



EMPLOYMENT TRIBUNALS

Claimant

Mr Colin Homes

Respondent

v East of England Ambulance Service
NHS Trust

Heard at: Bury St Edmunds (in person) **On:** 29, 30 and 31 May 2024
In chambers 5 July 2024

Before: Employment Judge Laidler (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Ms J Duane, Counsel

RESERVED JUDGMENT

1. The Claimant was dismissed by reason of conduct, a potentially fair reason for dismissal falling within Section 98(2) Employment Rights Act 1996 ("ERA").
2. The Respondent acted reasonably in all of the circumstances of the case in treating that reason as one to justify the dismissal of the Claimant.

REASONS

Background

1. The claim in this matter was received on 1 May 2023 following a period of ACAS Early Conciliation between 13 March and 13 April 2023. In detailed particulars the Claimant set out how he considered he had been unfairly dismissed, that was the only claim before this Tribunal.
2. Upon receipt of the ET3 an Employment Judge listed an attended Hearing for four days commencing 28 May 2024. Unfortunately, due to lack of judicial resources the first day had to be postponed. This Tribunal was able to start on what would have been the second day. It had a Bundle of 1,279 pages and a Witness Bundle of 82 pages.

The Hearing

3. On the first morning there were case management matters to be dealt with and then the Judge read until the afternoon of the first day, when the Respondent's evidence was started. The evidence and submissions were heard on the morning of the third day, leaving some limited time for the Judge to commence her deliberations. As was explained to the parties, there was not then allocated time thereafter for these deliberations to be concluded and these written reasons are being sent to the parties at the earliest opportunity.

Witnesses

4. On behalf of the Respondent the Tribunal heard from the following:-
 - 4.1. Dean Ayres, Head of Information Governance and Data Security;
 - 4.2. Simon King, Head of Clinical Operations; and
 - 4.3. Johann Scheffer, Director of Strategy, Culture and Education.
5. The Claimant gave evidence on his own account and called Andrew Latter and Jonathan Dennis as character witnesses on his behalf. He also produced a witness statement from Tony Chisam who was unable to attend, was not therefore cross examined and so limited weight has been given to his statement.
6. The Respondent took issue with the Claimant's statement. After witness statements had been exchanged the Claimant provided what was referred to as a 'revised' witness statement on 12 May 2024, stating that all he had done was update page numbers in the bundle. The Respondent, however, noticed that he had made considerable changes from paragraph 31 onwards, which came from his reading of the Respondent's statements. The Judge considered the points he was making in those paragraphs whilst she was reading and determined that the most proportionate way to deal with the issue, as the Claimant was a litigant in person, was to allow him to put those points to the Respondent's witnesses as they were in effect comments on their witness statements. That is what the Claimant did and the rest of his statement through to paragraph 31 was accepted as his evidence.

The Facts

7. From the evidence heard the Tribunal finds the following facts.
8. The Respondent is an NHS Trust responsible for providing 24 hour access to Accident and Emergency Services to those in need of emergency treatment and transportation in Bedfordshire, Hertfordshire, Essex, Norfolk, Suffolk and Cambridgeshire.

9. The Claimant was employed by the Respondent from 4 June 2012 to 20 December 2022, most recently as a Paramedic.
10. The Tribunal saw the Claimant's principal Statement of Terms and Conditions of Employment (page 169). At the time that was entered into the Claimant's post title was that of Technician and he was based at Fakenham in the West Norfolk Division. The date of commencement in that post was 31 May 2016, but with his continuous service from 4 June 2012.
11. The Claimant's employment was subject to the Trust Disciplinary Policy, although Clause 24 of the Terms provided it did not form part of the Contract of Employment.
12. The Disciplinary Policy was seen in the Bundle at page 88. The following Clauses of which are relevant to these proceedings:-

"Clause 11 - Suspension

- 11.1 Suspension is where an employee continues to be employed but must not attend work or do any work.
 - 11.2 The use of suspension within this Policy is a neutral act and is not considered as disciplinary action. As the employee continues to be employed by the Trust throughout their suspension, they remain bound by the Trust's NHS terms and conditions of employment.
 - 11.3 Any decision to suspend will be subsequently confirmed in writing to the employee no longer than four working days (extended by any Bank holidays falling within that time period). This will outline the reason for the suspension and the details of their nominated Welfare Contact. The Manager should contact Human Resources Department to obtain the standard format letter.
 - 11.4 In certain circumstances, consideration should be given to a period of suspension. These would include, for example, potential cases of gross misconduct, fundamental breach of contract ... damage to Trust property ... or to aid an unhindered investigation that cannot be mitigated with the employee remaining in the workplace. ...
 - 11.9 It is recognised that a decision to suspend can have an impact to an employee's wellbeing. The Trust will follow good management principles by the provision of welfare support to ensure the suspended employee's psychological wellbeing is monitored and appropriate signposting to the Trust's Employee Assistance Program provider is offered."
13. The Disciplinary Policy goes on to deal with the First Formal Investigation with the Commissioning Manager being required to appoint an Investigation Officer (Section 12 of the Policy). Clause 12.2 provides:-

“Clause 12

12.2 Once a fact finding investigation has been conducted and formal proceedings instigated, the employee will be notified of this and an investigation will be carried out in a maximum six weeks. ...”

12.3 of the Policy provided that,

“12.3 The methods of the investigation will vary depending on the circumstances. In some cases this will require the holding of an investigatory meeting with the employee and / or obtaining a written statement from them. In others, this may not be necessary, and the investigatory stage will involve the collation of information. The Trust reserves the right to dispense with an investigatory interview and to proceed directly to a Formal Hearing where appropriate. This action would only take place where there is clear evidence of a breach of conduct.”

14. Section 13 of the Policy deals with the outcome after investigation. The Investigating Officer would submit an Investigation Report to the Commissioning Manager. It is not the role of the Investigating Officer to prove the guilt of any party, but to investigate and to make a recommendation based on the findings of the Investigation for the Commissioning Manager’s consideration. It is that Manager who will take a view on whether there is a case to answer, deal with it informally or arrange for it to proceed to a Formal Disciplinary Hearing.
15. At Section 17.4 of the Policy are set out the circumstances in which summary dismissal can be justified. These are defined as offences regarded as gross misconduct which are listed in Appendix 13, (page 162). The list is described as neither exclusive nor exhaustive. Whether or not a particular action constitutes an offence which falls into the category will depend on a number of factors including the degree of seriousness and the responsibilities of the employee. The list at Section 2.5 of that Appendix gives the list of examples of gross misconduct and these include:-
 - 15.1. Deliberate and / or serious misuse or damage to Trust property or its name;
 - 15.2. Bringing the Trust into serious disrepute;
 - 15.3. Misuse of Trust IT and / or communications equipment; and
 - 15.4. Breach of contract of employment – any fundamental breach of contract or conduct which renders impracticable continuation of effective employment.
16. On 12 January 2016 Rob Morton, who was at that time Chief Executive Officer of the Respondent, circulated an email to all staff, (page 345). It is necessary to quote the email in full, which in these proceedings and in the Investigation Report has become known as ‘RM/1’-

“Colleagues

You will be aware that last Friday **DATE REDACTED** one of our student Paramedics was struck by a vehicle whilst on duty. **NAME REDACTED** was flown to Addenbrooke’s and remains in a serious but stable condition. I know you will join me in sending our thoughts, best wishes and prayers to **NAME REDACTED** his family, friends and colleagues at this most difficult time.

I know that Matt Broad, Terry Hicks and their teams have been working hard to keep **NAME REDACTED** local colleagues informed on his progress and supporting his loved ones during this difficult time.

This horrific incident reminds us what a challenging service we deliver every day and how important it is to reflect on each other’s safety wherever we are and whatever we are doing.

But it is times like this, that our organisation works best bringing out the sense of family and collegiality that we have in the Ambulance community. It also shows the importance of the staff support networks we have in place and are building on and I would urge anyone who is affected by this or any other matter to make use of them.

If you have been affected and feel like you need support, please remember that the Trust’s Employee Assistance Program is available at any time. It’s free, confidential, runs 24 / 7 and can be accessed either on the phone or online. Just visit www.well-online-co.uk (Username: EASTlogin, Password: Wellbeing) or call 0800 0851376.

Robert

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Chief Executive
East of England Ambulance Service NHS Trust
Whiting Way
Melbourn
Royston
SG8 6NA

Email: ceo.eeast@eastamb.nhs.uk

Phone: +44 1763 268743 ”

17. In 2018 following a National pay deal the Respondent required all Ambulance staff employed from 1 September 2018 (or existing staff who moved roll including promotions after this date) to move from Annex 5 to Section 2 Terms and Conditions. Section 2 provided that Ambulance Staff would be paid an unsocial hours provision based on a number of unsocial hours actually worked. There was a concern, for many Ambulance Staff that Annex 5 was more favourable than the new Section 2. This resulted in a dispute between the Respondent and some of its employees.

18. On 31 August 2018, Mr Morton made arrangements to announce his resignation from the Trust. Pre-planned and agreed emails were arranged to be sent during the day from his inbox. In his subsequent investigation Mr Ayres ascertained that from around noon he had switched on his out of office, (page 238).
19. The disputed email which is the subject of these proceedings has been labelled 'CH/1' and is sometimes referred to as the "repurposed email". The Claimant does not dispute that there was never a genuine email sent from Mr Morton to the Claimant on 31 August 2018. The email was sent at 15:59 hrs on that day from Mr Morton's East of England Ambulance NHS Address and again the email needs to be quoted in full. The subject title is "Progression":-

"Colin

I have received your email regarding your progression onto a 'Technician to Paramedic' course, the difficulties you have had confirming the advice you were given regarding Annex 5, and the short period of time you have to receive an answer.

The current Trust position is that if you have been accepted onto a pathway before the date of change you will remain on Annex 5 after completion of that pathway, which includes all courses and requirements for completion. In the case you describe, this would include, but not be limited to, your initial course and the later university course. The date of acceptance is the important point here, not the date you would eventually change roles or sign a new contract, as you have commenced your move already.

You mention that you believe some courses have been cancelled or delayed. This would also not affect somebody already accepted.

In the sense of collegiality and with our focus on staff support, I urge you to pass this information onto anyone in a similar position.

Robert

Robert Morton
Chief Executive
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SG8 6NA

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Phone: +44 176 3268743 "

20. This email was sent from the Claimant to his own email address on Saturday 8 May 2021 at 15.33. The subject heading is "FW: Annex 5 or Section 2" and his email states:-

“Apologies for the prolonged wait for me to actually look for emails re Annex 5 but I have been churning out essays and EBLs.

I genuinely have no recollection of receiving this email, I couldn't honestly say I have even seen it before although I remember emailing lots of people at that time, and nobody else seemed able or willing to answer it.

This has probably been mentioned elsewhere but it was also confirmed by the ETOs at Hellesdon that we would remain on Annex 5 if we were accepted before 1/9/18. I have an email from Cheryl confirming acceptance dated 28/8/18 and presumably you all have similar from before the deadline (?)”

21. This email forwarding the email from Robert Morton of 31 August 2018 has been referred to throughout the investigation and these proceedings as 'CH/2'.
22. The Claimant then forwarded this to his colleagues (four who were affected by the changes as was he) on the same Saturday 8 May 2021 at 18.05. The subject line stated, “Forward Annex 5 or Section 2” and contained the information as set out above. This document has become known in the investigation and these proceedings as 'JS/1'.
23. Jaynie Sheen was one of the recipients of that email and forwarded it to OCE at the Respondent on 2 October 2021 stating,

“The all important email from Robert Morton”.
24. This was received by Liz (believed to be Liz Connell) and forwarded to Stephen Bromhall on 5 October 2021 stating,

“No dear or to.
Signature not correct.
Email CEO – incorrect.
The wording is not his style either.”
25. Stephen Bromhall (Chief Information Officer) forwarded this to Dean Ayres on 5 October 2021.
26. Dean Ayres is employed by the Respondent as Head of Information Governance and Data Security and has been employed in that role since 1 March 2021. He has, however, worked at the Trust since 1989. He spent the first 12 years on the front line including as a paramedic. Having an interest in clinical audit and technology he liked looking at how technology could be used in Health and Social Care. By 2010 he was in charge of the Clinical Audit Department and in that year started studying a Masters Degree in Computer Security and graduated in 2014. This included modules on forensic and computer ethnics. He left the Respondent for a brief period between 2015 and 2017 when he returned into an admin role working his way up to the role that he now has. He has undertaken a

number of complex investigations on behalf of the Respondent, including those involving digital forensics. Most of those have been HR investigations and disciplinaries, including fraud cases. Prior to commencing this investigation he did not know the Claimant even by name.

27. Mr Ayres gave evidence to this Hearing which was found to be extremely clear and his expertise evident. He was contacted by Stephen Bromhall on 5 October 2021 and met with him that day. He was informed about what appeared to be a suspicious email that had purportedly been sent to the Claimant on 31 August 2018 by the then CEO Robert Morton. It related to a wider national pay dispute as to how Ambulance Staff were paid for unsocial hours. As explained at paragraph 6 of Mr Ayres witness statement all paramedics are subject to the Agenda for Change national terms and conditions. Prior to 1 September 2018 unsocial hours were subject to 'Annex 5 of Agenda for Change which provided that a consistent amount of unsocial hours payments were made and these were calculated in advance and based on shift patterns in rotas. A national NHS pay deal in 2018 provided that ambulance staff employed from 1 September 2018 (or existing staff who moved role, including promotions, after that date) would move to Section 2 of Agenda for Change. This section provided for payment for unsocial hours based on the number of unsocial hours actually worked. There was therefore concerns that for ambulance staff, Annex 5 was more favourable than Section 2.
28. Mr Ayres was aware that a collective Grievance had been raised in connection with this pay issue, which included the Claimant. His understanding was that the issue was whether the Claimant and his cohort had moved to a "new role" when progressing through the Education Pathway for the purpose of triggering a move from Annex 5 to Section 2. It is understood this could have had huge financial consequences at a national level. The email allegedly from Mr Morton supported the claimant and others in his cohort that they remained on Annex 5.
29. When Mr Ayres was instructed the only version of CH/1 was that forwarded by the Claimant, the original of it has never been located. Mr Ayres was asked by Mr Bromhall to carry out a Preliminary Investigation into CH/1. This was not an HR investigation and the Claimant was not the subject of it. The purpose was to establish whether CH/1 was genuine and if not, to seek to establish where it originated. The Claimant was not informed of and was not involved in this Preliminary Investigation.
30. Mr Ayres' Report was dated 1 November 2021 and commenced at page 233 of the Bundle. It explained that he had used the MS Defender Compliance Suite to undertake a range of searches across the entire email system, including:-
 - 30.1. Emails containing Robert.morton@eastamb.nhs.uk between 29 August 2018 and 1 September 2018;
 - 30.2. Emails contained within the Claimant's Trust inbox between 29 August 2018 and 1 September 2018;

- 30.3. Emails contained within the Claimant's Trust inbox between 1 January 2020 and 15 October 2021;
- 30.4. Emails containing CEO.eeast@eastamb.nhs.uk ; and
- 30.5. Emails containing the word "collegiality" across all inboxes between 29 August 2018 and 15 October 2021.
31. The evidence collected included several thousand items that had been analysed by Mr Ayres, including the use of tools provided through MS O365..
32. His Report first set out his findings on the email 31 August 2018 which he describes as the 'Target' email, but is CH/1 in these proceedings.
33. He then looked at the original email of Mr Morton dated 12 January 2016 (RM/1).
34. He then made factual findings in Section 3 of his Report and also set out some circumstantial findings and hypotheses. Section 6 provided his Summary which contained the following:-
 - 34.1. There were significant issues with CH/1, including its date, the fake phraseology, the salutation and valediction, the incorrect signature block and Mr Morton's statement that he did not send the email;
 - 34.2. It does not appear to have existed prior to 8 May 2021;
 - 34.3. The original email has never been found;
 - 34.4. It has been authored by someone other than Mr Morton;
 - 34.5. The email resided in the email box of the Claimant;
 - 34.6. The phraseology was similar between that and the 12 January 2016 email;
 - 34.7. The 2016 email and CH/1 email used the same signature block;
 - 34.8. That signature block was in use in January 2016 but was not being used after April 2018;
 - 34.9. The Claimant forwarded the 2018 email to himself some hours before passing it on to his colleagues;
 - 34.10. The forwarding of the email enabled the Claimant to edit the content;
 - 34.11. In the target email the claimant suggested he found it in his account but the searches showed that an email containing the word 'collegiality' is only in existence from the 8 May 2021.

- 34.12. On the balance of probabilities, the Claimant used the 2016 email as a base for the fabricated email which having been forwarded to himself, by himself, allowed the creation of the Target email; and
- 34.13. On the balance of probabilities, CH/1 is fictitious.
35. Mr Ayres, in his Report, tested a hypothesis that the Claimant had recalled the email from 2016 and realised it could be utilised to produce a fictitious email that would substantiate the ongoing legal claim about unsocial hours pay. He sent it to himself to produce an editable version. In the example given in his Preliminary Report at 5.1.4, Mr Ayres changed the details of the individual that originally sent an email and the date and time to make it look like a genuine email. It is fictitious but looks genuine.
36. The Tribunal did not hear from Mr Bromhall, but accepts Mr Ayres' evidence that he was at this point concerned about the possibility of future criminal proceedings. Mr Ayres suggested a few organisations that could carry out a forensic independent investigation, including PricewaterhouseCoopers LLP ("PwC"). It is his understanding that they were commissioned to carry out an independent investigation. This Tribunal has been told that as it was commissioned by external lawyers it is privileged and has not been disclosed in these proceedings. Mr Ayres was not involved in the commissioning of that Report, but did assist in providing PwC with access to the forensic evidence he had collated. He also proof read the final draft of their Report to ensure that elements relating to the Respondent were factually accurate, but he did not input or contribute to any findings. He was not involved in any decision making relating to what should happen with the PwC Investigation. The tribunal accepts that evidence.
37. Following both Mr Ayres' Report and that from PwC, the Respondent took the decision to suspend the Claimant on 13 May 2022. This decision was taken by Nick Cason, Interim General Manager, who confirmed the decision in a letter seen in the Bundle at pages 213 – 214. The letter stated that the Claimant remained bound by the terms of his contract of employment, but must not enter any Trust premises without prior permission from Mr Cason. He must not undertake employment elsewhere and must not speak to his colleagues. He was expected to co-operate fully with the investigation and remain available during normal working hours to attend meetings as required. He was advised the suspension would be reviewed regularly and he would be notified of any changes. The allegations were set out as follows:-

"You allegedly repurposed an email composed by Robert Morton, the Trust's former CEO, initially sent on 12 January 2016 at 12:00pm.

You allegedly forwarded this email to your work email address on 08/05/2021 at 14:49pm. As a result, this email was received in your inbox on 08/05/2021 at 15:33pm, but was later deleted.

You have attempted, through the misrepresentation of information to make financial gain for yourself and other employees within the Trust.

Through your actions above, your honesty and integrity have been brought into question.

You have failed to demonstrate the Trust's values as expected of all employees."

38. The Claimant was advised that these were serious allegations and if found on the balance of probabilities to be proven, disciplinary action may be taken including termination of employment.
39. The Claimant was also advised of his right to be accompanied at any formal investigation meeting by a fellow worker, trade union representative, or an official employed by a trade union. Confidentiality was emphasised and that the Claimant and his companion were to keep the matter confidential and not discuss the letter or any aspects with colleagues, or anyone else. A breach would be considered to be a disciplinary matter.
40. During the Investigation, Tony Chisam had been appointed the Claimant's Welfare Officer and his details were provided. The Claimant was also given information about the Employee Assistance Program and how to access it and other assistance.
41. Dean Ayres was commissioned to carry out a thorough Investigation and his terms of reference were seen at page 228 of the Bundle.
42. The Claimant was invited to and attended an Investigation Meeting with Mr Ayres on 21 June 2022, (age 350). He was accompanied by Mike Hill, a colleague (who is also a trade union representative but was not there in that capacity). Notes of the meeting appear at page 350 and are contained within Mr Ayres Report. The meeting lasted 2 hours.
43. It was put to the claimant by Mr Ayres that there was evidence he had forwarded the 2016 email (RM / 1) to himself on 8 May 2021 at 14.49. He responded that he had no recollection of doing so.
44. The claimant was asked by Mr Ayres why he had forwarded the email CH/1 allegedly sent by Mr Morton to himself and he did not provide an answer. He did not have an answer either as to why Mr Ayres had not been able to find any other copies or references to CH/1 prior to the claimant's email of the 8 May 2021 at 15:33.
45. Mr Ayres explained to the claimant that there was a significant amount of metadata in CH/2 which contained two IDs; reference numbers. One for RM/1 and the other could not be traced on the respondent's system. The claimant could not provide an answer.
46. Mr Ayres investigated had found that there were no email in the claimants sent items prior to 13 May 2021. The claimant's explanation was that he had received a message that the mailbox was 90% full and deleted sent items. He explained that he was 'more selective of received emails and I pick them out'.

47. It was pointed out to the claimant that CH/1 suggested Mr Morton was replying to an email from the claimant but there was no evidence of such an email. The claimant stated he did not recall emailing Mr Morton.
48. The claimant confirmed that when he sent CH/1 to himself he was at home where his internet service provider is Sky. The forensic examination indicated it was forwarded via Sky ISP networks.
49. The claimant was informed that Mr Morton had been asked and confirmed that he had not written CH/1. The claimant's response was 'okay'.
50. Mr Ayres also interviewed Harriett Clapton, arising out of text messages that had passed between her and the Claimant. As the Claimant was not part of a WhatsApp group, Harriett had forwarded to him a request for any evidence that would help in their pay dispute. What he was trying to establish were the dates of their messaging. The claimant had suggested that Mr Ayres contact her as someone who may have a screenshot of the original copy of CH/1 which contained the whole email, including the from and to field at the top in Microsoft Outlook. She did not have a screenshot of that nature. Notes of his interview with her on 30 June 2022 are in the bundle at p1126-1129.
51. The tribunal saw messages in the WhatsApp group that the claimant was not part of asking for evidence. Harriett was relaying this to the claimant who was working on his course assignments. He then emailed Harriett that he had found an email:

'Found this email that I don't remember getting and would've sworn I'd never seen before...'

When Harriett received it she swore and said 'that's basically the proof we need'. That was in response to the claimant sending her CH/1. The claimant again text he did not remember receiving it and then said:

'I seem to have sent it to myself at some later point (and don't remember doing that either) and deleted the original, but f... knows why...'

Mr Ayres had found evidence that he had forwarded the 2016 email (RM / 1) to himself on 8 May 2021 at 14.49.

52. Details of the investigation are included in the report from section 3, starting on page 317. At page 318 is a colour diagram which was referred to in these proceedings, showing Mr Ayres' conclusions on the origin of CH/1 and CH/2 and how the emails were forwarded.
53. At paragraph 3.1.1.3, starting at page 329, Mr Ayres set out information from his interview with the Claimant.
54. At paragraph 3.1.1.4, (page 333) he set out as a document what he had looked at in relation to the Allegations 1 and 2.

55. At paragraph 3.1.1.5, he found there was irrevocable evidence that the Claimant repurposed an email sent by Mr Morton on 12 January 2016 creating email CH/1, which was then forwarded by the Claimant to himself creating CH/2 and then forwarded to others. It was his view that there was sufficient evidence to meet the requirements of an offence under the Forgery and Counterfeiting Act 1981. He set out the reasons for those conclusions on page 334.
56. In relation to Allegation 3 that the Claimant had attempted through the misrepresentation of information to make financial gain for himself and others within the Trust, Mr Ayres' conclusions were set out at paragraph 3.1.1.6 on page 334. He summarised the evidence in relation to that Allegation at paragraph 3.1.1.7 stating that the Annex 5 issue was of significance nationally and related to allowances and payments to staff undergoing training and that the outcome of the issue could result in payment nationally into hundreds of thousands of pounds. The financial gain would not only affect the Claimant, but a cohort of the Respondent's staff and many thousands nationally. In his conclusions on Allegation 3, at paragraph 3.1.2.0, Mr Ayres found that there was clear and irrevocable proof that the Claimant did repurpose the email and that he and others stood to make a financial gain. It was his view that Allegations 1, 2 and 3 met the requirements of an offence under the Fraud Act 2006.
57. Allegation 4 was that through his actions the Claimant's honesty and integrity had been brought into question and the evidence in relation to that was summarised at paragraph 3.1.2.2 on page 337. His findings were, following those already made in relation to Allegations 1, 2 and 3 that the Claimant had acted dishonestly and without integrity.
58. Allegation 5 was that the Claimant failed to demonstrate the Trust's values as expected of all employees and at paragraph 3.1.2.7 Mr Ayres summarised his evidence in relation to that. This was based on the evidence he had already referred to from which his conclusion was that the Claimant had failed to demonstrate the Trust values as expected of all employees.
59. A summary of his findings were contained in Section 4 at page 341. It was his opinion, based on his forensic examination that on 8 May 2021 between 14:49 when the claimant forwarded RM/1 to himself and 15:33 the claimant created UN/1.
60. His conclusions are set out on page 342:-
 - 60.1. The Claimant repurposed an email sent by Mr Morton that was in his inbox and sent on 12 January 2016 at 12:00hrs;
 - 60.2. The Claimant forwarded this email to himself at his Trust account on 8 May 2021 at 14:49hrs to facilitate the repurposing;
 - 60.3. The forwarded email was amended to create CH/1 when this email was sent to the Claimant it was assigned a new message – ID. Mr

Ayres believed that this is UN/1 and would have been found in the sent items of the Claimant, but this was deleted at some point before 13 May 2021 when all sent items were deleted;

- 60.4. The email was received by the Claimant and then became CH/2 with the additional wording added;
 - 60.5. The email CH/2 was then forwarded to others within the Trust; and
 - 60.6. That these actions met the requirements of offences under the Fraud Act 2006 and the Forgery and Counterfeiting Act 1981.
61. By email of 1 November 2022, (page 343) the Claimant was sent the Management Statement of Case and Appendices to the Investigation Report in readiness for his Disciplinary Hearing. The actual invite to the Disciplinary Hearing had been sent earlier on the same day (page 306). This confirmed the decision to proceed to a Disciplinary Hearing following a review of the Investigation Report by Nick Cason, Commissioning Manager. A separate letter advised the Claimant that the Disciplinary Hearing would be heard on 15 November 2022 and would be chaired by Simon King, supported by Neil Howlett, IMT Service Manager with Jen Ladbrooke HR Manager there for support. The allegations as detailed in the original suspension letter were clearly set out and again, the Claimant was advised that they could potentially constitute gross misconduct and could result in disciplinary action which may include termination of employment. The Claimant was reminded of his right to be accompanied. The Claimant was asked to provide his written statement of case and statements from any witnesses he wished to call, seven days prior to the hearing by midnight on 8 November 2022.
 62. On 6 November 2022, the Claimant asked for a postponement as he did not feel the seven day period was enough time to prepare his statement of case and he was waiting for his personnel file from the Trust, (page 482). He also stated that Mike Hill was unable to attend on 15 November 2022. He asked for the hearing to be rearranged for 28 November 2022, but the panel were not available on that day and the hearing was rearranged for 5 December 2022. The Claimant was then given until 28 November 2022 to prepare his statement of case.
 63. The Claimant has taken issue with the fact that the Disciplinary Policy states that a postponement “will” be granted if the person the employee wishes to accompany them is not available and he made much in questions to the respondent’s witnesses of the fact that he had to ask for this postponement. It was not clear to the Tribunal the point he was seeking to make when he was not refused a postponement and it was granted.
 64. The Claimant emailed his statement of case on 28 November 2022 and it, including all his relevant documentation was over 400 pages (pages 491 – 910).

65. The Disciplinary Hearing commenced on 5 December 2022 and the notes of the meeting were seen at pages 992 – 1000 of the Bundle. They are not verbatim but the Claimant accepted they provide a summary of the points that were discussed and did not raise at this Hearing matters that he says were not included.
66. As it was not possible to conclude the Hearing that day, it was adjourned and another date listed on 20 December 2022, which was the first date that all in attendance were able to attend. The Hearing Minutes for that date are at pages 1001 – 1009.
67. Nick Cason was the Presenting Manager at the Disciplinary Hearing and he began by presenting the Management Case. He summarised the findings of the Investigation Report.
68. Mr Ayres then gave evidence at the disciplinary hearing explaining the evidence that he had found which he stated demonstrated that the email in question CH/1 was created from the original email from Robert Morton in 2016, that CH/1 was not available in any other format other than as part of the emails that the Claimant forwarded to himself and to his colleagues and that the original copy of CH/1 had not been found. Mr Ayres' position was that CH/1 was not a genuine email and that the Meta Data of CH/2 was clear evidence that CH/1 had been repurposed from RM/1.
69. A matter that arose at the Disciplinary Hearing and also this Hearing was whether someone else could have repurposed the email within the Claimant's account. Mr Ayres explained to the Disciplinary Hearing, as he did to this Tribunal, that to do so they would have needed to know the Claimant's password, have access to the IP address and have used the same machine as the Claimant or been in the same location.
70. The Claimant's case at the Disciplinary Hearing was that in May 2021 he searched through his emails, found the email from Robert Morton in good faith (CH/1) and tried to forward it to colleagues but was unable to do so, so forwarded it to himself and then onto others. Someone else had repurposed the email and that he had no reason to do so as he would not benefit if the pay dispute concluded in favour of the employees. In particular, he argued that his colleague Jaynie Sheen may have been responsible, however, he was not able to provide any evidence of her involvement.
71. As the Claimant had presented so much documentary evidence, Mr King did explain to him at the Disciplinary that he may wish to consider how he wanted to present his case. He had to explain to him on a number of occasions throughout the day that the Claimant needed to work out how to summarise his case and make his points clearly. The Claimant took issue with this in cross examination, suggesting that Mr King had told him how to present his case. The Tribunal accepts the evidence of Mr King that he did not do that, but was trying to help and had some concerns that the bundle prepared by the Claimant was in some places repetitive. The Claimant's defence of many of the points was similar and having made that point he would make it again.

72. It was put to Mr King that he did not ask for Jaynie Sheen to be investigated. Mr King's evidence, however, was that Mr Ayres had completed a digital investigation of her machine. No digital evidence was found relevant to the issues.
73. Further concerns about the way in which the Claimant was presenting his case were raised by Jen Ladbrooke in an email to the Claimant, copied to his representative Simon King and also to Neil Howlett, on 7 December 2022 between the two meetings. She reiterated how they had spoken about this at length during the hearing and were concerned about the line by line commentary the Claimant was presenting within his verbal Statement of Case at the hearing. She emphasised that the pre-submission of his Statement of Case is made in order that the Panel can read it in full, which had already been undertaken by all Panel Members. The verbal submission
- "...should be more concise and poignant, referencing the main points of the incident, any mitigation or considerations the Panel should be aware of and any concerns of process".*
74. She asked him to reconsider his approach for the second day to ensure they remained focused and attentive to the case.
75. On the second day the Claimant continued to present his case and although he had abbreviated some points, he had not really summarised them. He continued to go through the documents, although he skipped some sections. He called at that hearing four colleagues as character witnesses. The Panel heard from Harriett Clapton in response to questioning from the Claimant that Jaynie Sheen was one of the individuals most affected by the pay dispute and that she would have quite a bit to pay back if it was not resolved in the employees' favour.
76. The panel re-called Dean Ayres to answer further questions. The first was from Neil Howlett as to whether it was possible for someone to have repurposed RM/1 into CH/1 on another computer, saved it to a memory stick and placed it in the Claimant's IT account and whether the meta data would show that that had been done. Mr Ayres explained that this would cause problems as the repurposed email CH/1 had never actually been sent through the IT system. He was also asked whether he could categorically state whether the Claimant was responsible and he explained that anything was possible with the right knowledge and equipment but that he would not have been able to do this. The panel found that significant in view of his qualifications and expertise in this area.
77. Mr Ayres was also asked further questions by the Claimant and the panel about:-
- 77.1. Whether the message ID (a unique identification number attached to all emails) of an email sent to multiple people would be the same for all recipients, or whether the email would have a different message – ID for each recipient. If the message ID was different, this could establish who received RM/1 email that was repurposed; and

- 77.2. RM/1 had been forwarded by the Claimant's email account to the Claimant's email account approximately 40 minutes before the Claimant sent CH/2. Mr Ayres' evidence was that the forwarding of RM/1 took place on an IP address linked to Sky Broadband which is the same internet service provider as the Claimant used to send CH/2 and to later forward CH/2 to his colleagues. Mr Ayres was asked whether it was possible to determine from the IP address whether RM/1 had been forwarded on the same device that the Claimant had sent CH/2 and JS/1.
78. Mr Ayres left the hearing to find the answers to these questions. There was then an adjournment. During that time Mr Ayres confirmed that the message ID of an email sent to multiple recipients is the same for each recipient. This answer was relayed to the Claimant and recorded in the Minutes.
79. The outcome was given to the Claimant at the end of the meeting on 20 December 2022 that he was to be dismissed summarily for gross misconduct. The letter confirming this was sent to him on 5 January 2023 (page 940).
80. The Claimant was advised that he had a right of appeal and that he should do so within seven calendar days of receipt of the outcome letter.
81. The Claimant submitted his Appeal on 12 January 2023 (page 950, with the actual grounds set out on pages 952 – 953).
82. On 10 February 2023, the Claimant was invited to an Appeal Hearing (page 990), to be conducted on 27 February 2023. It was to be chaired by Mr Scheffer and Simon King would present the Management Case. As had been set out in a previous email exchange of 6 February 2023, the Claimant was required to provide his written statement of case and statements from any witnesses he wished to call, seven days prior to the Hearing. Copies therefore were to be sent by 13 February 2023.
83. The Claimant's written evidence in support of his Appeal was sent on 13 February 2023 (pages 1011 – 1092).
84. On 20 February 2023, Liz Connell confirmed she had spoken with Mr Morton who had confirmed he did not send email CH/2.
85. Mr King prepared a Management Response to the Claimant's Appeal dated 20 February 2023 (pages 1101 -1129).
86. The Minutes of the Appeal Hearing on 27 February 2023 are seen at pages 1195 – 1242 and the Tribunal heard from Mr Scheffer. The Claimant explained why he considered the decision to be unfair and this focused on the allegation that he was responsible for repurposing the email CH/1. The Claimant did not dispute that the email containing CH/1 referred to throughout as CH/2 and JS/1 came from his account and he seemed to accept the investigation findings in relation to this. He appeared to also

accept that the finding that the email was not genuine and had been repurposed. He maintained he was not responsible for creating CH/1 and provided detailed submissions in support of his Grounds of Appeal regarding alternative explanations for who could have done this. He raised a number of possibilities but was unable to present any evidence that supported his hypothesis that someone else and in particular his colleague Jaynie Sheen was responsible for repurposing the email to create CH/1 in his account. He made a lot out of the calculations of pay that he would receive if the employees were successful in their pay dispute against the Respondent. He sought to evidence that the difference in salary was minimal and this was evidence as to why he would not have fabricated an email as he did not have much to gain by doing so. His position was that it could not be proven that he or anyone else had been responsible for repurposing the email. In his witness evidence before this Tribunal, the Claimant relied upon finding that Jaynie described herself on LinkedIn as an IT Specialist. Having heard from Mr Ayres the Tribunal is satisfied that would not necessarily enable her to do this and that was something the Respondent was entitled to take into account.

87. The decision was taken to uphold the Claimant's dismissal and this was communicated to him on 9 March 2023 (page 1187).
88. By email on 28 February 2023, the Claimant answered a question that had been posed to him at the Appeal Hearing (page 1185). As he was challenging the sanction of dismissal he had been asked what level of sanction he would impose if he were chairing a panel which felt the same four allegations had been proved. The Claimant had felt unable to answer that at the time, but had then researched the matter. He considered an appropriate sanction that he would have applied would have been a Final Written Warning to be held on file for an extended period of time. He had reached this conclusion balancing any apparent guilt with the fact that had only been determined on balance of probabilities and that the person accused had multiple testimonies from colleagues including managers regarding his good character and had had a long involvement with the Trust.

The Relevant Law

89. The Claimant claims unfair dismissal. It is for the Respondent to show the reason for dismissal and that it was one falling within s.98 of the Employment Rights Act 1996 ("ERA"). The Respondent relies upon conduct.
90. The Tribunal must, if it is satisfied that that reason has been established, determine whether or not within the meaning of s.98(4) ERA 1996, the dismissal was fair or unfair:-

"98(4)(a). depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

91. In a misconduct case the Tribunal must have regard to the guidance given in British Home Stores v Burchell [1980] ICR 303, and consider the following:-

“First, there must be established by the employer the fact of the belief in the act of misconduct, that the employer did believe it;

Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief; and

Thirdly, the employer at the stage at which he formed that belief on those grounds must have carried out as much investigation into the matter as was reasonable in all of the circumstances of the case.”

92. It is not for this Tribunal to substitute its view for that of the employer. It must consider whether or not dismissal was within the band of reasonable responses.

The Tribunal’s Conclusions

93. The Respondent in this case relies upon conduct and there is no doubt that that was the reason for the dismissal of the Claimant. Indeed, that has not been challenged by the Claimant who rather focuses on the sanction than anything else.

94. Applying the Burchell test, the employer certainly had the belief in the misconduct following the initial and subsequent investigation by Mr Ayres who had expertise in this area.

95. The employer had reasonable grounds to sustain the belief, having looked at all the evidence that Mr Ayres had accumulated from his investigation.

96. There was the most thorough investigation by Mr Ayres whose expertise has not been subject to challenge. He had conducted a thorough and forensic search of the Respondent’s computer system and the Claimant was unable to offer any explanation as to why all of the evidence pointed to it being him who repurposed the email of Mr Morton and subsequently sent the email to his colleagues.

97. There was no evidence that CH/1 was sent by Mr Morton on 31 August 2018 to the claimant and the claimant has accepted that he has never been able to produce the original. It was only reasonable that the respondent viewed with great scepticism the claimant’s position that he did not recall a personalised email from the then CEO which supported an employee pay dispute.

98. By forwarding Mr Morton’s original email to all staff (RM1) the claimant was able to amend the text in it, whereas an original email cannot be amended

in this way. The evidence showed that RM1 was sent from C's email account to his own account at 14:49 on 8 May 2021. 40 minutes later the 'repurposed' email CH/2 was forwarded to himself and then colleagues. On or around 13 May 2021 the claimant deleted emails from his sent box. His evidence that this was because a dialogue box appeared stating his inbox was over subscribed was not credible as it was from the sent box he made the deletions, even leaving emails in his junk box.

99. The Tribunal must then determine whether the Respondent acted fairly in all of the circumstances of the case in dismissing the Claimant. There are no procedural shortcomings in the process that was followed. The Claimant was given due notice of meetings, advised of his right to be accompanied and granted postponement when his representative was not available. He was given every opportunity to present his case and indeed the disciplinary hearing went into a second day. He produced voluminous documentation for the panel to consider, which they did consider and the disciplinary hearing took place over 2 days.
100. It was pure speculation on the Claimant's part that someone else, or more particularly his colleague Jaynie, could have planted the email in his inbox. The Tribunal is satisfied that would have taken a level of expertise unlikely to be found amongst one of the other employees and even Mr Ayres with his level of expertise doubted he would have known how to do that.
101. It was quite clear that if the allegations were found proven that they came within the Respondent's Disciplinary Policy as gross misconduct and that an appropriate sanction would be dismissal. The Respondent had lost all trust and confidence in the Claimant who had gone to such lengths to repurpose an email. The tribunal is satisfied that dismissal was well within the band of reasonable responses in all of the circumstances of this case.
102. When asked by the respondent what sanction he considered should have been applied the claimant had indicated a final written warning. In support of that he stated that the charges against him had only been established on the balance of probabilities and he had produced many character witnesses.
103. The employer and this tribunal are not assessing the misconduct as if they were involved in criminal proceedings. The matters that have to be taken into account are as set out in the relevant law above. The respondent must have a 'reasonable' belief after 'reasonable' investigation in the misconduct alleged. The tribunal must decide whether the employer acted reasonably in all the circumstances. Neither the tribunal or the employer are applying a 'beyond all reasonable doubt' standard. It is also of note that when asked that question the claimant did not state there should have been no sanction but suggested the next most severe, a final written warning.
104. Where the employer was satisfied after its reasonable investigation that all the evidence pointed to the claimant having repurposed the email dismissal was clearly within the band of reasonable responses, when the claimant's integrity could no longer be relied upon or trusted.

105. For those reasons, the dismissal was fair and all claims brought by the Claimant are dismissed. Whilst remedy is not now an issue the tribunal would have accepted the respondent's submissions that had any procedural shortcomings been established the claimant would have been dismissed in any event, that any compensatory award should have been reduced to reflect the claimant's contributory conduct and that there was no breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures.

Employment Judge Laidler

Date: 12 July 2024

Sent to the parties on: 23 July 2024...

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For the Tribunal Office.

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