



EMPLOYMENT TRIBUNALS

Claimant: YY
Respondent: BARTS HEALTH NHS TRUST
Heard at: East London Hearing Centre (by CVP)
On: 25, 26, 27, 28 June and 2 July 2024.
Before: Employment Judge Mr J S Burns

Representation

Claimant: Mr D Welch (Counsel)
Respondent: Mr C Adjei (Counsel)

JUDGMENT

The claim is dismissed.

The restricted reporting and anonymity order made in this matter on 8 December 2022 is made permanent.

REASONS

1. This was a claim of (ordinary) unfair dismissal following the Claimant's summary dismissal on 7/3/22.
2. The documents were in a core bundle of 1021 pages and a supplementary bundle of 2883 pages. I also received an agreed list of issues, an agreed chronology and a cast list. I heard evidence from Ms C Alexander (dismissing officer) Mr A Williams (investigator) and Mr M Turner (appeal officer). The particulars of claimed unfairness were set out in the agreed list of issues and have been reproduced in italics in the conclusions below. I received oral closing submissions.

Findings of fact

3. On 17.7.18 the Claimant commenced employment with the Respondent. By the time of his dismissal he was employed as a full-time substantive Consultant Interventional Radiologist.

4. On 14 August 2020 the Claimant commenced a sexual relationship with a staff nurse (XX) whom he had been working alongside in the Interventional Radiology Department for two years previously without any problems.
5. The Claimant and XX fell out at the end of December 2020 and on about 2820 XX told the Claimant that she wished to end the relationship.
6. On 29 December 2020 XX told the Claimant that she did not want to see him and wanted time to herself but he did not accept this and went to Leyton central line station where he had an interaction with XX unwanted by the latter and witnessed by another nurse in the Radiology Department and a friend of XX. The Claimant then followed XX to her home. XX locked herself in and the Claimant out. XX texted the Claimant to ask him to *"Stop this teenage game and go home"*.
7. After many more impassioned messages from the Claimant, XX responded *"No...I asked you for time...and you didnt give it to me...Followed me to my house...enough is enough....From now on our relationship is strictly professional since you wont leave me alone"*. The Claimant responded *"please you know this is not possible, we are far more than colleagues"*. XX replied *"From now on ... Don't follow me, don't look for me in the rooms, don't talk to me unless is related to a common patient"*. Later on XX texted again *"But now leave me alone"* and later *"I don't want a relationship with you"* and *"I think you are great, you are just not for me. Accept this and leave me alone."*
8. On 31 December 2020 at work the Claimant kissed XX. She pushed him away and begged him to leave her alone.
9. The Claimant continued to send XX numerous messages. She replied *"I find this unnecessary and disturbing...I don't want anything else than a professional (relationship)"*
10. On 1 January 2021 XX sent a text to the Claimant: *"you are the only violent here (sic) not respecting me. Following me and trying to kiss me"*
11. After another passionate text from the Claimant, XX texted him again variously *"no I am not for you and I don't want any of this. I do not want a relationship with you...I truly don't. Sorry if is hard to accept that but is the truth. I don't want more calls, more long whatsapps or any of this"*.
12. The Claimant responded to this with a sexually graphic message to XX *"If after the 28th dinner I would have come with you to Leyton, we would have made love, for the first time likely coming together"*
13. XX wrote *"You and I are not going to be together again, never, from now on unless it is for common patients don't contact me"*
14. On 2 January 2021 following more texts from the Claimant XX wrote to him *"Since this is abuse and you don't respect me I have to stop answering. I will try my best to not work with you. All the best but stop this behaviour or I will be*

force to take actions that I do not wanna take....you are the nature (sic) one here not accepting that I don't want a relationship...Since you don't give a shit about it, and your words and actions are more valid than mine (as usual and expected with you) the only thing I can do is stop any kind of contact. The difficult part is that we still work together and you don't even respect me there like when followed me to Angela's office".

15. The Claimant ignored this warning and went on sending numerous long emotional and contentious text messages to XX.
16. On 4 January 2021 the Claimant made a joke at work in XX's presence about the type of sanitary toiletries that XX used. After the shift XX spoke to the Claimant and warned him that he should *"never again under any circumstances do comments regarding (XX) or her private life or she would escalate the situation"*.
17. The same day the Claimant sent a message to XX referring to some picture of him and her and stating *"And don't worry, I cut it and took off our nudities by myself, our nipples remained between us"*. He also wrote *"...if I cant speak with the woman I love Id rather prefer to have my cock cut and my heart explanted"*
18. XX sent a message to the Claimant: *"This is not appropriate whatsoever. Please dont send me anything else, I don't want any flowers, gifts, chocolate, or whatever. I want to live in peace and have a balanced life...please respect my wishes"*
19. On 5 January 2021 the Claimant sent XX a highly sexualised message in which he referred in graphic terms to his own genitals, her genitals, oral sex and other sex acts between them. On receipt of this message XX blocked the Claimant from sending her further Whatsapp messages.
20. However the next day 6 January 2021 XX unblocked the messaging system in order to *"convey to him that she had had had a smear test which had comeback positive, (in case) he wanted to do your checks or whatever"*. The Claimant responded in graphic terms making reference to his failure to have used a condom and then going on to describe his penis as *"very clean smooth and shiny"*.
21. On 8 January 2021 the Claimant started sending messages asking XX whether she was seeing someone else. XX responded *"since you don't listen and do whatever you like not considering my wish of just having a professional relationship...I have to block you again and for good"*.
22. The Claimant refused to accept this and went on pressing XX to answer her, despite XX protesting that *"she didn't have to answer anything personal, that it was none of the Claimants business"* and finally *"leave fucking alone"*. The Claimant carried on pressing XX to tell him whether she had found someone else and then backed this up by threatening XX *"don't let me ask this at work"* and again *"please tell me just this are you dating another? Don't let me catch*

you at work to ask, it would be a disaster” If I don't receive an answer Im gonna ask you tomorrow in person”.

23. On 15 January 2021 the Claimant sent XX, who was having a day-off, a text saying it was about work, and then turned up at her home. XX did not want this, She sent the Claimant a message asking him *“please do not come more to my place...we are not together we are not going to be together and this situation is not healthy for none of us”.*
24. On 20 January 2021 XX wrote to the Claimant: *“thank you for listening to me today..I respect your opinion and like to know it. But I keep saying that we are just not for each other...”*
25. On or about 24 January 2021 there were various exchanges of messages culminating in the Claimant sending a text. *“(I) have a nice cock”.* XX's response was *“HAHAJAJAJA You do have a beautiful one...”.*
26. On 28 January 2021 the Claimant and XX were working together in an operating theatre. The Claimant claimed that XX *“firstly sent the rest of my staff away for lunch, claiming that she would look after a sedated patient, then she disappeared from the operating theatre to make a personal telephone call. The patient injured himself, removing the left femoral access. After taking care of the patient and performing the Duty of Candour, I asked XX to debrief and she refused.”*
27. XX subsequently complained that on 28/1/21 the Claimant had told her *“You can go and keep talking shit at the back”* also screamed at XX *“You have to understand that the patient could have dissected his own artery and you have done nothing”.*
28. On 28/1/21 XX wrote to the Claimant *“Its not my fucking fault if someone has a picture of me on his fucking phone. Don't you fucking get it????... and Stop this cocky attitude. You are not my boyfriend and not will be . Full stop. Talk to me regarding patients. Don't be rude and watch your mouth with me. I will be as much professional as possible and that's the whole story.....leave alone...I live with anxiety when you are around ...I am tense...this is fucking toxic....text me only for a professional matters and leave me alone ”* ..The Claimant replied, *“no it is not. What is horrible is a chav commenting on your ass in the boarding room on Monday”.* He also sent an email to XX attaching photographs taken during their personal relationship.
29. On 30 January 2021 the Claimant and XX were working together again. XX subsequently complained that the Claimant had swapped the line list in ITU with another consultant in order to work the same shift as XX; and that during this shift he touched XX's breasts once, placed his genitals near her face and touched XX's hips several times. (This allegation was subsequently found not proved by the disciplinary panel).
30. On 3 February 2021 the Claimant and XX were working together again. XX subsequently complained that that the Claimant was rude to her, told her that

should not be there, that she should go to the back of the room and “*keep talking and laughing*” and that she could not supervise a new starter; that subsequently he tried to talk to her, followed her around the department and threatened to report her to the Senior Charge Nurse. Further that the Claimant shouted “*NO! You shut up, you don’t have any idea, I am the doctor and she should ask me, and not you!*” and did not allow XX to speak and when XX removed herself from the situation by locking herself in the toilet again that the Claimant followed her screaming “*You are not professional, this is fucking ridiculous*”.

31. On 3 February 2021 (as subsequently confirmed by the evidence of XX and the Ward Manager DD), XX went to speak to her matron/line manager JG and complained about the Claimant’s conduct towards her that day. JG told XX to put her complaint in writing. JG also went the same day to DD and told him that he needed to speak to XX about the matter.
32. On the same day the Claimant went to DD and told him about his relationship with XX and how it had broken up. He had also sent DD an email. He went on to complain about the incident on 28 January 2021 in which he alleged that XX had acted unprofessionally. He also told DD that “*he was concerned because of the previous personal relationship and bitter ending, he was concerned that XX might get back at him. He was concerned that’s why he was coming to see me*”. DD suggested mediation to the Claimant.
33. On 4 January 2021 DD met with XX and showed her the Claimant’s email. She became very emotional and started crying. She described her version of what had happened in the operating theatre on 28 January 2021 and complained that the Claimant had shouted at her and told her she was useless, and that this had been witnessed by other nurses. She also referred to the way the Claimant had been treating her since the break-up. DD offered her mediation but she declined, saying she was not ready for it yet.
34. On 5 February 2021 DD met with a nurse AV who had witnessed interactions between the Claimant and XX. AV told DD that the Claimant had been “*very unprofessional and had been shouting things*”.
35. On 6 February 2021 XX submitted a detailed formal complaint against the Claimant to Dr M Matson a Medical Director and to Ms F Found, a People Director, in which XX referred to the incidents on 28 January 2021, 30 January 2021 and 3 February 2021 and referring to his “*bad behaviour, obsessive attitude, harassment and sexual harassment*” and that “*for the last month she had been harassed in the workplace and that this was making her feel uncomfortable and unsafe.*”
36. She followed up this complaint by sending in copies of various Whatsapp messages and exchanges between her and the Claimant, some of which have been summarised above.
37. Shortly after making her complaint XX left the Royal London Hospital and went to work at another hospital nearby namely Whipps Cross as a temporary measure, and the Claimant never saw her again.

38. On 14 February 2021 the Claimant lodged a cross-complaint against XX, claiming that over the last 6 months "*multiple episodes regarding XX had been brought to his attention by third parties*", complaining about her alleged professional misbehaviour, talking in a foreign language in theatre, lack of concentration and distraction of staff, constant undermining, impossibility to have a professional debriefing, taking illegal drugs and lack of respect for the NHS in general. He denied that he had sexually harassed XX and said that as recently as 30 January 2021 they had been "*chatting nicely together*".
39. On 3 March 2021 Dr Harrod (case officer) sent instructions to Dr Williams, to commence an investigation under the Respondents *Maintaining High Professional Standards* policy ("MHPS"). The allegations he had to investigate were those made by XX about the incidents on 28 January, 30 January and 3 February 2021 plus the unwanted personal and messaging contact which the Claimant had had with XX in January 21. The instructions included the following; "*in doing so (ie in investigating the complaint against the Claimant) you should consider the allegations and concerns made by (the Claimant) about XX in his email to Felicity Found*"
40. In total Dr Williams interviewed 9 people including the Claimant and XX. The Claimant gave to Dr Williams a list of witnesses whom he wished to be interviewed. Dr Williams did interview two of these, but not all of them. One of the Claimant's requested witnesses CM could not be interviewed because she did not respond to emails and HR did not have her up to date contact details. He explained that he did not think he needed to interview more than he had, as he had abundant evidence, he had limited time to prepare his report, and he had had to act in a proportionate manner.
41. The Claimant wanted Dr Williams to do a site-visit to the operating theatre to satisfy himself about matters such as whether the lights could be dimmed (one of the conflicts in the theatre allegedly had been about lighting), and also to look at CCTV footage which the Claimant said would show him and XX leaving the hospital together on one of the days on which she was complaining about his conduct. Dr Williams declined to do so as he thought it was unnecessary and would be disproportionate.
42. On 7 April 2021 Dr Williams completed his report which contains a careful and detailed analysis and evidence-based reasons for his conclusion that all the allegations against the Claimant were proved and that "*The mismatch in what both the Claimant and XX wanted in terms of their relationship appears to have caused emotional and sexual frustration on the part of the Claimant which has spilled over into the workplace on several occasions but specifically in terms of this report on 28/1, 30/1 and 3/2 resulting in behaviour which could be considered to amount to harassment sexual harassment and unprofessional behaviour*".
43. On 21 April 2021 the Claimant was invited to a disciplinary hearing on 25 May 2021. This was subsequently postponed many times and finally took place in 2022, as explained below.

44. On 11 May 2021 Ms S Osho provided the Claimant with the outcome of the fact-finding investigation into his complaints against XX – the complaint was not upheld. The Claimant complained that this outcome flew in the face of the evidence and furthermore Ms Osho had not interviewed him before reaching her conclusions. The Claimant wanted the matter escalated. It was not escalated and that was the end of his formal complaint of 14 February 2021 against XX.
45. The Claimant raised a Datix report about the incident on 28/1/21. Datix is a system whereby medical staff must self-report operational near-misses and other problems. Eventually there was an investigation into this by a Dr Martin who issued a report on 9/12/21. The report includes the following: *“A Datix about the incident on January 28th 2021 was submitted by (the Claimant) on June 1st 2021 in which he stated that a contributory factor to the incident was inadequate supervision of the patient by Nurse E (a reference to XX) . He reported that Nurse E and Nurse D were “chatting in and looking at a social media video or a photo on Nurse E’s mobile phone” at the time of the incident. The Datix states that “40 minutes of compression” was required. Furthermore, (the Claimant) states that he feels that some of the patient’s subsequent complications may have arisen because of the accidental removal of the Angioseal device on January 28th. (The Claimant) also feels that there should have been a debrief immediately after the procedure. Nurse E disputes (the Claimant’s) account of her behaviour. She concedes that she may have spoken in (a foreign language) to Nurse D (they are both native speakers as are Nurses F & C); however, she states that they were handing over and denies using her mobile phone at that time or engaging in any non-work-related conversations.’* The report goes on to list some key learning points but does not contain any findings of fault against XX.
46. XX made a complaint about the Claimant to the police, but the Respondent did not. The police carried out an investigation including scrutiny of XX’s phone. The police outcome was notified to the Claimant shortly before the disciplinary hearing. The outcome was that he had no (police) case to answer. Neither party to the disciplinary/tribunal proceedings asked the police for the evidence they had relied on in reaching their decision.
47. The Claimant had been told not to contact work colleagues but he was given an opportunity to give to the Respondent’s HR a list of the witnesses he wished to call to the disciplinary hearing, and he did so.
48. The disciplinary hearing took place on 25 and 28 February 2022. Ms Alexander sat with two others on a panel to decide the disciplinary charges. The Respondent was represented by Ms Motraghi of Counsel and the Claimant by Mr Welch of Counsel. Live witnesses were called by both sides and cross-examined on their evidence. The Claimant would have been able to call further witnesses if he had asked HR to arrange this.
49. The disciplinary hearing was conducted in a hybrid format, with some witnesses being allowed to join by Teams on both sides.

50. Ms Alexander confirmed that there had been some minor connectivity issues with some remote witnesses but that these were rectified with technical help.
51. At the beginning of the disciplinary hearing Mr Welch made submissions about 6 procedural matters referring to the disciplinary process and their impact on the disciplinary hearing. The panel retired for 15 minutes to consider before returning to resume the substantive hearing.
52. The disciplinary hearing was conducted over two days and the Claimant and Mr Welch were given a full opportunity to cross-examine and make submissions at length. 11 witnesses were called including the Claimant and XX.
53. Panel questions to Dr Williams and his answers included the following:
- Question: *“What was your understanding of the impact on the witnesses?”*
Answer: *“The culture of the department was one of fear and upset and not wanting to go to work”.*
 - Question: *“what was the root cause of that distress?”* Answer: *“The way the Claimant had made XX feel and made her feel around her colleagues, it was the communication in the department and how that made people feel in the department.”*
 - Question: *“When you read the texts what impression did you get?”* Answer: *“They were unpleasant to read. Things you should not send especially not to someone you work with. I was upset and distressed reading them.”*
54. Panel questions to AV (a nurse colleague) and her answers included the following:
- Question: *Did you see XX after this incident? (a reference to 3/2/21)?*
Answer: *Yes, when I came back from ITU.*
 - Question: *What passed between you?* Answer: *I told her that (the Claimant’s) behaviour was inappropriate and if she needed me to talk to management I would.*
 - Question: *Who initiated it?* Answer: *I did.*
 - Question: *Why?* Answer: *I was worried about how she was.*
 - Question: *What was your impression of any impact on (the Claimant)?*
Answer: *I think they had relationship, I could see he was unhappy with her, trying to follow her, I thought it was inappropriate the way he was talking to her.”*
 - Question: *Your impression of XX?* Answer: *Stressed and anxious because she cried.*

- Question: *Is this the normal way you saw (the Claimant) interact with staff in the department?* Answer: *No.*
- Question: *What was his usual manner like?* Answer: *Like a normal person, talking to everyone, nice to everyone. He was not that stressed, he did not talk to other people like that.*
- Question: *Up to this point what was your impression of him?* Answer: *I did not change my impression, he is a good doctor a good radiologist, I was scared at how he was treating XX*

55. XX's evidence at the disciplinary panel included the following:

- Question: *Can you tell us if these (the beautiful cock text messages) were before or after you broke up. There are no dates there but tell us when you think that was? Whether it was before or after the break up?* Answer: *After the break up.*
- Question: *Your response was "haha, you do have a beautiful one..." why is that?* Answer: *"Knowing him how he was, I got the idea he was showing off about the penis surgery he had. I decided to just shut it down by saying hahaha yes you have a beautiful one full stop".*
- Summary statement by XX: *'I have experienced false accusations of harming patients, taking drugs, psychological manipulation, numerous calls from his number, threats, emails, private pictures taken during our relationship. Highly sexual content. A different number sending messages after I blocked him. Inappropriately touching and kissing me in the CNS office,. Touched inappropriately whilst at work, screamed at in the presence of patients. I am very aware he has attempted to shift the focus of this investigation. I am happy to cooperate and to take a drug test if required. I implore you not to detract from the allegations of sexual harassment and inappropriate behaviour in the workplace.'*

56. The notes of the disciplinary hearing show that the Claimant in giving evidence in chief focused on procedural objections, and that when cross-examined took a similar line to that which he took at the tribunal hearing - denying misconduct, contending that the text messages were incomplete, misdated or taken out of context, and frequently adopting an evasive approach by giving long answers which did not answer the question.

57. The closest he came to an admission of wrongdoing at the disciplinary hearing was in answer to a panel question: *"Could you have handled the end of the relationship better? Could you have put something in motion to change that dynamic?"* The Claimant's answer to this was *"I could have been stronger in not texting her. I could have asked to move".*

58. The panel dismissed part of the allegations against the Claimant relating to 28 January 2021 and all of the allegations relating to 30 January 2021, in effect disagreeing with Dr Williams's findings on these matters. However, in a detailed

and reasoned outcome letter, the panel upheld the following charges against the Claimant:

- *Misconduct: on 28 January [2021] whilst participating in cases in Room 3 the Claimant in front of colleagues, screamed at XX and stated, "You have to understand that the patient could have dissected his own artery and you have done nothing".*
 - *Misconduct: "on Wednesday 3 February 2021 in ACAD 6 the Claimant was rude, unprofessional and aggressive towards XX in the presence of colleagues, including telling her that she should not be there, she should go to the back of the room and "keep talking and laughing" and that she could not supervise a new starter; subsequently tried to talk to XX. Further, followed XX around the department and threatened to report her to the Senior Charge Nurse."*
 - *Misconduct: "during another incident on 3 February 2021 the Claimant came towards XX shouting at her stating "NO! You shut up, you don't have any idea, I am the doctor and she should ask me, and not you!" and not allowing XX to speak. This was in response to XX attempting to answer a query of a Junior Staff Nurse about equipment. XX removed herself from the situation by locking herself in the toilet again and YY followed her screaming "You are not professional, this is fucking ridiculous".*
 - *Gross Misconduct: the contact or attempted contact made by the Claimant towards XX in person or via messaging regarding personal matters after she had asked him not to contact her unless it was patient-related.*
 - *Gross Misconduct: "that the Claimant has behaved in an unprofessional and unacceptable manner towards XX and his behaviour could reasonably be considered harassment and sexual harassment".*
59. It was accepted by both Ms Alexander and by Mr Turner (the subsequent appeal manager) that the second Gross Misconduct charge was really just a rehash of the previous charges and did not rely on any additional facts.
60. The panel concluded that the appropriate sanction was summary dismissal. Despite the mitigating factors that YY presented (principally his previous good service and clean record) the panel did not consider that they were sufficient to justify a lesser sanction.
61. The outcome of the hearing was reported to the General Medical Council in line with the Trust Policy for Maintaining High Professional Standards.
62. The Claimant appealed in a 29-page document. Ms Motraghi prepared a management response document. The appeal was conducted before a panel consisting of Mr M Turner and two others. Again, the Claimant was given the chance to call witnesses and he was professionally represented.
63. Many of the grounds of appeal were the same as the specific allegations of procedural unfairness which had already been raised before and dealt with by

the disciplinary panel and which have been relied on subsequently in this ET unfair dismissal claim. I have set out my conclusions about them below.

64. In addition the Claimant through Mr Welch challenged the disciplinary panel's findings of fact on the evidence.
65. Having considered all these matters the panel dismissed all grounds of appeal in a letter sent to the Claimant on 7 June 2022.

The law

66. Where the conduct of the employee is established by the employer as a potentially fair reason for dismissal under Section 98(1) and (2) of the Employment Rights Act 1996, then section 98(4) must be considered which provides as follows:

Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – depends upon 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 shall be determined in accordance with equity and the substantial merits of the case.'

67. A dismissal for misconduct will not be unfair if it is based on a genuine belief on the part of the employer that the employee had perpetrated the misconduct, which belief is based on reasonable grounds following a reasonable investigation BHS v Burchell [1978] IRLR 379.
68. An Employment Tribunal should not substitute itself for an employer or act as if it were conducting a rehearing of or an appeal against the merits of an employer's decision to dismiss. The employer not the Tribunal is the proper person to conduct the investigation into the alleged misconduct. The function of the Tribunal is to decide whether that investigation is reasonable in the circumstances and whether the decision to dismiss, in the light of the result of that investigation, is a reasonable response. HSBC v Madden [2000] ICR 1283.
69. The range of reasonable responses test (or to put another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances, as it does to the reasonableness of the decision to dismiss for the conduct reason. Sainsbury v Hitt 2002 EWCA CIV 1588
70. The ACAS Code of Practice No.1, Disciplinary & Grievance Procedures (2009) provides that that an employer wishing to discipline an employee should carry out an investigation to formally establish the facts; inform the employee in writing of the problem; after a proper interval, hold a meeting to discuss the problem; decide fairly on the appropriate action, and provide an opportunity to

appeal. If these steps are not taken then, even if the employee has been guilty of misconduct, it is likely that the dismissal will be unfair and, under Section 207A of the Trade Union and Labour Relations Consolidation Act 1992, an Employment Tribunal, in awarding compensation for unfair dismissal can, if it considers it just and equitable in all the circumstances to do so, increase the award it makes to the employee by no more than 25%.

Conclusions

71. The Respondent's decision-makers had a genuine belief in the Claimant's misconduct.
72. That belief was based on reasonable grounds.
73. The evidence relied on in relation to the findings of misconduct on 28/1 and 3/2 is recorded in the Investigation report and in the record of the disciplinary hearing and the salient points were identified by Ms Alexander in the outcome (dismissal) letter.
74. The evidence relied on in relation to the findings of gross misconduct consisted in unwanted personal contact and numerous messages written by the Claimant to XX in the period 29 December 2020 to 3 February 2021. In addition, the Claimant had made contact with her in person - for example on 31 December 2020 he tried to kiss her, as he had acknowledged in an audio note.
75. The Claimant had suggested, (as he has continued to do subsequently) that the evidence of the Whatsapp messages was incomplete, misdated or taken out of context. He claimed to have deleted all his Whatsapp messages with XX from his phone on or about 29 January 2021 as a way of putting his relationship with her behind him. He then suggested that the messages XX had disclosed to the Respondent were incomplete and did not show the whole picture.
76. Mr Adjei submitted that if the Claimant had deleted messages, the real reason would have been to destroy evidence against him in relation to a complaint which by then he anticipated would be made by XX. It is unnecessary for me to decide whether or not this was so. If a person sends or receives messages of a character which are likely to become the subject of disciplinary proceedings and then for whatever reason decides to delete them when trouble is brewing, then that person must accept the evidential risk arising from the deletion.
77. The Respondent did not interrogate the mobile phones of either the Claimant or XX. It is not shown that it would have the power to do so. Nor did the Respondent ask the police for the evidence about the messaging which it may have been able to obtain. These are not steps which it would be reasonable to expect the Respondent to have taken in the circumstances. It was reasonable for the Respondent insofar as the messages were concerned to consider only those which XX and the Claimant placed before it.
78. Despite the Claimant's suggestion that the Whatsapp messages were incomplete misdated or taken out of context, they are clear in showing that XX

had explicitly and repeatedly asked the Claimant not to contact her unless it related to patient-matters but that he had ignored these requests and continued sending many unwanted messages to her.

79. The Claimant's messages/communications after the break-up were frequently offensive, sexually graphic and disturbing, making reference to actual or imagined sex between the Claimant and XX, making repeated references to his penis, and also referring to XX's body and to personal matters such as her sanitary products and her possible boyfriends.
80. Contrary to one of the Claimant's submissions, the unwanted Whatsapp messages were not sent purely in the course of a private relationship. The parties were work colleagues and anything said or done between them would have had an effect on the work-relationship. Furthermore, some of texts made specific reference to work - for example those in which the Claimant threatened to ask around at work or confront XX at work if she did not tell him whether or not she had a new boyfriend.
81. For a brief period around 20/1/21 the Claimant and XX had cordial exchanges including about non-work matters such as the death of one of XXs relatives, in relation to which XX said that she was grateful for the Claimant's support.
82. There is also the text on about 24/1/21 from XX in which she wrote "*you do have a nice one*" in response to the Claimant writing to her that he "*had a nice cock*". XX's evidence about this particular message, which the panel was entitled to accept, had been that when writing this she was trying to "*shut down*" the Claimant's boasting about his penis.
83. It is notable that all sexual references during January 21 originated from the Claimant and there is no sign that XX wanted any of these- quite the contrary.
84. I agree with Mr Adjei's submission that a reasonable view of the evidence as whole is that XX was pestered and harassed by the Claimant and that she certainly did not want to receive the Claimant's explicit sexual messages but was "walking a tightrope" and trying to shut the Claimant off in a manner which would not cause "all hell to break loose". She had to work alongside him and for that purpose alone had to try to preserve some kind of relationship. The Claimant then exploited this.
85. The Claimant suggested that the problems at work had been caused by XX's alleged professional misconduct but the weight of the evidence did not support this. The evidence supported the conclusion that the situation in the workplace became untenable at the end of January 2021 as a result of the Claimant's harassment of XX over the previous month.
86. It was telling that the Claimant worked without any problems alongside XX for two years up to the end of 2020 and that the Claimant started reporting problems with XX's work only after the sexual relationship had ended and XX had made it clear that she was unwilling to resume it, and there had been trouble at work in front of third-party witnesses.

87. Notwithstanding the evidence of the cordial messages, the disciplinary panel was entitled to prefer XX's version of events to that of the Claimant, and to conclude that Claimant's behaviour had been unprofessional, highly inappropriate and in breach of the Trust's WeCare values and had amounted to serious and persistent sex harassment of XX who had suffered considerable stress and a negative impact on her health, and disrupted the surgical team.
88. The procedure adopted by the Respondent was in accordance with the ACAS code and in fact went considerably beyond it - for example by allowing cross-examination of witnesses and professional legal representation.
89. The Claimant's specific reasons for claiming unfair dismissal were set out in an agreed list of issues and are set out below in underlined italics, followed in each case by the Tribunal's conclusions about them:
90. Dr. Harrod not going through a Pause and Reflect checklist before deciding to initiate a disciplinary investigation, contrary to paragraph 3.7 of the Respondent's Disciplinary Policy and Procedure;
91. The investigation started under the Respondent's MHPS policy which at that time did not have a "pause and reflect" requirement. By the time the process under the MHPS was complete it was too late to start the pause and reflect process which was provided for in the Disciplinary policy. I accept Mr Turner's evidence about this which was that "*I understand the investigation did not proceed without agreement of the Medical Director/Chief Medical Officer (who was Alistair Chesser as CMO who appointed Simon Harrod as case manager). Whilst I have not seen any formal pause and reflect form, my view is that the threshold for formal action was clearly met in this case and it was clearly appropriate for this matter to proceed through a formal process*".
92. Dr. Andrew Williams not interviewing CM as part of the disciplinary investigation;
93. She was not contactable by HR, despite attempts.
94. Dr. Andrew Williams not undertaking visits to the locations relevant to disciplinary allegations 2, 3, 4 & 6 as part of the disciplinary investigation;
95. The disciplinary policy referred to the possibility of investigators taking steps of this kind, but did not make them mandatory.
96. This is not a case which required a site-visit by the investigator. One of the complaints by the Claimant against XX was that she had refused to dim lights as per his instruction. However whether or not the theatre lights could be dimmed was not a significant matter. The question was not whether the lights had been adjusted to the Claimant's liking on a particular occasion but rather

whether his behaviour had remained reasonable and professional, whatever frustrations of this kind he may have experienced.

97. Nor was this a case in which examining CCTV footage would have assisted. Even if it had shown what the Claimant said it would show, namely the Claimant and XX leaving the hospital together on an occasion, (which was not something which XX denied) it would not have excluded a finding that he had behaved badly towards her earlier.
98. *Dr. Andrew Williams failing to follow the terms of reference of the disciplinary investigation by not considering the Claimant's complaint made on 14 February 2021 concerning XX's professional conduct;*
99. Dr Williams said in his evidence that he did consider it and in paragraph 1.3 of the report he formally referred to it and a copy was set out in an appendix. Dr Williams was well aware of it, and it would have been difficult for him not to have considered and investigated the allegations against the Claimant in the light and context of that knowledge.
100. The substance of his report deals with the events at work at the end of January and early February 21 which were the same matters which had triggered the Claimant's complaint.
101. The issue which Dr Williams was investigating was whether the Claimant had been guilty of professional misconduct and had harassed XX, and not XX's conduct. Even if XX had been guilty of some misconduct, or some procedure in the operating theatre had gone wrong, that would not have justified or excused professional misconduct and sexual harassment by the Claimant.
102. In any event, even if Dr Williams had not considered the Claimant's complaint about XX, the disciplinary panel was plainly aware of it and expressly referred to at least two aspects of it:
103. One aspect of the Claimant's complaint had been about XX's involvement in the "Angioseal incident" (on 28/1/21). The outcome letter referred to this as follows: *"The panel finds that the Angioseal incident should have been escalated immediately and it would have been appropriate to hold a team debrief regarding the incident as soon as practicable. This escalation did not happen and it was wholly inappropriate for you to request an individual de-brief with XX, particularly given the known relationship issues between you both. The panel felt if you were so concerned regarding this incident it should have been escalated in 'real time'. The panel concludes your approach to the debrief was because of your interpersonal relationship issues with XX"*
104. Another aspect had been about XX's use of a foreign language in theatre. The panel's outcome letter included the following: *"The panel considered carefully the evidence it heard regarding the alleged inappropriate use of foreign languages between staff within the department. We acknowledge that you and other colleagues might have, on occasion, felt marginalised and excluded when other staff conversed in another language other than English in front of you."*

105. Providing the investigation bundle to XX and her trade union representative;
106. The 900-page bundle of documents for the disciplinary hearing (including the investigator's report and its appendices) was disclosed to XX and her TU rep prior to the disciplinary hearing. This was not specifically provided for in the Respondent's policies.
107. In the outcome letter the disciplinary panel stated that "*was not persuaded that this issue made the process unfair or that it gave any unfair advantage to witnesses, all of whom had provided their evidence to the investigating officer in the course of the investigation*".
108. At the appeal stage Ms Motraghi conceded that the disclosure to XX had been a mistake and had been done in error by an HR employee.
109. In the Claimant's evidence during the Tribunal hearing he made generalised suggestions that this had allowed witnesses in the investigation (who had given statements which were unfavourable to the Claimant) to change their testimony at the disciplinary hearing. However, he was unable to show any clear examples of this or of any other ways in which disclosure of the bundle may have disadvantaged him forensically at the disciplinary hearing or at any other time.
110. Continuing with the disciplinary process instead of suspending it until after the police investigation had concluded;
111. The disciplinary panel's finding about this point was as follows : "*It is clear from the policy that Trust investigations should normally not take place whilst a police investigation is on-going. We understand that is to avoid prejudicing a criminal process, where there are additional protections in place. However, the panel was satisfied that had not happened here. At the time the Trust conducted its investigation, there was no police investigation. That was not commenced until after the internal investigation had been concluded and you had already provided a full account of your version of events, as had the witnesses. It was perfectly proper that the Trust had investigated and taken those matters forward at that time. In any event, your own representative confirmed that at the time of the hearing there is no on-going criminal process, and so there is no prejudice. We were satisfied, on that basis, that there was no barrier to us continuing and that there had been no unfairness and no prejudice to your position.*"
112. That is a full and satisfactory answer to the point. Furthermore, the Claimant had received the outcome of the police investigation (which was no case to answer) shortly before the disciplinary hearing started.
113. Not postponing the disciplinary hearing until after the Covid pandemic had ended;
114. This point was not pursued at the Tribunal. In any event it conflicts with the Claimant's complaint that the disciplinary process was unduly delayed. At the time when the disciplinary, and subsequently the appeal, hearings, took place,

there was no guarantee of a time in the near future when the pandemic would be over.

115. Not holding the disciplinary hearing in person but instead holding a hybrid hearing whereby some witnesses were permitted to give their evidence remotely;
116. The panel's outcome letter included the following about this: *"Due to continued high levels of Covid-19 transmission in London, witnesses had been offered the choice whether to attend in person or join the hearing virtually via an MS Teams video-link. The Trust has enhanced levels of infection control and prevention measures in place for its premises (beyond Government Regulations and reflecting its position as a healthcare provider with its own obligation to assess risk to workers and patients), which had placed restrictions on the maximum number of people allowed in meeting rooms to comply with social distancing requirements. At the hearing Ms Motraghi also drew our attention to the NHS resolution Guidance on MHPS processes during the Covid-19 pandemic updated on 8 February 2022, which continues to make provision for remote participation in internal MHPS processes. ...We also noted that some management witnesses and some witnesses you had called had opted to give evidence via MS Teams"*
117. That is a full and satisfactory answer to the point.
118. I am satisfied that any connectivity issues were overcome and that the hybrid format did not prevent an effective and fair disciplinary hearing.
119. It is notable that the Claimant did not object to the ET hearing as a whole being conducted remotely.
120. Permittin. AY and LL (who were witnesses) not to attend the disciplinary hearing;
121. Two witnesses whom the Claimant wished to question at the disciplinary hearing (AY and LL) were not required to attend. AY was at work at the time of the disciplinary hearing but was suffering from some personal matters which were divulged to me by Mr Adjei at my request during the Tribunal hearing but which it is unnecessary for me to record in these reasons. LL was absent in a foreign country on maternity leave. Both expressed a wish not to attend and they were not required to do so by the Respondent. AY was a witness whose statement was on the whole favourable to the Claimant but LL was unfavourable. Neither witness would have been able to contribute materially to the most serious matters under consideration, namely the Claimant's persistent contact and messaging of the Claimant in January 2021.
122. The disciplinary panel's view of this was as follows: *"The panel accepted that it was unfortunate that LL and AY were unable to attend to give evidence, but noted the reasons for their non-attendance and considered that they were reasonable and unavoidable. We did not consider that their failure to attend rendered the process unfair, or that it meant their evidence should be ignored.*

However, recognising that their evidence could not be tested, the panel gave appropriate weight to their written statements.”

123. The reasons which prevented their attendance were substantial. It was reasonable and proportionate for the Respondent not to try to force either of them to attend and the disciplinary panel made the appropriate adjustment to the weight it gave to their written statements.
124. *On 11 May 2022, disclosing the final report concerning the Claimant being bullied by Dr. Tim Fotheringham despite repeated earlier requests for this report by the Claimant and thereby preventing him from presenting the report to the disciplinary hearing;*
125. This was a report into a complaint which the Claimant had made in about October 2020 about TF having been abusive to him. It had nothing whatsoever to do with the problems between the Claimant and XX and the outcome of this complaint (which the Claimant received only after his dismissal) could have made no possible difference to his disciplinary hearing or its outcome.
126. *Dr. Harrod seeking from RB statements to use against the Claimant;*
127. Dr Harrod (the HR case worker) obtained material about another alleged incident in mid-2020 during which the Claimant was said to have made unwelcome approaches to another nurse employed by the Respondent. There had been no formal complaint about this, it had not been not investigated by Dr Williams and it formed no part of the charges against the Claimant.
128. It was prejudicial material from the Claimant’s point of view and it should not have been included in the disciplinary hearing bundle. Dr Harrod or someone closely associated with him inserted it in the bundle without prior discussion with the Claimant or Mr Welch, but the latter spotted it and requested that it be removed. The Respondent’s HR department refused to remove it.
129. Mr Welch should have renewed with Ms Motraghi his request that the material be removed before the disciplinary hearing started. He did not do so but instead raised the matter (amongst other procedural complaints) at the outset of the disciplinary hearing before the panel, thus drawing its attention to it.
130. It was wrong for the Respondent to have inserted this material in the first place but I accept Ms Alexander’s evidence that she and the other members of the panel did not refer to or rely on it. Ms Alexander impressed me as a conscientious and fair person.
131. *Concealing Ms. Felicity Found's (HR) continued involvement in the disciplinary process whereby she provided support and advice to XX and her trade union representative;*
132. The Claimant complained that Ms F Found had worked behind the scenes in a biased manner against him. He provided a multipage written

chronology/summary of Ms Found's involvement (which was not challenged in cross-examination).

133. This material shows that Ms Found in her first dealings with the Claimant on 10 and 14 February 2021 showed a willingness to deal with the XX complaint and the Claimant's cross-complaint by means of a dialogue, and mediation, including an apology from the Claimant (rather than by starting formal action against him).
134. However at a meeting on 16 February 2021 with XX and her union rep Ms Spring, the latter told Ms Found that "*the Claimant had a history of inappropriate behaviour...that the Police had been involved and there was a restraining order in place. the Claimant had been involved in a similar situation with his previous employer in Liverpool and had left that employment without any investigation/disciplinary process being undertaken*".
135. This information from Ms Spring (which the Claimant contends is false and which in any event has not been ventilated in the evidence before me) appears to have motivated Ms Found later on 16 February 2021 to abandon any previous inclination she may have had to deal with XX's complaint informally, and instead decide to initiate a formal investigation against the Claimant under the Respondent's MHPS.
136. Ms Found thereafter remained in communication with Ms Spring, and JG (XX's line manager) discussing such matters as whether XX should remain working at Whipps Cross or be brought back to the Royal London Hospital, and whether the Claimant should be sent to Whipps Cross instead.
137. Ms Found then also gave guidance about how the Claimant's complaint against XX should be dealt with - saying that action should be postponed until the MHPS process against the Claimant had run its course and suggesting that "softer behavioural issues" should be dealt with "informally".
138. The Claimant was aware of this approach by Ms Found, which he regarded as biased, and later he complained about this to HR. He was given assurances by both J Uvieghara on 22 March 2021 and again on 13 May 2021 by Dr Harrod that Ms Found "*would not have any continuing involvement in the Claimant's case*", but despite this she continued taking a leading role behind the scenes, for example by liaising with Ms Spring, and on 20 September 2021 expressing a negative view about settlement proposals put forward by Mr Welch and writing that "*overall we think the case should proceed given the seriousness of the allegations*".
139. While Ms Found was influenced by Ms Spring to start the MHPS process against the Claimant, and while Ms Spring may have done so by relaying information about the Claimant which may have been false, XX's complaint against the Claimant was in any event a matter which should have been formally investigated under the MHPS by the Respondent.

140. Furthermore, the fact that Ms Found's decision (as to how the complaint should be dealt with), may have been influenced in this way does not go to the fairness and appropriateness of the investigation and disciplinary process itself once they got going, because a fair process can take place regardless of the quality of its trigger.
141. Once the MHPS process was underway, over the ensuing period Ms Found and the Respondent's HR department generally had to consider not only the Claimant but also the position and interests of XX who had been removed from her normal workplace, and whose trade union rep Ms Spring was persistent in her efforts on XX's behalf.
142. After the investigation report was complete and Ms Found had read it she was negative towards the Claimant and sympathetic towards XX. Given the content and conclusion of the report this was not surprising.
143. Dr Harrod should have ensured that his promise of 13 May 2021 was kept, but is not shown that Ms Found was involved in any material way in the investigation, or in the disciplinary hearing or appeal, or that her views and partisan approach affected the outcome in any way.
144. Unreasonably delaying the holding of the disciplinary hearing;
145. The original hearing was scheduled for 25 May 2021. The original hearing had to be rescheduled to ensure that the composition of the disciplinary panel met with the requirements of the Trust's Disciplinary Policy.
146. On 11 June 2021 a new hearing date was scheduled for 24 June 2021. Following receipt of a letter from Mr D Welch on 21 June 2021 requesting that the hearing be postponed, on 22 June 2021 the 24 June 2021 hearing was postponed as the Trust was unable to find a replacement chair.
147. There were then difficulties in securing the attendance of panel members together on two consecutive days. This resulted in the staggered hearing dates of 15 September and 1 October 2021 being proposed.
148. The hearing approached and Mr Welch contended that the remote hearing was inappropriate and needed to be held in person. It was therefore rescheduled for 14 and 20 October 2021 and then rescheduled again to take place on 6 and 7 January 2022 (both these requests to reschedule being due to the Claimant being on sick leave) with the disciplinary hearing eventually taking place on 25 and 28 February 2022.
149. This was an long unfortunate delay which must have wasted NHS resources, but the Claimant was in receipt of his full salary throughout and much of the delay was caused by his own requests.
150. I do not uphold any of the specific allegations of unfairness as material.

151. Despite his clean record and good medical work, the Claimant was found guilty of serious misconduct. He showed little or no insight into, or remorse about, what he had done, instead contesting every point at each level and trying to shift the blame onto XX.
152. The Respondent expects courtesy from its employees even if they are in senior roles. Consultants must set a good example to junior doctors and others. The Respondent places importance on employees not abusing imbalances in power.
153. Both the Respondent's disciplinary procedure and its decision to summarily dismiss the Claimant were within the range of reasonable responses open to the Respondent in the circumstances.
154. Hence the Claimant was fairly dismissed and his claim fails.
155. If I am wrong about any of the above and should have found that the dismissal was unfair, I would have found that the Claimant should receive no damages because of his 100% contributory fault.
156. I have made the restricted reporting and anonymity order permanent in order to protect the Article 8 rights of XX.

**Employment Judge J S Burns
2 July 2024**