



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K Cowley

**Respondent:** The Secretary of State for Justice

**Heard at:** Liverpool Employment Tribunal

**On:** 15, 16, 17 May 2024

**Before:** Employment Judge Serr

## **Representation**

Claimant: In person

Respondent: Ms Elizabeth Hodgetts, Counsel

# JUDGMENT

1. The complaint of unfair dismissal is not well founded and is dismissed.
2. The complaint of breach of contract in relation to notice pay is not well-founded and is dismissed.

# REASONS

## **Background**

1. The Claimant is a former supervisor with the Respondent. He joined the Respondent's predecessor in title in 2010. His employment was subsequently subject to TUPE transfers ending with employment with the Respondent, although nothing turns on this. He was dismissed from his employment with effect from 21 February 2022 and an appeal against dismissal was refused on 24 June 2022.
2. The Claimant brings claims for Unfair Dismissal, Wrongful Dismissal and unlawful deduction of wages. The claim has a somewhat complex procedural history that the Tribunal needs to address briefly. Prior to his dismissal, but following the initiation of the disciplinary process that would lead to his dismissal, the Claimant presented claims for disability discrimination. Following being dismissed the claimant presented the present claim to the tribunal (which also initially included discrimination

claims subsequently withdrawn). The disability discrimination claim was subsequently heard before Employment Judge Benson and members in October 2022 and April 2023 (“the first tribunal”) with a written decision dated 13 July 2023. While the legal issues were different to those this Tribunal must grapple with there was some overlap in the narrative, and the first Tribunal made findings of fact highly relevant to the present claim. The first Tribunal heard extensive evidence over 13 days including from Ms Jane Leigh and Mr Maurice Ashby, two witnesses whose evidence is germane to the present claim as well as of course the Claimant himself. Accordingly where appropriate this Tribunal adopts the first Tribunal’s relevant findings of fact.

### **The Issues**

3. A list of issues was presented to the Tribunal agreed between the parties. While commendable, they were somewhat generic and the Tribunal sought to finesse them at the outset of the hearing. Given the amount of material that was potentially required to be considered (the file ran to over 1500 pages and there was 60 pages of witness statements) and the limited time allocated it was agreed that the tribunal would consider only the claims for Unfair Dismissal and wrongful dismissal and address at a later date the wages claims and any issues of unfair dismissal remedy. The issue of *Polkey* and contributory fault would however be considered within the three days allocated.
4. Accordingly the issues were identified as follows:
  - 4.1 What was the reason for the dismissal. The Respondent relied on conduct and specifically conduct related to the Claimants behaviour towards his line manager Jane Leigh in two meetings (one face to face and one remote) on 2/12/20 and 9/12/20.
  - 4.2 Did the Respondent act reasonably in treating that as a sufficient reason to dismiss the Claimant in all the circumstances of the case, including the size and administrative resources of the Respondent, and in accordance with the substantial merits of the case? In particular
    - 4.2.1 Did the Respondent unreasonably fail to provide relevant pertinent documentation to the Claimant in respect of the 2/12 and 9/12 meetings.
    - 4.2.2 Should the Respondent have considered grievances against Ms Leigh and others prior to concluding the disciplinary proceedings.
    - 4.2.3 Did Ms Pugh have inappropriate influence on the initiation or the continuation of the disciplinary proceedings.
    - 4.2.4 Did the disciplinary proceedings take too long.
    - 4.2.5 Was Dismissal was out with the band of responses open to the Respondent.

5. In respect of the wrongful dismissal claim did the incidents on 2/12 and 9/12 constitute a fundamental breach of the contract of employment entitling the Respondent to dismiss without notice.

### **The Procedure**

6. The Tribunal had a bundle of 1503 pages and witness statements running to 58 pages. It heard evidence from Ms Rebecca Flynn who investigated the grievance of Ms Leigh and Ms Pugh and recommended the matter be referred to a disciplinary hearing, Ms Kerri Bendon who dismissed the Claimant, and Ms Andrea Bennett who determined the appeal against dismissal. The Claimant gave evidence on his own behalf and represented himself. The Respondent was represented by Ms Hodgetts of Counsel. The Tribunal is grateful to both parties for their focus on the issues and the economy of their questions and submissions which allowed the matter to be concluded within the 3 days.

### **The Facts**

7. The Tribunal made the following findings of fact.
8. As will be seen although the Claimant was initially charged with three allegations of misconduct he was in fact only found to have committed misconduct in respect of one allegation – the 2/12 and 9/12 meetings with Jane Leigh and so the focus of the Tribunal's findings relate to these matters.
9. On 8 February 2010 the Claimant commenced employment with the National Probation Service as a Supervisor. His role was to supervise those carrying out their sentences in the community.
10. The claimant has a diagnosis of anxiety and depression. He had medication for those conditions. In March 2019, the first respondent's Occupational Health practitioner ("OHP") confirmed that the claimant was likely to be covered by the Equality Act 2010 in respect of these conditions.
11. In January 1998, the claimant was diagnosed with a hearing issue. A report obtained at that time described it as moderate inner ear deafness on both sides. This did not constitute a disability and while the 1998 report was passed to his then line manager Mr Ashby, it was never passed on to the Respondent's HR team .
12. In April 2020 the Claimant's manager changed from Maurice Ashby to Jane Leigh. For the previous 12 months the Claimant had been subject to a complex series of events including problems with his mental health, alleged bullying by colleagues leading to a grievance, an investigation about a potential misconduct incident in the reception area of the Respondent's Prescott centre on 12 June 2019 leading to a grievance submitted by a colleague Sue Lam, and long term sickness absence commencing in

November 2019 for which he was being managed under the absence management procedure. These matters are all detailed in the first tribunal decision.

13. In September 2020 a substantial grievance outcome letter was sent to the Claimant addressing the Claimant's grievances.
14. On 2 December 2020 the Claimant met with Ms Leigh in a Return to work meeting. The meeting was to discuss an occupational health report of a doctor Charleson. He considered the Claimant remained unfit for work.
15. The first Tribunal made express findings about this meeting. It stated *On 2 December the claimant met with Ms Leigh in a return to work meeting. The meeting was conducted face to face and the claimant's union representative dialled in. The claimant continued to raise issues about his wellbeing assessments and matters contained within his grievance. He considered he was still being bullied. It was agreed that he would return to work on Wednesday 9 December and a discussion would take place to agree a phased return over four weeks. The wellbeing checklist would also be discussed and completed. During that meeting the claimant at times became agitated and raised his voice. He was aggressive towards Ms Leigh. He later apologised and advised that his hearing difficulties made him raise his voice. Mr Ashby who was in the next room texted Ms Leigh to check she was ok. Ms Leigh found the meeting difficult. The claimant's union represented confirmed directly to the claimant that his tone towards Ms Leigh was inappropriate and aggressive.*
16. The reference to the Claimant apologising and advising that his hearing difficulties made him raise his voice is curious. There is no express reference to an apology in any of the contemporaneous documents. The position of the Claimant throughout has been he did not apologise as he has done nothing wrong to apologise for. It seems Ms Leigh may have viewed some later correspondence from the Claimant in December as a form of apology which she then told the first Tribunal, but this Tribunal does not conclude it can be read that way. In any event that was not information before the Respondent during its disciplinary process.
17. On 3 December Ms Leigh wrote an email to the Claimant stating it was lovely to see you yesterday and I am really pleased with your decision to return to work. She wrote this in an effort to be conciliatory and constructive but it did not reflect her true feelings about the meeting.
18. There was subsequently correspondence about the minutes of the meeting of 2/12 between Ms Leigh and the Claimant. The minutes do not reflect any concerns from Ms Leigh about the Claimant's behaviour at the meeting but again this was in an attempt to be conciliatory rather than because no such concerns existed. There was then a further meeting of 9/12. Again the first Tribunal made express findings of fact

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*Following receipt of the minutes of the meeting, the claimant amended them and challenged much of what had been discussed. On 9 December the claimant spoke with Jane Leigh in a telephone call as arranged but did not return to work. He discussed his concerns about the minutes and again expressed his view that he was being bullied and treated unfairly. Again, his voice was raised and he became irate such that Ms Leigh had to tell him to stop shouting. He refused to complete the wellbeing form saying that Ms Leigh was trying to cover over the past. He said he wasn't taking his antidepressants as he wanted to be able to drive when he returned to work. He felt that he needed to return, or he would be sacked. Ms Leigh sought to allay his concerns but was unable to do so. Ms Leigh raised concerns about the claimant's conduct towards her to her manager.*

19. Ms Leigh kept notes of the 9/12 meeting. Within those notes she complains of the Claimant shouting and being irate and not listening to her. The notes conclude

*I am very concerned regarding his return to work as I don't feel we accomplished anything from this 2-hour meeting and I am also very concerned about what kind of working relationship can be had if he does not trust management or the company.*

20. On 14 January, Nicola Pugh (a director of the Respondent) and Jane Leigh submitted grievances in relation to the claimant's behaviour. Ms Leigh's related to the claimant's conduct in the meetings of 2 December and call of 9 December 2020. Ms Pugh's grievance was in respect of the Claimant's conduct, which she considered was bullying, and inappropriate defamatory and offensive comments towards her. Ms Leigh's grievance stated

*As his line manager I have held several meetings with Kevin who can be become irate and frustrated whereby he raises his voice in a very angry manner. In a meeting on the 2nd December 2020 held at LFS with myself and Kevin and his rep on the telephone to discuss his occupational health report Kevin started the meeting by going over the historic events of bullying he became very irate and began to raise his voice, at one point he was so angry he was foaming at the mouth. I attempted to calm him down and advised we were not here to discuss that matter but the OH report, he continued to shout until his rep intervened and calmed him down. The meeting continued in much of the same fashion with his rep talking him down and at times he became irate with his rep.*

*At the time of this meeting my colleague was in the other room conducting a meeting and was very concerned for my wellbeing as he could hear Kevin's raised angry voice and at one point he sent me a text me to see if he needed to intervene. Kevin eventually calmed down and we continued with the meeting agreeing his return to work.*

21. A grievance investigation was undertaken by Ms Rebecca Flynn from February 2021 until April 2021 into the grievances of Ms Pugh and Leigh. She was asked to do this by Donna Meade, Head of Operations. Other than the fact it was about Ms Pugh's grievance, Ms Pugh had no input into the decision to investigate the grievances or the report's conclusions, which were Ms Flynn's alone.
22. Ms Leigh was interviewed by Ms Flynn on 5 March 2021. Her evidence of the meetings of 2/12 and 9/12 was consistent with her notes and written grievance. She is recorded as stating "The meetings with Kevin on 2nd and 9th December 2020 were extremely difficult. For the most part during these meetings Kevin was very irate and at one point in the meeting on 2nd December. Kevin was so angry that he was frothing at the mouth. I have found Kevin's behaviour at these meetings to be aggressive and unprofessional and I have felt intimidated and by him". She also interviewed Mr Ashby, a colleague who was working in the adjacent office at the time. He said that he could clearly hear the Claimant shouting at Ms Leigh and became so concerned for her safety and welfare that he sent her a text message asking if she needed help. He also maintained that that he waited in the car park after his own meeting had finished and reported what he had heard to Ms Pugh on the following day.
23. Ms Flynn attempted to interview the Claimant to obtain his version of events. However despite making all reasonable efforts the Claimant would not attend a meeting. On 5 March 2021 the Claimant suggested that he was attempting to obtain company paper work germane and relevant to her inquiry. She asked for more details of what documents he was seeking in the hope she could assist but he did not reply. Eventually she finalised her report in his absence. Ms Flynn also offered to hold the meeting by skype, phone or to send a taxi for the Claimant to attend in person but never received a positive response. The Tribunal finds that was a missed opportunity on the part of the Claimant.
24. Ms Flynn's investigation report was dated 22 April 2021. She accepted Ms Leigh's account. She concluded that the Claimant had been aggressive and intimidating in the meetings of 2/12 and 9/12. His behaviour also evidenced insubordination. In the report she states that Ms Leigh was placed in fear by the Claimant's conduct. It was not immediately obvious where this conclusion came from. In evidence Ms Flynn said it was inferred from what Ms Leigh had told her including the references to being intimidated. While Ms Flynn focussed largely on the meetings of 2/12 and 9/12 she did not confine herself entirely to those meetings. Ms Leigh had provided emails passing between her and the Claimant from April when she took over management duties. Ms Flynn found that the emails could be described as patronising and undermining in that the Claimant appeared to be instructing Ms Leigh as to how to undertake her management role. She upheld the grievance and also found that his conduct potentially breached the Respondent's professional conduct policy in that it was inappropriate language and behaviour in dealings with colleagues and insubordination

and she recommended the matter be taken to a disciplinary hearing. She further upheld Ms Pugh's grievance and recommended that issue be taken to a disciplinary hearing as well.

25. In May 2021 Nicola Pugh asked Kerri Bendon to hold a formal hearing with the Claimant to discuss the irreparable breakdown in trust and confidence between himself and the company. Following HR advice from Ms Jane Bolland, evidenced in correspondence in June 2021, to which Ms Pugh is a party, it was decided that the disciplinary process would incorporate the issues in respect of Ms Leigh and Ms Pugh in the recommendations of Ms Flynn's report as well as the Sue Lam grievance from 2019. While the Tribunal is satisfied of the independence of Ms Bendon who had prior to this never met the Claimant and worked for a different area of the probation service, Ms Pugh's involvement in making arrangements for the disciplinary hearing was inappropriate given her complaint against the Claimant was to be part of the subject matter of the disciplinary hearing.
26. The Claimant was formally invited to a meeting on 14 June 2021 to discuss what was said to be an irreparable breakdown in the employment relationship between himself and the Respondent which may lead to dismissal for some other substantial reason. The letter attached various documents including the various grievance investigation reports, an Occupational Health advice and a chronology.
27. The proposed meeting did not happen. Instead a lengthy period of correspondence then ensued between the Claimant and Ms Bendon which is detailed in Ms Bendon's witness statement and which the Tribunal accepts as fact. The Claimant had difficulties accessing documents and then requested more information. There was discussions over the format of the hearing and delays while the Claimant had hearing aids fitted.
28. On 23 November 2021 a revised invitation was sent to the Claimant. The allegations remained essentially the same but the meeting was to be held under the disciplinary policy to consider allegation of unprofessional behaviour.
29. Again the meeting did not happen. There were further requests for information under a subject access request (SAR) by the Claimant. Efforts were made by the Respondent's disclosure team to progress the SAR with the Claimant but he was uncooperative. The Tribunal does not find in any event that resolution of the SAR was a necessary precursor to the Claimant attending the meeting.
30. There was also efforts made to allow the Claimant to view CCTV said to cover the incident of 2019 which formed the basis of Ms Lam's grievance. The CCTV footage was to be viewed on 2/2/22 with a disciplinary meeting on 9/2/22. Ms Bendon in fact could not view the CCTV footage herself due to technical difficulties. The Claimant was stood down from attending the CCTV viewing and was told the June 2019 incident involving Sue Lamb was

to be withdrawn in its entirety (although Ms Bendon's evidence was that this decision pre dated the CCTV technical issues and was due to the matter having been investigated on a number of occasion over a lengthy period of time and her conclusion that procedural fairness dictated it not be pursued).

31. On 2 February 2022 a further revised disciplinary invite letter was sent to the Claimant confirming 9 February 2022 as the hearing date and that the Sue Lamb allegation in respect of 12 June 2019 incident was withdrawn.
32. Once again the Claimant seemed to find obstacles to attending this hearing including not being able to view the CCTV footage and not receiving the SAR documentation. The disciplinary hearing took place on 9/2/22 with Ms Flynn presenting her findings but without the Claimant present. The Tribunal conclude this was a further missed opportunity for the Claimant to put forward his version of events and any mitigation.
33. On 9 February 2022 the Claimant submitted 6 formal grievances against a range of co-workers including Ms Leigh. Within that document the Claimant did not accept that he had acted inappropriately in any way on 2 December or 9 December. Rather the Claimant appeared to blame Ms Leigh and his trade union representative stating that he was caught in the cross fire of two vocal and verbose individuals.
34. The Respondent initially determined not to address these grievances although the actual decision letter does not appear in the file of documents before the Tribunal. There was an appeal against this decision. There is a letter from Ms Paula O'Neill head of HR dated 29 April 2022 stating that the Claimant was invited to a face to face meeting which he did not attend. She considered the substances of the grievances to be the same as those previously submitted and had been dealt with and so rejected the appeal.
35. The outcome decision is dated 21/2/22. It is a fairly lengthy document but in summary Ms Bendon dismissed the allegation against Ms Pugh but found that the Claimant had acted unprofessionally and in an intimidating manner towards Ms Leigh in breach of the Professional Conduct Policy. She stated *There is sufficient evidence that you behaved in an unprofessional and intimidating behaviour towards a colleague which made her fearful for her personal safety.*

*It is my conclusion that you have breached the following elements of the Merseyside Professional Conduct policy.*

*3.3 Employees of MCRC are expected to demonstrate a proper standard of professionalism, integrity, courtesy and anti-discriminatory and pro-social model behaviours.*

*3.3 (f) use appropriate language and behaviour in their dealings with colleagues, service users, contractors and other agencies.*

*3.3 (g) not use any language or behave in a way that they know, or should know, is offensive or likely to cause offence.*



*As such, I therefore conclude that your behaviour during the interactions with Jane Leigh on 2nd December 2020 and 9th December 2020, evidence gross misconduct.*

36. The reference to Ms Leigh fearing for her personal safety was taken from Ms Flynn's report.
37. The letter went on to dismiss the Claimant with immediate effect and without notice. The decision also addressed the issue of documentation and delay and set out a long list of the documentation provided to the Claimant with dates since November 2021. The Tribunal accepts this list as accurate.
38. The Claimant was offered the opportunity to appeal. He was given until 4 March 2022. This was extended until 18 March 2022 due to sadly a bereavement suffered by him.
39. In fact the Claimant submitted his grounds of appeal on 3 March 2022. Within those grounds of appeal the Claimant again denied any inappropriate conduct in the meeting of 2/12/20. There were criticisms of Ms Leigh. The Claimant suggested that it was his hearing problem and the fact that the Trade Union representative was joining the meeting by mobile phone that explained his raised voice. The issue of his SAR and his recent grievances were raised. The decision not to attend the grievance meeting of Ms Flynn and the disciplinary hearing was because he had not been provided appropriate documentation in advance and would be going to those meetings "blind". This was not correct.
40. On 17 March the Claimant was invited to an appeal hearing by Ms Andrea Bennett to be heard on 1 April 2022. Ms Bennett is a regional probation director for the North West, was suitably independent and an appropriate person to consider the Appeal. Once again there was a delay. The Claimant initially failed to respond and then sought a delay due to his bereavement. The Respondent attempted to reschedule the hearing. Despite extensive efforts by Ms Bennet, including requests designed to pin point what additional documentation the Claimant wanted and why, the Respondent could not secure the Claimant's agreement to attend an appeal hearing.
41. The appeal eventually went ahead in the Claimant's absence on 22 June 2022. By a letter dated 24 June 2022 the appeal was dismissed. Ms Bennett found the Claimant had not been denied access to any relevant and necessary documentation, Ms Bendon had implemented reasonable adjustments to the disciplinary process and no new information had been provided to refute the allegations around what occurred on 2 December and 9 December. Ms Bennett told the Tribunal in evidence, and it is accepted, that she considered options other than dismissal such as a change in role. However the Claimant had not engaged in the process and shown no insight or reflection into his conduct and she did not consider that he could properly be allowed to supervise those persons on probation. She emphasised the nature of the Respondent's work which required a high standard of

behaviour of its own employees given its statutory function of supervising high risk offenders who have been released into the community.

## The Law

### Reason for dismissal

42. The relevant legislation is found at s98(1), (2) and (4) Employment Rights Act (“ERA”). It is for the employer to show the reason for dismissal and that it is a potentially fair one, such as conduct: this is not a high threshold for a respondent. In *Gilham and Ors v Kent County Council* (No2) 1985 ICR 233, the Court of Appeal held as follows: “The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to [s98(4)] and the question of reasonableness.”

### Substantive fairness

43. Regarding conduct cases, the case of *British Home Stores Ltd v Burchell* [1978] IRLR 379 encompasses the relevant test for fairness:  
Did the respondent have a genuine belief that the claimant was guilty of the misconduct alleged by the respondent?

If so, were there reasonable grounds for the respondent in reaching that genuine belief?

and, Was this following an investigation that was reasonable in all the circumstances?

44. In all aspects of such a case, including consideration of sanction, in deciding whether an employer has acted reasonably or unreasonably within s98(4) ERA, the tribunal must decide whether the employer acted within the band of reasonable responses open to an employer in the circumstances. Whether the tribunal would have dealt with the matter in the same way or otherwise is irrelevant, and the tribunal must not substitute its view for that of a reasonable employer – *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439, *Sainsbury’s Supermarkets Ltd v Hitt* [2003] IRLR 23, *London Ambulance Service NHS Trust v Small* [2009] IRLR 563.

### Procedural fairness

45. Following the case of *Polkey v AE Dayton Services Ltd* [1988] ICR 142, it is well established that fairness in procedure is a vital part of the test for reasonableness under s98(4) ERA. It is not relevant at this (the liability)

stage to consider whether any procedural unfairness would have made a difference to the outcome: that is a matter for remedy.

46. If there is a failure to adopt a fair procedure, whether by the ACAS Code's standards, or the employer's own internal standards, this may render a dismissal procedurally unfair.
47. Regarding dismissal for conduct issues, the reasonableness of the procedure rests fairly heavily on the reasonableness of the investigation, and the provision of opportunity for the employee to make his position, explanation and mitigation heard and understood.
48. Procedural and substantive fairness do not stand as separate tests to be dealt with in isolation – *Taylor v OCS Group Ltd* [2006] ICR 1602. It is, ultimately, a view to be taken by the tribunal as to whether, in all the circumstances, the employer was reasonable in treating the reason for dismissal as a sufficient reason to dismiss. It may therefore be that in a serious case of misconduct, it may be fair to dismiss, even if there are slight procedural imperfections. On the other hand, where the conduct charge is less serious, it may be that a procedural issue is sufficient to tip the balance to make the dismissal unfair.

#### Wrongful Dismissal

49. This claim requires the Tribunal to perform a different exercise when compared to the test under s98 ERA. Here, the question is, as a matter of fact, was there a breach of contract in that the employer failed to pay the employee their contractual notice pay? This requires a Tribunal to consider first whether the employee acted in a way so as to fundamentally breach their contract to enable the employer to summarily terminate the employment contract. In other words, "did the employee so breach the contract, meaning that the employer could treat itself as released from its contractual obligations?".
50. Unlike under a claim for unfair dismissal, regarding a wrongful dismissal claim, it is for the tribunal to make findings of fact as to the nature and extent of the employee's conduct. The reasonableness of actions by the employer is irrelevant. Therefore, a wrongful dismissal is not necessarily unfair, and an unfair dismissal is not necessarily wrongful.

## Conclusions

### *Unfair Dismissal*

51. Addressing each of the issues identified at the outset in turn.

#### The reason for dismissal

52. The Tribunal is quite satisfied that the reason for the dismissal was as asserted by the Respondent the Claimant's conduct. In particular his conduct towards Ms Leigh at the meetings of 2/12/20 and 9/12/20.

#### s.98 (4) fairness

53. Disclosure- A constant theme of the Claimant's interactions with the Respondent and repeated to the Tribunal was that he was denied relevant and pertinent material in the control of the Respondent and that this entitled him not to attend any disciplinary meetings. The Tribunal rejects this assertion. A very substantial amount of material was sent to the Claimant over time, some of which is recorded in the dismissal decision letter. While it may be suggested that the CCTV was necessary to view for the June 2019 allegation involving Ms Lam, the Claimant had certainly received all documentation in respect of the complaints involving Ms Pugh and Ms Leigh by the time of Ms Flynn's investigation. The Claimant in evidence could point to no specific documents that he still needed prior to the 9 February 2022 hearing. Rather the Claimant's position was that had the SAR been answered something may have been produced beneficial to him. The failure to progress the SAR was not the fault of the Respondent and it is pure speculation that it would have produced something relevant in any event. The claim under this ground fails.

54. The Claimant's grievances- There was no requirement on the Respondent to pause the disciplinary process in order to consider the Claimant's grievances. The issue of what did or did not happen on 2/12 and 9/12 meetings with Ms Leigh was the only grievance issue relevant to the disciplinary charges that the Claimant faced. The grievance was submitted on the day the disciplinary hearing was due to take place and a year after Ms Flynn's investigation had begun. The Claimant had every opportunity to put his case forward on the 2/12 and 9/12 meetings through the disciplinary process. The Tribunal observes that according to the Respondent's grievance procedure at paragraph 10.3 where a grievance is raised during disciplinary proceedings only in exceptional circumstances will the disciplinary proceedings be postponed while the grievance is investigated. The claim fails under this ground.

55. The role of Ms Pugh- the Tribunal has already indicated that given she had submitted a grievance against the Claimant, which subsequently became a disciplinary matter, Ms Pugh should not have been involved in any arrangements in respect of the disciplinary hearings. However the Tribunal is satisfied that both Ms Bendon and Ms Bennett were independent of Ms Pugh and in no sense were their decisions influenced by her. Indeed this was demonstrated by the fact that Ms Bendon withdrew the allegations in

respect of the unprofessional behaviour on 12 June 2019 and did not uphold the disciplinary allegation in respect of Ms Pugh herself. The claim fails under this ground.

56. The duration of the disciplinary proceedings- There is no question that the disciplinary proceedings were extremely protracted taking well over a year from the report of Ms Flynn to the final decision dismissing the appeal. The question however is how much of that delay was ascribable to the Respondent and to what extent if at all it renders the dismissal unfair. Based on the facts as found, the Tribunal is not of the view that there was significant culpable delay on the part of the Respondent. In fact it was the Respondent that attempted on numerous occasions to progress the disciplinary proceedings and the Claimant that repeatedly delayed or simply did not engage. The claim fails under this ground.
57. Dismissal as a reasonable response- On analysis the Tribunal found this issue to be the only one seriously arguable for the Claimant and the one that gave it most pause. The Respondent was entitled to accept the evidence of Ms Leigh (and to some extent Mr Ashby) in respect of the meetings of 2/12 and 9/12. The Claimant did act inappropriately at those meetings. The Respondent found he was angry and did raise his voice and his behaviour was intimidating to Ms Leigh causing her to complain to her manager. Further Ms Bendon was critical of the general tone of some of the correspondence from the Claimant to Ms Leigh leading up to the December meetings. That said the Claimant had been employed with the Respondent continually for 12 years and had no previous disciplinary sanction against him. At the date of the meetings he had been off sick continually for a significant period of time as well as having been subject to disciplinary investigations and an absence management process. Dismissal in these circumstances essentially for what occurred in those two meetings could be considered harsh. The witnesses for the Respondent however indicated to the Tribunal the high standard of conduct that the Respondent holds its employees to. They also emphasised that the Claimant did not engage with the disciplinary process and showed no insight reflection or remorse and remained unrepentant as to his behaviour. The Respondent did not find that the Claimant acted as he did with Ms Leigh due to mental health problems or due to a hearing impairment and it was entitled to come to this conclusion on the evidence before it.
58. The Claimant still maintained in evidence to the Tribunal that he had done nothing wrong on 2/12 and 9/12 even in the face of the first Tribunal's findings. The Tribunal reminds itself that it cannot substitute its view for that of the employer. In all the circumstances it cannot be said that dismissal fell outside the band of reasonable responses. The claim fails on this ground.
59. For the above reasons the claim for unfair dismissal is not well founded and is dismissed.

*Wrongful Dismissal*

60. Although not stated in the dismissal letter the Respondent's professional conduct policy states under gross misconduct

*Gross misconduct is misconduct which is serious enough to prejudice the business or reputation, or which irreparably damages the working relationship and trust between employer and employee. It is a serious breach of contract and may lead to summary dismissal, that is, dismissal without notice or any compensation*

61. The policy gives serious insubordination as a matter normally regarded as gross misconduct under the policy.

62. The question for the Tribunal is whether whether the Respondent has proven that the employee did the act in question and it was sufficiently serious as to be repudiatory. The Tribunal must focus on the conduct that led to the termination of employment. Contextual factors such as length of service, while relevant for unfair dismissal, are not relevant to whether dismissal without notice constitutes a breach of contract- see *East Coast Main Line Company v Cameron* UKEAT/0212/19.

63. In the Tribunal's view the Claimant was in fundamental breach of contract and the Respondent was entitled to dismiss him without notice for that conduct. The conduct was not isolated, it occurred on both 2/12 and 9/12. There is no doubt that Ms Leigh was deeply concerned and affected by the Claimant's behavior and the Tribunal notes that Mr Ashby who was next door was so troubled by what had occurred that he texted Ms Leigh checking on her welfare and sent an email to Ms Pugh. The first Tribunal rightly categorised the Claimant's behaviour as inappropriate and aggressive. This was conduct that could rightly be categorised as serious insubordination. The claim for wrongful dismissal also fails and is dismissed.

Date:20 May 2024

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JUDGMENT & REASONS SENT TO THE PARTIES ON

Date: 7 June 2024

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FOR THE TRIBUNAL OFFICE

**Notes**

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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**Recording and Transcription**

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>