The request from the police to pause contact with some witnesses could fall into that category, but that only applied between September 2017 and 15 January 2018. Allowing for that delay at the request of the police, and assuming in the respondent's favour that no other useful investigative work could be done in the meantime to progress matters, the procedure ought reasonably to have been concluded by the late spring or early summer of 2018 at the latest.

116. One practical consequence of the delay was that the cogency of evidence was impaired. By the time of the investigating panel hearing, the incidents were approaching 5 years old. Further, when the claimant hesitated in his recollection of key events at the disciplinary hearing that counted against him and was interpreted as dishonesty.

117. Quite apart from the effect on the cogency of evidence, the protracted nature of the procedure placed the claimant under prolonged stress, which in turn contributed to heart problems. I find Dr Kalman's letter of 26 August 2022 to be compelling evidence of the effect of the delay on the claimant's health, and of the fact that the respondent was on notice of those consequences.

118. Finally, the time taken to conclude the disciplinary process in this case was in tension with the respondent's own policy in relation to suspensions. The suspension reporting requirements and the frequency of reviews required by the Guidance suggest a much shorter process. It is inconceivable that the authors of that document were contemplating that a suspension could properly be reviewed at least every two weeks, for more than 6½ years. Under the Guidance, the suspended employee can request a review and the lifting of their suspension after 8 weeks and special reports must be made if the investigation has not been completed within 3 months of suspension. It is difficult to reconcile that with the idea that a reasonable procedure might nevertheless take more than 6½ years.

119. For all those reasons, the length of time taken to complete the disciplinary process was so great as to fall outside the reasonable range.

Procedural fairness – approach to fact finding

120. The submission made on behalf of the claimant was that the investigation panel's conclusions were merely "advisory" and had no greater status later in the Annex C process. I am unable to accept that submission because it ignores the express words of Annex C, which seek to give a degree of priority to the findings of the investigation panel on issues of fact and fault. There is room for debate over precisely how much freedom Annex C gives to the sanction panel to depart from or to reopen issues of fact if it considers that they were reached after a flawed or unfair process. If "should be accepted" means something less strict than "must be accepted", then when is it permissible not to accept those findings? Annex C does not supply the answer. I would prefer to base my own reasoning on general principles of fairness.

121. A procedure that fell within the reasonable range would allow for some challenge to findings of fact. Whether that challenge was permitted at the sanction stage or only on appeal would not necessarily matter, but fairness requires an opportunity for the claimant to be able to argue, in effect, "you dismissed me on facts which should not have been found proved."

122. Mr Roberts' approach was that he *might* have been prepared to reopen issues of fact in some circumstances, but that he chose not to do so in this case because he was reassured that the investigating panel's decision was "robust". He explains in paragraph 18 of his witness statement that, "*the key document which I relied on for my decision was the outcome of the investigatory panel (their report). This showed us what conclusions they had reached, but also allowed us to review the process which had been used to reach those conclusions. This then allowed us to decide that the process was*

reasonable". He was also impressed by the composition and background of the panel.

123. Therefore, the sanction panel only really subjected the investigating panel's fact finding to a procedural review, focussing primarily on "process" and panel credentials, before concluding that the investigating panel findings had been "*reasonable and robust*". That is very different from engaging with the claimant's analysis of the evidence against him and his criticism of the reasoning underpinning the factual findings.

124. That would not necessarily be a problem if the claimant had an opportunity to challenge the grounds for certain findings of fact on appeal. However, I have concluded that he did not have that opportunity. The appeal panel did not really engage with the claimant's argument, and instead asked "*whether the investigation should in effect be re-opened*." The appeal panel decided that it should not be reopened because it felt that the investigation process had been "*robust and* fair". The outcome letter said, "*We observed that the process which resulted in the facts being established involved an investigation by management, an independent three person panel chaired by an advocate and including an expert adviser, and the opportunity for you to review the outcome report and make comments on it before it was finalised.*"

125. Therefore, my conclusion is that the claimant was never given an effective opportunity to argue that the investigation panel had made findings which were not sufficiently supported by evidence and for which there were not reasonable grounds. That omission meant that the disciplinary procedure adopted by the respondent fell outside the range of reasonable procedures.

Procedural fairness - clarity of charges, findings and process

126. On these points I do not think that the claimant's submissions are well-founded. The findings of the investigation panel on issues of fact and fault had been published long before the sanction hearing. The claimant was well

aware of those findings and was also well aware, from a reading of Annex C, that the sanction panel "should" accept those findings and would approach sanction in that context. The claimant is an intelligent man and he was supported by a formidable team of specialist representatives. I do not accept that they were in any real doubt regarding the facts and issues that they needed to address at the sanction hearing or on appeal. Similarly, it was obvious that dismissal was a potential outcome both because the correspondence said so, and also because Annex C only applies in such situations. Further, the claimant and the claimant's representative at the appeal hearing conceded that they had understood the allegations prior to the disciplinary hearing. There was no unfairness to the claimant on this basis.

Procedural fairness - dishonesty

127. No specific issue of dishonesty was set out within the investigating panel's terms of reference. In that sense, there was no specific "charge" of dishonesty. It become an important aspect of the sanction panel's reasoning on sanction, and their conclusion that dismissal for gross misconduct was the appropriate outcome. Dishonesty was listed as a reason why the sanction panel considered redeployment an inappropriate alternative to dismissal. Later in the letter Mr Roberts states, "*…you were not being honest with me at the hearing or throughout this process and that, in itself, is a professional misconduct issue. Based on this level of dishonesty and professional misconduct, there is a fundamental breakdown of trust between you and [the respondent.*" In cross-examination, Mr Ross accepted that the claimant had not been given an opportunity to comment on whether he was being honest or dishonest.

128. It is not necessarily a problem that a new issue relevant to sanction arises during a hearing, *provided that* the employee is given a reasonable opportunity to know that it might be important, to understand the gist of the case he must meet and an opportunity to address the point. The claimant was

not given that opportunity during the sanction hearing and the finding of dishonesty took him by surprise. That was unfair and took the procedure outside a reasonable range.

129. The sanction panel's finding of dishonesty was problematic, unfair and fell outside a reasonable range for another reason too. It was based to a significant degree on the claimant's "demeanour" and the contrast between his perceived fluency when talking about certain matters and his perceived hesitancy when talking about the patient. In my judgment that was an unsound and unreasonable basis for a conclusion of dishonesty. There are many reasons why witnesses might hesitate over some parts of their evidence. Several of the respondent's witnesses hesitated during their evidence at this hearing. It is not unusual. The reasons could include embarrassment, regret, stress, a sense that they must take extra care over important evidence, or a simple struggle to recollect the fine detail of important events that happened some time earlier. Thinking time is permissible and normal. At the sanction hearing, the relevant events had occurred more than 6 years earlier, and the consequences had been a massive source of stress to the claimant, adversely affecting his health. In those circumstances there would be many acceptable reasons for the claimant to have hesitated when discussing the patient, and an inference of dishonesty had no reasonable basis. Mr Ross did not consider those possibilities, and while he said in cross-examination that he "*agreed with* [the] *underlying point*", he continued to emphasise the contrast between the claimant's fluency on some matters with his hesitancy on others.

130. In so far as the finding of dishonesty made by the sanction panel was based also on criticisms made by the investigation panel of the claimant's *credibility*, that is a false equivalence. Dishonestly implies a subjective element – an awareness of the truth coupled with a desire to mislead. A person might not be "credible" (i.e. believable) but it does not automatically follow that they have deliberately sought to mislead too. They might have done, but the decision maker would need to explain why they have made that finding.

131. A sufficiently thorough and fair appeal could have rectified those problems, but it did not in this case. The appeal panel rather missed the point, although that may have been because of the way in which the claimant framed his submissions at the time. The appeal panel's reasoning was that dishonesty could not have been notified in advance of the sanction hearing because the issue only arose during that hearing. That may be so, but the real problem is that the claimant did not have a fair opportunity to address it. The appeal could have been an opportunity to hear the claimant's rebuttal of the criticism of his honesty, and to make fresh findings in that regard, but the respondent missed that opportunity. The appeal panel did not reach any fresh conclusion of its own on the issue of the claimant's honesty.

132. For those reasons, I have concluded that in so far as the claimant's alleged dishonesty formed part of the respondent's reasoning on sanction, the process was unfair, fell outside a reasonable range, and was not corrected on appeal. If, alternatively, it is analysed in ***Burchell*** terms, there were no reasonable grounds for a belief that the claimant had been dishonest.

Sanction

133. For the reasons set out above, I have concluded that there were only reasonable grounds for a belief in guilt in relation to the phone calls and the text messages that passed between the claimant and the patient.

134. For the reasons set out above, there was no reasonable basis for a conclusion that the claimant had visited the patient at home or that he had been dishonest during the disciplinary process. In cross-examination Mr Ross admitted that dishonesty "*was a factor in deciding the level of sanction*".

135. It is important to note the mitigating factors put forward by the claimant.

    a. He had worked in A&E and Emergency Medicine for 30 years, rising to the A&E Clinical Lead role with the respondent.

b. The claimant had taught and mentored many A&E doctors at many levels.

c. He had an entirely unblemished disciplinary record.

d. Until the incidents outlined above, no similar allegations had ever been made, still less upheld. These were the only professional complaints in 35 years of medical practice.

e. He had suffered considerable stress and a marked downturn in his cardiac health, developing Atrial Fibrillation which he attributed to the stressful events of the last 6.5 years. He had received electric shock defibrillation on 10 occasions. Worsening symptoms had led to sickness absence, Pulmonary Vein Isolation and Cryotherapy Ablation via Cardiac Catheterisation in late 2022.

f. The claimant had cooperated fully with the investigation.

g. The claimant was able to provide an extensive collection of impressive testimonials. Those testimonials were made by people well aware of the charges against the claimant in the MPTS process and had authorised their use at the disciplinary hearing too. Many of those providing testimonials were themselves regulated health professionals with their own obligations of candour, truthfulness and the maintenance of public confidence in their profession. Mr Ross described the testimonials as "*very, very glowing*" and "*very supportive*". Mr Hardman said that he had never seen so many positive references.

h. The claimant had reflected extensively over the previous 6 years about the circumstances of the incidents and his actions. That process had included the production of written reflections. The MPTS panel had considered that they demonstrated the development of insight over time, including the identification of failures and weaknesses. All reasonable employers would take the same view.

i. The claimant had attended two full "Maintaining Professional Boundaries" courses run by the Clinic for Boundary Studies. The claimant funded those courses privately. The focus of those courses was the importance of boundaries and the impact on patients of

boundary blurring within professional relationships. They were therefore extremely relevant and appropriate courses. They helped the claimant to recognise traits in his self-awareness and to develop strategies to maintain professionalism. Against that background the claimant had prepared a teaching presentation on the dangers of breaching professional boundaries based on his own experience.

j. For those reasons, the claimant asserted that he had fully learned the lessons of his lengthy experience and that he could return to work without any risk of repetition or similar incident.

136. It is uncontroversial that the MPTS process and the respondent's disciplinary process are different things with different objectives and that they might well hear different evidence and reach different factual conclusions. The findings of one do not oblige the other to reach any particular conclusion. However, one is not wholly irrelevant to the other either. Had the MPTS panel concluded that the claimant's fitness to practise was impaired, then that would have been a consideration that all reasonable employers would have taken into account. By parity of reasoning, the fact that the MPTS panel concluded that the claimant's fitness to practise was *not* impaired was also a consideration that all reasonable employers would have taken into account. Mr Ross could not remember whether he had considered the MPTS conclusion or not. I find that he gave it little if any weight if he considered it at all.

137. There was no cogent evidence to suggest that there was a significant risk of recurrence. On the contrary, there was cogent evidence (in the form of the claimant's extensive remediation and testimonials) that there was little or no risk of recurrence.

138. Having been careful not to substitute my own view for that of a hypothetical reasonable employer, my conclusion on sanction is as follows.

a. Reasonable employers would probably have imposed a disciplinary sanction of some sort, given that the claimant's behaviour had been a breach of accepted standards.

b. However, no reasonable employer, applying the respondent's policy, could have concluded that the misconduct reached the level of "gross misconduct" as defined. Reasonable employers would probably have considered that the misconduct was "*unprofessional conduct as defined by reference to generally accepted standards of conduct or ethics within a staff group*", but no reasonable employer would have found it to be conduct of such seriousness that it caused irreparable damage to the relationship of trust and confidence. That is the core definition, whatever else the examples of gross misconduct might say.

c. Even if the misconduct *had* reached the level of gross misconduct, the claimant's mitigation was so powerful that no reasonable employer would have dismissed a consultant with such long and otherwise unblemished service, genuine insight, effective remediation and glowing references. All reasonable employers would have chosen an alternative sanction to dismissal in those circumstances.

139. My conclusion on sanction is based on the charges which the respondent found proved (i.e. including the visit to the patient's home and the finding of dishonesty). I would, of course, have reached the same conclusion even more easily if the respondent had assessed sanction on the more limited basis of the calls and texts only. On my findings, those are the only charges for which there were reasonable grounds for a belief in guilt.

Contributory fault

140. On this issue my findings of fact are that on the balance of probabilities:
    a. the claimant made the phone calls with which he was charged;
    b. the claimant sent the text messages which which he was charged;
    c. he did not have a reasonable work-related reason for doing so;
    d. those actions were in breach of accepted professional standards.
    e. the claimant did not visit the patient at her home;
    f. the claimant did not engage in any sexual activity whatsoever with the

patient;

g. the claimant was not dishonest during the disciplinary process.

141. I trust that the reasons why I have reached those conclusions are obvious from my analysis of the respondent's grounds for a belief in guilt, above. Mostly, I share the reasoning of the Investigating Panel. I differ from them on the issue of the home visit and I differ from the Sanction Panel on the issue of honesty.

142. The making of those calls and the sending of those texts without a proper clinical or other work-related reason was blameworthy conduct. It was a failure to maintain proper professional boundaries. The fact that the patient was obviously vulnerable was an aggravating factor. However, the claimant also had powerful mitigating factors and the respondent's decision to dismiss was outside the reasonable range. It also depended on adverse findings in relation to the home visit and dishonesty, which I do not make. That limits the causative impact of the blameworthy conduct which I have found proved.

143. The claimant's conduct was blameworthy, and it contributed to his dismissal, but only to a modest extent. I have concluded that it would be just and equitable to reduce both the basic award and the compensatory award for unfair dismissal by 15%.

Polkey issues

144. I can express my conclusion on these issues shortly. If the respondent had behaved differently and fairly then the claimant would not have been dismissed. There is no possibility that a fair procedure would also have led this respondent to dismiss, so I do not make any "***Polkey***" reduction.

Summary of conclusions

145. The claimant was unfairly dismissed for the following reasons.

a. There were no reasonable grounds for concluding that the claimant had visited the patient at home, or that he had been dishonest during the disciplinary process.
b. The claimant did not have a fair opportunity to dispute the latter finding.
c. Excessive delay in concluding the disciplinary process.
d. The fact-finding process adopted by the respondent did not sufficiently allow for the claimant to challenge the factual conclusions and the basis for them.
e. The sanction of dismissal was one that no reasonable employer would have imposed on the facts found by the respondent.

146. It would be just and equitable to reduce both the basic award and the compensatory award by 15% given the claimant's contributory fault.

147. The respondent would not have dismissed if it had followed a fair procedure, so it would not be just or equitable to reduce the compensatory award to reflect the chance that dismissal would have resulted anyway.

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Employment Judge M Whitcombe

Date of Judgment 25 March 2024

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