EMPLOYMENT TRIBUNALS

Claimant: Doctor Emile Aboud

Respondent: Spire Healthcare limited

Heard at: Southampton Employment Tribunal by CVP
On: 7, 8, 9 and 10 May 2024,

Before: Employment Judge Rayner
Ms J Cusack
Ms Y Ramsaran

Representation
Claimant: Ms L Veale Counsel
Respondent: Ms K Moss Counsel

RESERVED JUDGMENT

1. The claimant's claim of ordinary unfair dismissal does not succeed and is dismissed.

2. The claimants claim that he was automatically unfairly dismissed contrary to section 107 employment rights act 1996 does not succeed and is dismissed.

3. The Claimants claim that he was subjected to detriment contrary to section 43 ERA 1996 does not succeed and is dismissed.

4. The claimant's claim of wrongful dismissal does not succeed and is dismissed.

Reserved REASONS

The hearing

1. By a claim presented on the 27 March 2023, the claimant brought claims of ordinary unfair dismissal, automatic unfair dismissal because of a protected

disclosure, protected disclosure detriment and wrongful dismissal/breach of contract.

2. The issues were discussed at the management hearing on 12 September 2023 and the matters was listed for a hearing.

3. In the CMO, parties are told what to do if they intend to call a witness to give evidence from abroad.

4. The case was heard over four days by video.

5. The claimant gave evidence on his own behalf and provided an initial witness statement. He made an unopposed application which was to rely upon a supplementary witness statement, which was granted. He gave oral evidence under oath.

6. Evidence for the respondent was given by Mrs Fiona Conway, who had chaired the disciplinary hearing and who had made the decision to dismiss the claimant for gross misconduct; and by Mrs Fiona Taylor who had chaired the appeal hearing and made the decision to uphold the decision to dismiss thereby dismissing the claimants appeal.

7. Both respondent witnesses relied on written witness statements and gave oral evidence under oath.

8. The hearing was listed for four days, and a provisional trial timetable had been set out to include reading time; deliberation time and time to deliver judgement.

9. During the course of the hearing and at the point that Dr Aboud was about to start giving his evidence under oath, it became clear that he was not in the UK but was in fact in Malta. No permission had been sought by the claimant from the Maltese government to give evidence from overseas and following some discussion with the parties, it was agreed to adjourn the case, so that Dr Aboud could fly back to the United Kingdom. This meant that the afternoon of the second day of hearing was lost. Dr Aboud did fly back to the UK and gave his evidence on the third day of hearing. In the event, and

partly for this reason, it was not possible to deliver judgment at the end of the hearing and it was therefore reserved.

10. Counsel for the claimant provided both a preliminary statement in writing by way of opening and lengthy closing written submissions.

11. Counsel for the respondent provided concise written skeleton submissions at the end of the hearing.

12. Both counsel addressed the tribunal orally on the last day of hearing and the tribunal is grateful to them for their written and oral submissions.

13. At the start of the hearing tribunal dealt with the following preliminary matters.

14. The claimant alleged that there had been a failure by the respondent to provide full disclosure in respect of certain documentation. The respondent denies that it had failed to comply with its obligations in respect of disclosure, but had decided to provide the additional documents not because they were considered relevant at all by the respondent, but by way of a pragmatic attempt to move matters on.

15. Therefore, in addition to an agreed bundle of documents the tribunal was provided with a number of additional documents which had been disclosed to the claimant at a later stage. We all agree that this was a sensible and co-operative decision of the respondent in line with the overriding objective and make no criticism of them.

16. The claimant made an application to rely upon a supplementary witness statement which was written in response to some of these documents. This was granted unopposed.

17. The tribunal was also provided with a chronology and a cast list.

Background and findings of fact

18. The Claimant, Dr Emil Aboud was employed by Spire Healthcare limited for 14 years until his summary dismissal on the 8 December 2022 for gross misconduct.

19. The respondent, Spire Healthcare Limited, operate private hospitals and the claimant was employed at its Bristol hospital.

20. He was employed as a Resident Medical Officer (RMO) and at the point of his dismissal he was a Senior Resident Medical Officer (SRMO).

21. He was part of a team providing 24-hour medical cover for all routine medical care. Part of his role involved immediate first line resuscitation to patients; visitors or staff members as required. The claimant was not authorised to admit patients or to carry out procedures himself unless consent was expressly sought and given.

22. The claimant was issued with a job description which set out the duties of the role. In so far as relevant to this case those duties included the following

General duties

a. a professional approach must be adopted with patients, staff and visitors;
b. conform to all infection control and health and safety regulations for the hospital. be aware of the fire evacuation procedure;
c. RMOs must work within their level of experience and competence and highlight verbally and in writing to the nurse in charge if they are being asked to work outside their level of competence to provide routine and emergency medical cover in conjunction with other areas if applicable
d. to complete mandatory training in ; fire; H&S; infection control manual handling; child protection and vulnerable adult information governance preferably within the first month of employment. Evidence of this is given to each hospital where the RMO is allocated for a contracted.

e. Acknowledge the risk of healthcare associated infections HCAI and understand own responsibility as agreed with line manager in the prevention and control of HCA I.

Consultants

f. RMOs must seek consent for any procedures that they intend to undertake. this will be clearly documented in the medical records.

Duties

g. to provide urgent medical attention and treatment to staff or visitors in case of accident or sudden illness in liaison with the senior nurse on duty;

h. to undertake emergency procedures including resuscitation, actively participating in hospital scheduled simulations and take the lead as necessary;

i. to comply with all hospital policies and procedures EG health and Safety at Work and infection and prevention control;

j. RMOs have no admitting rights to the hospital. All patients admitted will be under the care of a consultant with admitting rights to the hospital.

23. On Sunday the 9 October 2022 Dr Aboud was contacted by a friend with a request that he administer Botox to her that day. Dr Aboud states that he has been administering Botox to this individual for some years and that he would normally go to her home (which we understood was in London) and administer it there. On this occasion he says he was unable to do that, because he was travelling from London to Bristol to start work at 7:00 PM. He says she was insistent that he treat her that day and that it was therefore agreed that Dr Aboud would see the patient at the Spire Bristol hospital prior to commencing his shift that evening.

24. Dr Aboud does not deny that he did not tell anyone at Spire Bristol hospital that he was intending to attend at the hospital before his shift with a friend in order that he could administer Botox to her at the hospital and it is not denied that he did not seek consent for using a hospital room to do this.

25. Dr Aboud asserted that he believed any manager would have granted his request and says he was reluctant to disturb senior managers after hours on a Sunday night for an issue that he did not regard as important enough, especially since no Spire patient was involved.

26. We find that there was always a manager on call and that this was known to Dr Aboud. We find that since he was aware of the request earlier in the day, he could if he had chosen to do so, have contacted management and sought their consent to use the hospital room.

27. We find that Dr Aboud knew that the hospital policies required him to have consent from hospital management to use a room for private purposes and we also find that he was well aware of other policies, such as the lone working policy; patient safety policies and policies in respect of infection control, that were relevant to his actions that day.

28. We find that as an experienced doctor and a senior RMO, he knew or ought to have been aware that what he was doing was in breach of the hospital policies and rules.

29. Dr Aboud stated that he believed he would have been given consent had he asked for it. It is possible that he would have been, but the point is that he did not in fact have consent and he knew that it was required. We find that he chose to go to the hospital and carry out a medical procedure without consent and without the knowledge of the respondent.

30. The woman he was intending to treat was not a patient of the Spire hospital.

31. Dr Aboud met his friend and took her into the closed outpatient's area of the hospital, into a private room where he administered Botox to her face. He used his own equipment and used Botox which he had purchased privately. He did not inform anybody either that he was in the hospital or that he was in the hospital with a friend or that he was intending to treat his friend by administering Botox to her face.

32. Once he had finalised the procedure, he escorted his friend off the premises through the reception area. He left a box or bag of his equipment in the reception area.

33. Dr Aboud then proceeded to attend for his session at the hospital. He did not at any time inform anyone of what he had done, or the fact that he had used the room for private purposes.

34. We find that he was paid for administering Botox to his friend.

35. We also find that his friend was an employee of one of Spire hospital's main competitors which was Nuffield health.

36. On the 10 October 2022 a member of the respondent staff walking through the reception area found a box containing syringes, Botox, a Corkscrew and a sharps box containing the used syringe, and other items. She reported this to her managers and the respondent officers decided that there was a need to investigate.

37. The area was covered by CCTV which was viewed, and which showed Dr Aboud escorting a woman in and then subsequently out of the reception area and showed him leaving the box in the reception area.

38. The discovery of the box and the viewing of the CCTV led to some further investigations. The respondent realised that the box suggested that Dr Aboud had been administering Botox and some further inquiries raised two issues in addition to his attendance at the hospital on the Sunday night.

39. Firstly, the respondent realised that Botox had been going missing from Spire Hospitals' own supplies and a question was raised about whether Dr Aboud had been using Spire hospital Botox or not.

40. Secondly, there was an initial concern that Dr Aboud might have been running a private clinic without the knowledge or consent of Spire hospitals.

41. The respondent therefore invited the claimant to a meeting at the start of his shift on 6 November 2022. The meeting was held with Mr Curren, Hospital Director, Mrs T Cooper, Head of clinical service and Ms Tracey Webb Head of HR. We have been referred to notes of that meeting.

42. At that meeting, Dr Aboud was asked about the evening of 9 October, and was asked why he was in the physiotherapy room between 1836 and 1900 hours. He explained that he had doing private Botox and fillers for many years and that a patient had wanted Botox short notice but he couldn't meet her so she came to the hospital.

43. He said he told her he couldn't take her to the hospital because of COVID he said he tried to see if he could arrange this with the outpatients department but he couldn't as it was out of hours.

44. He stated that he obtained his Botox from Health EX pharmacy and that he administered these two friends. He confirmed that they were not patients of Spire. He confirmed that he had charged his friend.

45. There was some discussion about his records and then discussion about other procedures that he might have administered at Spire. He was asked about his competency for administering Botox and said that he was trained and had done an advanced course. he asked if he had told anyone that he was doing this sort of work on site and he said he had told his wife and Doina, a colleague.

46. Dr Aboud was told that a box had been found which contained items used to administer Botox and cosmetic fillers including the Botox drug itself fillers syringes and sharps box in addition the box had contained a waiters friend Corkscrew.

47. At the meeting the claimant was told that on the basis of the information provided there was reasonable grounds to suspect that the claimant may have been administering Botox and fillers to individuals on Spire owned facilities without legitimate reason or permission by Spire, thus bringing

Spire's reputation into disrepute. The claimant was told that on that basis and given the serious nature of the allegations he would be suspended.

48. He was told that an investigating manager would be appointed, and they would contact Dr Aboud to carry out an investigation interview, that he would remain employed receiving his salary but that he would not be required to carry out his duties or to attend the workplace unless authorised by an investigating manager. He was also told not to communicate with any employees contractors or customers unless authorised by the investigating manager and was told that his e-mail account had been suspended and that he no longer had access to the computer network.

49. The claimant's suspension was confirmed in a letter from Miss Webb on 8 November 2022.

50. On 11 November 2022 the Claimant received a letter from Mr Kevin Griffiths the hospital director at Spire Portsmouth inviting him to attend a disciplinary meeting on the 17 November 2022.

51. The letter stated that the investigation was in respect of an allegation that *you may have been administering Botox and fillers to individuals on Spire owned facilities without legitimate reason or permission by Spire thus bringing spire's reputation into disrepute.*

52. The letter set out the purpose of the meeting as being to *establish a fair and balanced view of the facts before making any decision as to whether matters should progress to a disciplinary hearing*.

53. On 17 November 2022 Mr Griffiths interviewed a number of staff members about the events. He interviewed Rhys Clark, the pharmacy manager at Spire Bristol, who had been contacted when his colleague had found the box of equipment in the waiting area.

54. He confirmed his understanding that a sharps disposal bin, a bottle of Botox and a box of needles as well as some other consumables had been left in reception. One reason he was interviewed was because of the need to check

whether or not the Botox and other high-cost items had come from the Spire stores or from elsewhere. From the interview, there was no evidence that the Botox had been provided to Dr. Aboud from Spire stores.

55. Mr Griffiths also interviewed Lisa Jewell, who was the member of staff who was informed when the claimant's box of sharps and Botox was found in the reception area.

56. Mr Griffiths interviewed Toby Cooper, director of clinical services. Lisa Jewell had reported finding in the box in reception to Toby Cooper. He described his steps in checking the CCTV and then also meeting with the pharmacy manager and checking the process for management of Botox across the hospital.

57. Mr Griffiths interviewed also Phil Curran, the hospital director at Spire Bristol. Mr Curren described the claimant as a conscientious Doctor.

58. He confirmed that the claimant did not have permission to administer Botox on Spire premises and confirmed that he was not aware that Dr. Aboud had done this.

59. Mr Curran stated that the claimant did an enormous amount of hours; that he had been at the hospital with for a fair amount of time; that he was very well known and very well respected. He described him as a very good doctor and said y*ou know if you call him, he comes and will do all the right stuff*. He was described as reliable and dependable. He would cover sickness and therefore was well respected. He also made reference to having been told by another member of staff that Dr Aboud had done something similar previously.

60. Mr Curran was asked about the risks of providing an aesthetic service. He said there were a multitude of risks. He said if he, Dr Aboud, was bringing his own drugs in, then he was misappropriating Spire premises for the delivery of a service that they had not commissioned him to do, outside of any governance framework. He said there was a concern that possibly two patients had received Botox and that Spire did not know who they were or

where they lived. There was a risk of anaphylaxis and all the attendant risks of administering and from a clinical point of view, that was what worried him the most. Secondly, he was concerned about obvious reputational damage, if there were complaints , which could lead to human resources being involved and the possible need to involve the police or the GMC.

61. The claimant was invited to attend at an investigation meeting on the 17 November 2022 with Mr Griffiths.

62. The claimant attended at the meeting on the 17 November 2022 on his own and without a representative. As well as Mr Griffiths, Tracy Webb, Head of people was in attendance.

63. The claimant was shown the CCTV and confirmed that it was him and his friend in the reception area. He confirmed that he had worked with his friend Angela at Nuffield Saint Mary's hospital.

64. The claimant explained that he had been administering Botox for some time before he joined Spire and that he had done a course about 15 years ago and subsequently had done an advanced course. he said he did not advertise mainly did it for family and friends, but he felt he had done enough to be competent he thought he had probably seen several hundred members of family and friends.

65. The claimant suggested that there had been some urgency for the administration of Botox and stated that she was going away, and she wanted to look good on her holiday. Dr Aboud subsequently suggested that the reason for the urgency was that his friend Angela was receiving Botox because she suffered with headaches. This was not said in the initial investigation meeting.

66. There was a discussion about potential risks to the patient of Botox injections including anaphylaxis. Dr Aboud stated that he believed there was very little risk of anaphylaxis or anything else. He suggested that if anything went wrong, that it would wear off in three to four months anyway and that there was little chance of doing any permanent damage.

67. He was asked if he thought it was right to bring his friend into Spire hospitals and he stated that in retrospect he should not have done it. He accepted that nobody had known that he was in the hospital. He stated that he had not done anything to damage the reputation and that there was no proof of financial irregularity or any loss of income for Spire. He said this because at this point, he was aware that one concern of the respondents was that he had damaged their reputation.

68. He was asked whether he had any insurance or indemnity and said he had taken out insurance with the medical defence council, but he did not know when the last one was because with Covid, they would have lapsed. He said he was not insured specifically to administer Botox although he was insured for his medical profession.

69. He was asked what had been in the box and he stated at that meeting that there were syringes; fine needles; a temperature controlled bag for the Botox, the Botox and cotton buds in the box. We find that this is what he believed had been in the box at that time, and find that the respondents were entitled to accept and rely upon what he said.

70. There was also some discussion about where he obtained the Botox from; where he got his consumables from, and he admitted that he obtained them from outside sources.

71. There was further discussion about risk and Mr Griffiths raised concerns about the potential fire risk because nobody knew that he was in the building. Dr Aboud accepted that there was no receptionist at the time he was in the building and that no one would therefore have known that he and his visitor were in the building in the event of a fire.

72. Dr Aboud was asked about where he obtained the Botox from and explained that whilst he had in the past procured Botox through Spire, he now used a firm called Health exchange (possible Health ex Pharmacy), because it was cheaper.

73. There was a discussion about the box of equipment he had left in the reception and he was asked whether or not he could see the dangers associated with that. The respondent was concerned that the box might have been found by a member of the public for example.

74. We find Dr Aboud was very dismissive of the suggestion that by leaving a box of used equipment in the reception area, there was any risk to anyone if they came across it. He said that Botox would not be dangerous unless somebody swallowed it and he said there was a very small risk that anybody would do that. He suggested that there was a risk that somebody could fall over the box and injure themselves.

75. Mr Griffiths accepted that it was probably unlikely that a child would be able to get access to the box or its contents.

76. We accept that the risk of somebody actually injuring themselves by finding and using the contents of the box may have been small, but we find that Mr Griffiths considered that there was a potential risk because it was a public area and because it was medical equipment and because it contained sharps and Botox. We find that Mr Griffiths formed the view that it had been wholly inappropriate for Dr Aboud to have been in reception area at all and that it was inappropriate and potentially in breach of procedures to have left used equipment lying about in a public area.

77. We find that Dr Aboud did in effect, admit that he was in a hurry and was careless. He told Mr Griffiths that he wanted to get back so that he could start his shift.

78. Dr Aboud did not appear to acknowledge that it was wholly inappropriate to have left his box of equipment in a public area or that had a member of the public found the box they could have been a risk of injury but also a risk of reputational damage for the hospital.

79. There was further discussion about occasions on which Dr Aboud had administered Botox to Spire patients and others. This was not part of his role

as an RMO or an SRMO. We find that he did admit in the interview and that this was set out in the subsequent report, that he had administered Botox to several people over a period of time.

80. He also accepted that, on occasions, he had carried out other procedures such as syringing staff's ears on when they were having difficulty getting a GP appointment.

81. We find that Mr Griffiths had a genuine concern about infection control and breaches of procedures which he raised with the claimant, and which was subsequently identified in his report.

82. Whilst the respondent has not made particular reference to Covid – 19, the claimant did raise it in the meetings , as a reason for having gone to that part of the hospital. We note that the events took place following the COVID-19 pandemic. We remind ourselves that many people were having vaccinations and many people were still wearing masks in all public places.

83. We accept that the respondents take infection control seriously at any time, as they are obliged to do in a hospital environment, but we are also unsurprised that it at this point in time in October 2022 infection control was a matter of significant concern to the respondents.

84. Following the meeting Mr Griffiths produced a report dated 28 November 2022.

85. His report identifies the findings described the review of CCTV footage and also summarised what had been discussed during his interview with Dr Aboud.

86. He set out other relevant information including the limits of the claimant's authority.

87. He stated that Dr Aboud does not appear to be actively promoting his Botox business within the hospital all be it members of staff are aware that he is able to carry out the procedure.

88. He also identifies that although some questions had originally been asked, as to whether or not Botox had been sourced from Spire hospital, that discrepancies in the stock check of Botox at the hospital were attributable to the volume of patients seen and the failure to provide the correct forms to the pharmacy. It was not considered that this was anything to do with Dr Aboud.

89. It is also noted in the report that Dr Aboud had confirmed that he did not hold medical records for patients that he had administered Botox to.

90. In summary Mr Griffiths was satisfied that the claimant had performed a Botox procedure on a member of the public at Spire hospital without permission of the registered manager and without having explicit admitting rights to the hospital. He said there was no legitimate reason for the Dr Aboud to carry out any Botox procedures on site and was therefore a fundamental breach in procedure which had the potential to bring Spire Healthcare into disrepute and importantly compromised patient safety.

91. He concluded that there was a disciplinary case to answer and recommended that the matter should progress to a disciplinary hearing.

92. The claimant was subsequently invited to a formal disciplinary hearing to take place on the 8 December 2022.

93. He was provided with a copy of the investigation report and a copy of the disciplinary procedure .

94. The letter which is dated 5 December 2022 states, the allegation is that *you administered Botox to an individual on Spire owned facilities without legitimate reason or permission by Spire, thus bringing Spire's reputation into disrepute.*

95. The basis for the allegation was Dr Aboud's box containing contents having been found in the physiotherapy outpatients area on the 10 October 2022 and the fact that the claimant admitted that he had entered Spire on the 9 November 2022, with a friend and proceeded to an outpatient treatment

room where he administered Botox to his friend, without permission from or knowledge of any member of Spire Bristol senior management team.

96. The claimant has raised an issue about the fairness of the process, asserting that he was not provided with copies of the interview transcripts in advance of the disciplinary hearing.

97. We find that he was not provided with transcripts of the interviews but that the interviews were referred to, at the start of the investigation report. We find that the claimant knew that the individuals had been interviewed and could have asked for details of the interviews but did not do so.

98. We accept the respondent's evidence that it was an administrative error or an oversight that led to the claimant not receiving transcripts of the interviews. We find therefore that had the claimant requested the transcripts that they would have been provided to him.

99. Nonetheless we accept that this was a procedural failing and that the claimant ought to have been provided with all the information which formed the basis of or informed the report. This was a genuine mistake.

100. We also find that the report sets out in summary the key matters relevant to the conclusion that there was a disciplinary case to answer.

101. Much of the information in the interviews with other staff was concerned with the question of whether or not Dr Aboud had been sourcing Botox from the spire hospitals and secondly whether or not Dr Aboud was in effect running a Botox clinic. Following investigation both matters appeared without foundation and neither were pursued to a disciplinary hearing.

102. Other information was largely uncontroversial and amounted simply to descriptions of how staff had found the box of equipment, and therefore been alerted to the fact that Dr Aboud had entered the premises and the process for reviewing CCTV and raising concerns.

103. The claimant has suggested that there was an error in describing what was actually in the box that he left in reception. He suggests that if he had received the statements, he would have been able to challenge that error.

104. We find that the report produced by Mr Griffiths contains a description of what was in the box that reflects those interviews and that the claimant could therefore have challenged the report if he had considered that it was incorrect. He did not do so either at the point of receipt of the report or at the disciplinary hearing. The first time he has challenged the respondents understanding of what was in the box was at this hearing and we agree with Miss Moss that it is highly probable that the claimant's recollection would have been more accurate nearer the time, than it is now.

105. The claimant was invited to attend a disciplinary meeting and initially wanted to be accompanied by Doina Situe, RD, who was employed at Bristol Spire hospital. He also wanted to call a number of character witnesses, who were also employees at the hospital and for whom cover would need to be arranged.

106. On 7 December 2022 Tracy Webb spoke to Dr Aboud and suggested that as witnesses may not be able to attend on the 8 December, which was the following day, he might ask them to write witness statements for him which he could then present to the panel. She also explained that as the allegation was one of gross misconduct and if found it could result in dismissal, that he might want to think about whether he wanted to postpone the hearing. He confirmed that he wanted to do so and therefore Tracey Webb had contacted the relevant people at Bristol to inform them that they no longer needed to arrange cover for Doina.

107. However, following that conversation and on the 8 December, the respondents received a further call from the PA to Fiona Conway, informing them that Dr Aboud had called in and changed his mind and stated that he did want to go ahead with the hearing that same afternoon.

108. The claimant has asserted at this hearing that he would not have changed his mind, and would have adjourned if he had seen the witness statement of LL and the director, because he would have wanted to call witnesses to deal with matters they raised.

109. We find that this is not a matter which he raised at all when he appealed against the decision to dismiss him for gross misconduct. At that stage he was aware of the existence of the interviews and their contents. He did write a full appeal letter and made no mention of this matter.

110. Nevertheless, the claimant was entitled to have received those documents in advance and to have read and considered whether he did want to persist with an adjournment so that he could call witnesses. He was denied that opportunity.

111. We all agree that had he received the interview notes and had he wanted to postpone the hearing that the respondents would have postponed the hearing. We find it is possible that any adjournment might have been for 7 to 14 days but we have no evidence about that.

112. The evidence we do have is that the respondent dealt with matters reasonably quickly, but that Dr Aboud was also keen to get on with the matter.

113. We consider below what the impact of this procedural failing on the part of the respondent is on our conclusions.

114. The disciplinary hearing therefore took place on 8 December 2022. Fiona Conway who was the hospital director at Spire Cardiff heard the disciplinary with support from Tracy Webb.

115. At the start of the disciplinary hearing Miss Conway reminded the claimant that the allegation was *that you administered Botox to an individual on spy owned facilities without legitimate regional permission by Spire thus bringing Spires reputation into disrepute.*

116. She told him that she had reviewed the investigation report and read out the findings from the report. At the end of the conclusions, she read out the following part of the investigation and recommendation

> *there is no legitimate reason for Dr Aboud to carry out any Botox procedure on site at Spire Bristol hospital and as such is a fundamental breach in procedure that has the potential to bring Spire Healthcare into disrepute and importantly compromised patient space safety. I therefore conclude there is a case to answer and the matter should rest to a disciplinary hearing*

117. It is important to record at this point a difference in the wording of the allegation as set out in the invitation to the disciplinary hearing and the allegation described in the investigation report. The investigation report referred to the *potential* to bring Spire Healthcare into disrepute whereas the allegation set out in the letter referred to Dr Aboud's *bringing Spires reputation into disrepute*. We all agree that there is a difference between these words and that the allegation of bringing something into disrepute is different to an allegation of potentially bringing something into disrepute.

118. We find that in the disciplinary hearing, the claimant was given every opportunity to say what he wanted in his defence, and to explain himself and to raise issues.

119. Dr Aboud raised a concern that Mr Griffiths had made a reference within his report to Botox being missing from pharmacy, and he asked why this had been included and why it was relevant to his case.

120. Miss Conway confirmed that, whilst it had been identified in the report that some Botox was missing, that it was nothing to do with this incident. She also confirmed that there was no allegation of Dr Aboud taking the Botox.

121. Tracey Webb also tried to reassure the claimant that whilst there had been an initial query about the Botox being missing, once it was looked into, there was no implication that it was anything to do with him.

122. We accept that this was the true situation, and that both Miss Conway and Miss Webb knew and accepted that the initial investigation had resulted in no allegations being made against Dr Aboud about missing Botox. We find that neither of them thought it was anything to do with the allegations against Dr Aboud, but it is clear from the notes that Miss Webb had some difficulty satisfying Dr Aboud on this point. She did agree to take the matter up subsequently, because he felt strongly that it should not be included in the report.

123. We find, having read all the documents, and having heard the evidence from Miss Conway, that Miss Conway herself was very clear that there was no allegation being made against Dr Aboud in respect of the missing Botox, and that she accepted that it was nothing to do with Dr Aboud, once it had been investigated. We find that she did not take it into account at all when considering the allegation that was made against him or when reaching her decision on that allegation.

124. On the question of reputational damage or misconduct, Dr Aboud said it was never his intention and that it would never be his intention to do anything to harm Spire's reputation or name. He referred to his long service with Spire and his clean disciplinary record and stated that he admired Spire; thought it was a good company and was proud to work with them. He said that he would promote Spire, that he felt Spire did a great job and the patients were generally very happy with their treatment at Spire.

125. He then went on to say *I also recently twice in the sense of the matter but in reports on patients concerning patient treatment I have been called on to submit reports which I did and in both cases I was asked to amend my report and one was a case of a patient who had recovered reasonably well following surgery but then suddenly underwent a deterioration and then the point that an Abscess had actually burst and there was blood and pus all over the place patient had to be transferred. I was asked you know to write my report on my involvement. When I went through the notes I realised the patient had been on antibiotic and was doing well. CRP had come down to about 35 from over 200 and then for some reason the antibiotic was stopped. Three days later the CRP was 350 and the patient was very unwell and then*

this septic hematoma ruptured. So I put this in the report and I was told that I shouldn't put it in the report and I said well I just I reported everything that I did with the case so I was actually doing almost like a root cause analysis which wasn't my brief I was told this…. To do what I did so I felt well I have mentioned it I won't follow up on it i'll just put in I saw the patient on this day at that time & sign it. That could have been a…. Quite a bad incident otherwise…. Unintentional harm, but the staff acted in good faith and I'm sure the nurses did this with the reason and I know what the reason was. It was a note about patient being sensitive to penicillin, not anaphylaxis but sensitive. In fact they have been investigated the person had had a rest basically had had a minor reaction and had received penicillin later without any problems. She'd had five doses while in hospital and this was stopped without referring to myself or to the consultant. So there was…. There was a mess up, I can understand the concern and in questioning it that's very good that shows they're being proactive but I don't know how it happened that the antibiotics were stopped without another antibiotic being prescribed. In any case like I say I didn't make a complaint about that. The other one was a patient…. Well with patients that had stroke incidents.

126. It is these comments which the claimant relies upon as amounting to protected disclosures for the purposes of his detriment claim.

127. At this point Miss Conway interrupted stating that *I think we're going slightly off the…..* and the claimant interrupted her to say *we may be, but I'm trying to show that I was trying to act in Spires interest*. Miss Conway then said *whilst I appreciate that, you are making some quite serious allegations about incidents in the hospital.*

128. The claimant said *they weren't allegations that that was what happened* and Miss Conway attempted to speak but was again interrupted by Dr Aboud.

129. When Miss Conway was able to speak without interruption , she explained that this was not the remit of the disciplinary and that they were not there to talk about incidents that may have happened in Bristol hospital, which he may now think were not managed properly or effectively, because

the focus of the allegation was around him administering Botox within the hospital without the registered management knowledge. She then said that if he wanted to raise other issues about incidents that had happened with patients, that he would need to take that up outside this meeting.

130. The claimant went on to say *that's not my intention my intention is only to show that I always try to act in Spires best interests and where information could be unduly(sic)or misinterpreted and be harmful.*

131. He said the reputation in administering Botox was not on the same scale as those matters.

132. Miss Conway states in her witness statement that the respondent has a strong escalation culture and employees are always encouraged to escalate concerns so that these can be considered and where necessary investigated and appropriate action taken. She also stated that the comments that Dr Aboud made had no relevance to the allegations that had been made against him and which he had already admitted and she asserts that they did not influence her decision to dismiss him for gross misconduct.

133. Dr Aboud then spent some time explaining that he often went above and beyond his standard duties because he was trying to be helpful; that it was no secret at Spire that he did administer Botox; that Botox was not even a registered procedure and that there was no case in England as far as he knew, of anyone ever having had a problem with Botox he pointed out that hairdressers and non-medical people are able to give Botox and that he had done it many times and was good at it

134. He asserted that he had not compromised patient safety because the individual is a friend of his, not a Spire patient, he said that it was hardly misconduct, and could see no proof of any disrepute. He asked rhetorically whether anybody had complained, or had Spire's stock price gone down or was there any actual evidence that his actions had brought Spire into disrepute.

135. Miss Conway stated that the individual he had treated could go back to the Nuffield where they worked and tell their friends or their family *but it's fine to have Botox done in Spire, I wasn't a patient there, it was out of hours we went to the outpatient department, had my Botox and off I went* . She said that's where your disrepute comes in, it's the reputation of….

136. The claimant interrupted and contested this, saying it was was fantasy and extrapolation. He suggested that it must be a suggestion of the potential disrepute.

137. Fiona Conway then responds that it had the *potential* to bring Spire Health into disrepute and that she had explained to him why that could be the case. She said in terms of compromising patient safety *we had a person in the hospital out of hours having a procedure that nobody knew anything about that's where your patient safety comes in.*

138. After a further exchange she again referred to the report from Mr Griffiths, stating that the issue was of *potential*. She read out the wording from Mr Griffiths report again.

139. Dr Aboud said he thought the chances of bringing it into disrepute was so negligible that it had to be almost non-existent. He said there was no risk to patient safety, and he could not see any in fact and there was no evidence and there was no proof. He then asked to be reminded what the allegation was, and Fiona Conway reminded him of the allegation in the letter, that he had by his actions *thus bringing Spires reputation into disrepute*. He again pointed out the charge did not say *potentially* .

140. He then explained what he thought the difference between *potential* and *actual* was.

141. He then referred to gross misconduct and the non-exhaustive list set out in the disciplinary procedure. He asserted that his actions were not of the same type and that using a room for 25 minutes with someone he knew, giving them a procedure that he had done many times, does not fall into the category of gross misconduct.

142. After some further discussion, Miss Conway called an adjournment, during which she made her decision that the claimant's actions amounted to gross misconduct, and she decided to summarily dismiss him. The claimant was informed of the outcome and of his right to appeal.

143. The claimant was sent a letter dated 9 December 2022 with the disciplinary hearing outcome.

144. The letter states *the reason I have decided to terminate your employment without notice is that you have committed an act of gross misconduct in the following respects you administered Botox to an individual on Spire owned facilities without legitimate reason or permission by Spire thus potentially bringing spire's reputation into disrepute this was a serious breach of your obligations such as the warrant dismissal without notice and without any further warnings in accordance with Spire healthcare's disciplinary procedures.*

145. The letter set out the claimants right to appeal and the process for doing so.

146. On an e-mail 10 December 2022 Dr Aboud notified the respondent of his intention to appeal, on the basis that

k. He had new evidence which was not available at the time of the hearing which was of significant relevance to the case.
l. He felt that the evidence he did provide was not taken fully or properly into account.
m. the disciplinary sanction was unreasonable or inappropriate.
n. the disciplinary process was unfair.

147. The claimant was invited to an appeal hearing chaired by Fiona Taylor with assistance from Catherine Moy. The hearing was recorded, and we have been referred to the transcript of that recording.

148. At the hearing the claimant went through each of the four points he had set out with in his letter.

149. He asserted that there was a significant difference between what he was charged with initially and what Miss Conway came up with at the end of the hearing. He said that she had changed the allegation. This is a reference to the use of the word potentially.

150. Doctor Aboud explained at some length why he considered that the different wording was central to his appeal.

151. He also called Angela, the woman to whom he had administered Botox, to give evidence.

152. He also made statements about the safety of Botox and further statements about what had happened on the night that he had administered the Botox, with a view to underlining that in his view there was no risk to anyone.

153. He then refers to procedural matters which prevented him from presenting a reasonable defence. He criticised the length of time taken to investigate the matter, and criticised the nature of the investigation.

154. He referred to the interview reports and objected to the names of the people in the investigations having been redacted. He also objected to the implications from those investigations, that he had been responsible for Botox going missing and suggested that this had been a factor in the decision made against him.

155. He raised a concern at the appeal stage about when he received a copy of the interviews. He raised that he had not had access to them prior to the hearing although noted that he had received them after the hearing. He suggested that he was found guilty of things that could not be proven and wasn't given the choice to have a proper defence. He also said that he was not allowed to have witnesses.

156. Doctor Aboud referred in particular to comments that had been made in those interviews which he thought were particularly damaging and in particular he referred to a comment that suggested that somebody had been told off by previous management and had warnings and that they used to do that . We understood that in the appeal he was referring to the comments that had been made, that he had been warned previously for administering Botox to private patience at the Spire hospital.

157. During the appeal hearing, the claimant asked whether he could be permitted to send in some further evidence, and this was agreed by Catherine Moy.

158. On 14 February 2023 the claimant sent 5 further pages of submissions for consideration as part of his appeal to Fiona Taylor and Katherine Moy.

159. He addresses each of his concerns in some detail, referring to the alleged change of allegation; the disproportionate nature of the sanction compared to what Dr Aboud considered to have been relatively minor breaches of the rules with no actual adverse consequences; he refers to the administrative failings and the fact that he had not received the transcripts of interviews, or being able to call witnesses, and the suggests that no reference or consideration had been given to his excellent service record when determining to dismiss him.

160. At the end of his letter, he stated *I wish to thank Fiona and Catherine for all their patience support and understanding in this matter I feel that I am being afforded an impartial and sympathetic hearing which is significantly different to my unfortunate experience with the original hearing*. We find that this is a true reflection of how he actually felt at that point as well as being a true reflection of the fairness and impartiality of the appeal process.

161. We find that Fiona Taylor did read and take into account everything that the claimant wrote, and made her decision having considered everything she had heard at the appeal and all the information she had being provided with.

162. Her decision was to dismiss the Appeal. Her reasons for dismissing the appeal were set out in her letter of the 27th February 2023.

163. In the letter she states that since the meeting she had conducted further investigations to clarify what had been taken into account by Fiona Conway. She summarised the claimant's representations at the appeal hearing, and then sets out the rationale for her decision.

164. She states *it is accepted that there was different wording between the invite to hearing letter and the outcome letter where the word potential was inserted in relation to bringing Spire into disrepute. However for the avoidance of doubt there is no dispute about the rest of the allegation that you did as point of fact administer Botox to an individual on Spire owned facilities without legitimate reason or permission by Spire this individual was not a Spire patient .*

165. Mrs Taylor had clarified the factors that had been taken into account by Miss Conway. She also noted that the claimant had not been provided with copies of the investigation meeting notes but stated that this was rectified prior to the appeal hearing and that the claimant had opportunities to make representations about their content during the meeting. We find as fact that that was what had happened.

166. She also makes reference to the claimant's length of service and positive work history and states that the disciplinary chair had taken those matters into account as she had done when considering the appeal.

167. She concludes *however we both considered that your actions constituted gross misconduct and in isolation was serious enough to warrant dismissal.*

168. She also stated that she was very concerned that *you fail to understand the seriousness of your actions by stating the disciplinary process could have been avoided if the director of clinical services had addressed this informally with you this fundamentally demonstrates a lack of understanding and reflection on your part.*

169. We find that this is a true statement about how she decided the appeal.

Relevant legal tests

170. The Claimant has the burden of proving that his comments at the disciplinary hearing, amount to a qualifying disclosure according to s.43B(1)(b) or (d) Employment Rights Act 1996 ("ERA"), meaning:

> *"any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
> *…(b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
> *…(d)that the health or safety of any individual has been, is being or is likely to be endangered…"*

The disclosures

171. First, we have to determine whether what the claimant said at the meeting amounted to a disclosure of '*information*' or facts. This is not necessarily the same thing as a simple or bare allegation (see the cases of *Geduld-v-Cavendish-Munro* [2010] ICR 325 in light of the caution urged by the Court of Appeal in *Kilraine-v-Wandsworth BC* [2018] EWCA Civ 1346). An allegation could contain '*information*'. They are not mutually exclusive terms, but words that were too general and devoid of factual content capable of tending to show one of the factors listed in section 43B (1) would not generally be found to have amounted to '*information*' under the section. The question for us was whether the words used had sufficient factual content and specificity to have tended to one or more of the matters contained within s. 43B (1)(a)-(f). Words that would otherwise have fallen short, could have been boosted by context or surrounding communications. For example, the words "*you have failed to comply with health and safety requirements*" might ordinarily fall short on their own, but may constitute information if

accompanied by a gesture of pointing at a specific hazard. The issue was a matter for objective analysis, subject to an evaluative judgment by the tribunal in light of all the circumstances.

172. Next, we had to consider whether the disclosure indicated which obligation was in the Claimant's mind when the disclosure was made such that the Respondent was given a broad indication of what was in issue (*Western Union-v-Anastasiou* UKEAT/0135/13/LA).

173. We also had to consider whether the Claimant had a reasonable belief that the information that he had disclosed had tended to show that the matters within s. 43B (1)(b), (d) of (f) had been or were likely to have been covered at the time that any disclosure was made. To that extent, we had to assess the objective reasonableness of the Claimant's belief at the time that he held it (*Babula-v-Waltham Forest College* [2007] IRLR 3412 and *Korashi-v-Abertawe University Local Health Board* [2012] IRLR 4). 'Likely', in the context of its use in the sub-section, implied a higher threshold than the existence of a mere possibility or risk. The test was not met simply because a risk *could* have materialised (as in *Kraus-v-Penna* [2004] IRLR 260 EAT). Further, the belief in that context had to have been a *belief* about the information, not a doubt or an uncertainty (see *Kraus* above).

174. 'breach of a legal obligation' under s. 43B (1)(b) is a broad category and has been held to include tortious and/or statutory duties such as defamation (*Ibrahim-v-HCA* UKEAT/0105/18).

175. Next, we had to consider whether the disclosures had been '*in the public interest.*' In other words, whether the Claimant had held a reasonable belief that the disclosures had been made for that purpose. As to the assessment of that belief, we had to consider the objective reasonableness of the Claimant's belief at the time that he possessed it (see *Babula* and *Korashi* above). That test required us to consider his personal circumstances and ask the question; was it reasonable for him to have believed that the disclosures were made in the public interest when they were made.

176. The '*public interest*' was not defined as a concept within the Act, but the case of *Chesterton-v-Normohamed* [2017] IRLR 837 was of assistance. In it, Supperstone J decided that the public interest may have been limited to a small group of 100 or so employees (in that case, about 100 senior managers were potentially affected by the employer's massaging of performance figures in relation to bonus). The Court of Appeal confirmed the decision and determined that it was the character of the information disclosed which was key, not the number of people apparently affected by the information disclosed. There was no absolute rule. Further, there was no need for the 'public interest' to have been the sole or predominant motive for the disclosure.

177. As to the need to tie the concept to the reasonable belief of the worker;

> "*The question for consideration under section 43B (1) of the 1996 Act is not whether the disclosure per se is in the public interest but whether the worker making the disclosure has a reasonable belief that the disclosure is made in the public interest*" (per Supperstone J in the EAT, paragraph 28).

178. The position was to be compared with a disclosure which was made for purposes of self-interest only, as in *Parsons-v-Airplus International Ltd* UKEAT/0111/17).

179. We remind ourselves that there is both a subjective element (whether the claimant believed that it was made in the public interest) and an objective element (whether that belief was reasonable): ***Chesterton Global Limited v. Nurmohamed*** **[**2018] 1 All E.R. 947 (CA).

180. Without evidence that the claimant believed these two things, the Tribunal cannot go on to decide whether any such belief would have been reasonable. ***Martin v London Borough of Southwark*** *EA-2020-000432,* paras.6, 11 per HHJ Taylor. We have also referred back to the List of Issues set out by EJ Beever .

181. When considering whether or not something is in the public interest, Tribunals must consider all the circumstances, and ***Chesterton*** identified the following factors which could be useful to consider:

o. the numbers whose interests the disclosure served;

p. the nature of the interests affected;

q. the extent to which they were affected by the wrongdoing disclosed;

r. the nature of the wrongdoing disclosed; and

s. the identity of the alleged wrongdoer

182. The Tribunal should remind itself not to take too narrow a view of the term 'public'. In ***Dobbie v Felton t/a Feltons Solicitors*** [2021] IRLR 679***,*** the EAT held that a disclosure could be made in the public interest although the public will never know that the disclosure was made because the disclosure was only made to the employer (see para 28(3)). Further, a disclosure can be made in the public interest even if it is about a specific incident without any likelihood of repetition (see para 28(4)).

183. It is not relevant whether the Claimant had the public interest in his mind at the time of making the disclosures. The CA in ***Chesterton*** held as follows (emphasis added):

§29 *(…) the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that* ***a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it****. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to*

himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable.

184. Finally, we did not have to determine whether the disclosures had been made to the right class of recipient since the Respondents accepted that they had been made to the Claimant's 'employer' within the meaning of section 43C (1)(a).

Detriment (s. 47B)

185. If we find that the Claimant had made a protected disclosure, we must then determine was whether or not the Claimant suffered detriment as a result of the disclosure. The detriment relied upon was the widening or broadening of the allegation and the decision to dismiss him.

186. The test in s. 47B is whether the act was done "*on the ground that*" the disclosure had been made. In other words, that the disclosure had been the cause or influence of the treatment complained of (see paragraphs 15 and 16 of the decision in *Harrow London Borough Council-v-Knight* [2002] UKEAT 80/0790/01).

187. We remind ourselves of section 48 (2) ERA which was also relevant in this case;

> *On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done.*

188. The test was not one amenable to the application of the approach in *Wong-v-Igen Ltd*, according to the Court of Appeal in *NHS Manchester-v-Fecitt* [2012] IRLR 64).

Dismissal (s. 103A)

189. The second question is whether or not the disclosure was the reason or the principal reason for the Claimant's dismissal.

190. We have considered and applied the test in *Kuzel-v-Roche* [2008] IRLR 530;

t. whether the Claimant and had showed that there was a real issue as to whether the reason put forward by the Respondent was not the true reason for dismissal;

u. if so, had the employer showed its reason for dismissal;

v. if not, has the respondent disproved the claimant's reason (ie that he was dismissed for a reason related to the disclosure).

191. The burden of proof in automatic unfair dismissal claims

192. Where the claimant has two years' continuous employment , the burden is on the employer to prove both that there was a fair reason for the dismissal (ie not the prohibited reason): ***Maund v Penwith District Council*** [1984] ICR 143 (CA) .

193. It is for the employer to show a potentially fair reason for dismissal. Here the respondent relies upon gross misconduct, which is a potentially fair reason.

194. this case the claimant asserts that the description of the alleged gross misconduct set out in the disciplinary letter, was different to the reason for which he was dismissed because of the insertion of the word potentially, so that the allegation was that his conduct had potentially brought the hospital into disrepute.

195. Neither counsel has referred us to any specific case law but we remind ourselves that in Abernethy v Mott Hay and Anderson 1974 ISR 323 Court of Appeal, the court of appeal determined that an employer was entitled to rely on the set of facts which led to the claimants dismissal. If that set of facts

were made clear to the claimant at the time of the dismissal, it did not matter that the employer had attached the wrong label to them.

196. We have also considered the case of Brito-Babapulle v Ealing Hospital NHS Trust 2014 EWCA Civ 1626 Court of Appeal. In that case the Court of Appeal observed that whilst it was an elementary rule of natural justice and disciplinary proceedings that a party should know the case that he had to meet and whether the allegation was one of dishonesty, where there had never been any doubt about the nature of the allegations and the particular misconduct had been identified, then an incorrect label in that case the difference between a label of fraud or dishonesty was immaterial.

197. Once an employer has shown a potentially fair reason for dismissal, the tribunal must go on to decide whether the dismissal for that reason was fair or unfair. This involves deciding whether the employer acted reasonably or unreasonably in dismissing for the reason given in accordance with S.98(4) of the Employment Rights Act 1996 (ERA).

198. That provision states that 'the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)

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

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

199. It is the employer who must show that misconduct was the reason for dismissal. According to the EAT in *British Home Stores Ltd v Burchell 1980 ICR 303, EAT*, a three-fold test applies. The employer must show that:

a. It believed the employee guilty of misconduct;

b. it had in mind reasonable grounds upon which to sustain that belief, and

c. at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

200. When considering whether or not the employer has undertaken a reasonable investigation we must consider whether the investigation was in the range of reasonable investigations that an employer could take. (see for example *Sainsbury's v Hitt.* [2002] EWCA Civ 1588 [2003] I.C.R. 111)) That case reminds us that it is necessary to apply objective standards of the reasonable employer to all aspects of whether employee fairly dismissed. The purpose of investigation is not to establish guilt, but whether reasonable grounds existed to support dismissal for gross misconduct.

201. This means that the employer need not have conclusive direct proof of the employee's misconduct, and a genuine and reasonable belief, reasonably tested, will be enough.

202. We reminded ourselves that the onus on the employer to show reasonableness was removed by S.6 of the Employment Act 1980 and refer to His Honour Judge McMullen QC, giving the judgment of the EAT in *Singh*, which indicated that it is only the first of the three aspects of the Burchell test identified above that the employer must prove. The burden of proof in respect of the other two elements of the test is neutral.

203. We also remind ourselves and are reminded by the respondent council that an internal appeal process can cure defects of procedure in the original disciplinary process. as observed by the Court of Appeal in Taylor v OCS Group Ltd, [2006]ICR 1602 CA, At para 47

> *Employment tribunals should realise that their task is to apply the statutory test. In doing that, they should consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceedings with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether due to the fairness or unfairness of the procedures*

adopted, the thoroughness or lack of it of the process and the open mindedness or not of the decision maker the overall process was fair notwithstanding any deficiencies at the early stage.

204. We reminded ourselves that therefore it is not enough that the employer has a reason that is capable of justifying dismissal, as S.98(4) makes clear. The tribunal must be satisfied that, in all the circumstances, the employer was actually justified in dismissing for that reason. We reminded ourselves that for this part of the test, there is no burden of proof on either party and the issue of whether the dismissal was reasonable is a neutral one for the tribunal to decide . (see for example *Boys and Girls Welfare Society v Macdonald 1997 ICR 693, EAT*.)

205. We reminded ourselves of the need to be careful to assess the question of reasonableness under S.98(4) in the context of the particular reason for dismissal it found established by the employer.

206. We reminded ourselves that whether an employer has acted reasonably is not a question of law. S.98(4) has the effect of giving tribunals a wide discretion to base our decisions on the facts of the case before us, and in the light of good industrial relations practice. As Lord Justice Donaldson put it in *Union of Construction, Allied Trades and Technicians v Brain 1981 ICR 542, CA*:

'Whether someone acted reasonably is always a pure question of fact. Where Parliament has directed a tribunal to have regard to equity…and to the substantial merits of the case, the tribunal's duty is really very plain. It has to look at the question in the round and without regard to a lawyer's technicalities. It has to look at it in an employment and industrial relations context and not in the context of the Temple and Chancery Lane.'

207. The appellate courts have, nevertheless, developed certain general principles, some of which have crystallised into principles of law. Thus, the broad, non-technical approach has led to the development of the 'band (or

range) of reasonable responses' test as a tool for assessing the reasonableness of an employer's actions.

208. The test of whether or not the employer acted reasonably is usually expressed as an objective one meaning that we, the tribunal, must use our collective wisdom as industrial juries to determine 'the way in which a reasonable employer in those circumstances, in that line of business, would have behaved' (see for example *NC Watling and Co Ltd v Richardson 1978 ICR 1049, EAT*.) Nonetheless, there is also a subjective element involved, in that we must also take account of the genuinely held beliefs of the employer at the time of the dismissal. However, we reminded ourselves that what a tribunal must not do, is put itself in the position of the employer and consider how it would have responded to the established reason for dismissal. Whilst a tribunal can substitute *their decision* for that of the employer, that decision must not be reached by a process of substituting *themselves* for the employer and forming an opinion of what they would have done had they been the employer (Per Court of Appeal explained in *Foley v Post Office; HSBC Bank plc (formerly Midland Bank plc) v Madden 2000 ICR 1283, CA).*

209. The respondent refers me to *London Ambulance V Small* [2009] EWCA Civ 220 [2009] IRLR 563,in this respect, and reminds us that the question of whether or not a dismissal is within the range of reasonable responses open to the employer means that even if summary dismissal is one end of the range, with a written warning at the other end the dismissal is not unfair just because the tribunal would have chosen a lesser sanction.

210. The fact that the standard of the hypothetical reasonable employer is so central to the S.98(4) assessment of reasonableness means that tribunals are able to take account of good industrial relations practice in making their decisions.

211. Once the tribunal has determined that misconduct has taken place, the question of whether it amounts to gross misconduct and whether or not a dismissal is reasonable, will depend upon the nature of the misconduct in question. where misconduct amounts to breaches of rules or instructions as in this case, we must consider whether or not the claimant was aware of the

rules and instructions (See for example *Donachie v Allied Suppliers LTD* EAT 46/80), and whether or not the breach was a minor breach or one which in the view of the respondent was a serious breach.

212. must also consider whether or not the respondent sets out within their disciplinary code that the type of misconduct to which a claimant either admits or is found to have committed is capable of amounting to gross misconduct.

Polkey

213. If a tribunal finds that there was a possibility that the employee would still have been dismissed even if a fair procedure had been adopted, we reminded ourselves that compensation can be reduced to reflect the percentage chance of that possibility. *We have been referred to Polkey-v-AE Dayton Services [1988] ICR 142 which introduced an approach which requires a tribunal to reduce compensation.* We reminded ourselves, that a tribunal might conclude that a fair procedure would have delayed the dismissal, in which case compensation can be tailored to reflect the impact of any likely delay. What we must consider is whether a fair procedure would have made a difference, but also what that difference might have been, if any (*Singh-v-Glass Express Midlands Ltd* UKEAT/0071/18/DM).

214. We remind ourselves that it is for the employer to adduce relevant evidence on this issue, although a tribunal should have regards to any relevant evidence when making the assessment.

215. A degree of uncertainty is inevitable, but a tribunal should not be reluctant to undertake an examination of a *Polkey* issue simply because it involves some degree of speculation (*Software 2000 Ltd.-v-Andrews* [2007] ICR 825 and *Contract Bottling Ltd-v-Cave* [2014] UKEAT/0100/14).

Contribution

216. We have reminded ourselves that we can consider whether the Claimant's dismissal was caused by or contributed to by his own conduct

within the meaning of s 123 (6) of the Act. In order for a deduction to have been made under these sections, the conduct needs to have been culpable or blameworthy in the sense that it was foolish, perverse or unreasonable. It did not have to have been in breach of contract or tortious (*Nelson-v-BBC* [1980] ICR 110).

217. We have in mind, the test recommended in *Steen-v-ASP Packaging Ltd* [2014] ICR 56; We have to;

(i) Identify the conduct.

(ii) Consider whether it was blameworthy;

(iii) Consider whether it caused or contributed to the dismissal;

(iv) Determined whether it was just and equitable to reduce compensation;

(v) Determined by what level such a reduction was just and equitable.

218. We have also considered the slightly different test under s. 122 (2); whether any of the Claimant's conduct prior to his dismissal would have made it just and equitable to reduce the basic award, even if that conduct did not necessarily cause or contribute to the dismissal.

The Parties Submissions, our Discussion and conclusions

219. Ms Veale for the claimant submitted an opening statement and 38 pages of closing submissions she also addressed the tribunal verbally.

220. Ms Moss for the respondent, submitted a closing skeleton of just over 10 pages and made oral submissions.

The claimant's claims before the employment tribunal.

221. The claimant alleges that he was unfairly dismissed for gross misconduct. This is a claim of ordinary unfair dismissal.

222. The claimant also alleges that he was dismissed and/or subjected to a detriment because he made protected disclosures.

223. He also asserts wrongful dismissal /breach of contract in respect of notice

224. He asserts that he disclosed information during the course of the disciplinary hearing in respect of two matters about which he was required to write reports, amounted to disclosures of information.

225. Ms Veale submits that the claimant disclosed information, that he had been asked on two occasions to amend care reports in a manner that revealed a breach of the respondents obligation to record accurately all aspects of patient care, and that the information tended to show health and safety of a patient had been endangered by a *mess up* in the form of a stoppage of antibiotics, and secondly in respect of the second patient that there had been a deliberate attempt to remove relevant information in a patient's report in breach of the respondents obligation to accurately record patient care.

226. It is submitted by Ms Veale for the claimant that he reasonably believed that his alleged disclosures were in the public interest, and that he reasonably believed they tended to show that a person had failed to comply with a legal obligation to which he was subject, or that health and safety was damaged or at risk so as to satisfy the statutory test .

227. We have set out in the paragraphs above what Dr Aboud actually said in those meetings and we all agree that he disclosed information to his employer.

228. At the time, he made the comments in the context of explaining to the respondent that he was a good employee. Essentially, he asserted that he had done what he was required to do, in amending the reports.

229. We reminded ourselves that part of the test for a protected disclosure is that the claimant must have reasonably believed at the time of making the disclosure that first, that they were disclosing information which tended to show that there had been a breach of a legal obligation, and second, must have held a reasonable belief that the disclosure of information was in the public interest, and have made the disclosure in the public interest.

230. The respondent disclosed very late in the day documentation in the form of e-mail exchanges concerning the two incidents that the claimant said he had referred to. The claimant has provided a supplementary witness statement in respect of them.

231. One document is an e-mail from Ms T Cooper dated the 30 March 2022, in which she states she has reviewed the report and felt it should be rewritten. One of the matters that she refers to, is a suggestion contained in the report that the team had not used the on-call radiology to scan the patient as soon as they should have done. It was suggested that this was because of the lack of availability of a radiologist. It is noted that the timing of the scan was one of the main points of concern raised by the patient's complaint.

232. In her e-mail, Ms. Cooper states that she had interviewed the RMO who provided the care to this patient on the night of the incident and notes that he had confirmed a working diagnosis at the time, of post operative confusion. She notes that the RMO had said the patient was showing signs of improvement and vital signs showed no clinical deterioration. The booking of the CT scan for 8:00 in the morning was not related to the availability of a radiologist at all, but was due to clinical presentation and assessment. She then notes that *what has caused confusion is the RMO statement which was submitted seven months after the event in September, which highlighted that there was no on call list of radiologists.* This was the report written by Dr Aboud, who had not been the treating Doctor at the time

233. She goes on to note that this was not factually correct and that there was an ad hoc Rota of radiologists; that it had no impact at the time of the incident and that therefore, since there had been no diagnosis of a CVA on the night of the incident, this was nothing more than an academic suggestion from the RMO in his personal reflection. A CT scan was not required and that was documented in the patient's notes. The RMO she is critical of, who had not been attending on the night, but who had made these comments, was Dr Aboud.

234. Ms. Cooper then notes that she had met with that RMO (Dr Aboud) who had confirmed that this was a personal reflection and not a statement of

fact and therefore should not have been submitted as such. She concludes that it appeared to be an erroneous statement that did not reflect any of the clinical decision making at the time.

235. In respect of that patient , he says he was asked to provide a report and he did so and mentioned his concerns but there was no after-hours CT service in place. He describes subsequent correspondence about whether or not there was an after-hours CT scan service in place. It is clear that there is a disagreement between the claimant and the respondent as to the service that was available.

236. We have considered whether or not the words he said indicated which obligation was in the Claimant's mind when the disclosure was made such that the Respondent was given a broad indication of what was in issue. We have considered carefully what he did say and what he says now in his evidence to the ET.

237. In his supplementary witness statement provided for the purposes of these proceedings on the 5 March 2024, Dr Aboud suggests that the information regarding the CT scan was incorrect. If, as he now suggests he disagreed with the hospitals view about that service, he could have said so at the time and we have no reason to think that he would not have done so. Instead, he agreed to amend his report.

238. At the time and from the information we have seen, we find that he accepted that the information he had included was a personal view and at the time was willing to change his report for that reason. We find that his comments at the time, to Ms Cooper, were a true reflection of what he thought at the time.

239. We conclude that the most likely reason he changed the report, is that he agreed with the hospital that he had been incorrect. We all agree that what had happened was that the comments about the lack of availability of an out of hours CT service and the reasons for not referring to it, were considered to be wrong and Dr Aboud was being asked to correct factual inaccuracies and he did so.

240. At the disciplinary hearing, he did not state that he thought there was a failure to comply with legal obligations or a threat to the health and safety of an individual, either in respect of the treatment of the individuals, or in him being asked to amend his report.

241. Dr Aboud has given no evidence in chief why he considered that the comments he made to the disciplinary hearing tended to show a breach of a legal obligation. He has not identified in his evidence what that obligation might be. This is despite the fact that he was given leave to rely upon a supplementary witness statement in which he specifically addressed the additional documentation about the two patients which had been disclosed to him.

242. He does not state in his evidence to the employment tribunal either verbally or in his written statements that he held that belief at the time, but it is possible that he believed that the matter he was raising did tend to show those things.

243. However, in respect of the first matter, since we find as fact that he accepted that he was removing information which was incorrect and irrelevant, we conclude that when he told the disciplinary hearing about the events, he could not have reasonably believed that he was disclosing information which tended to show breach of a legal obligation, or a risk or damage to health and safety. He knew or should have known, that he was not. We conclude he did not in fact hold that belief at the point of the disclosure of information, and if we are wrong that it was not reasonable for him to hold it.

244. The second matter the claimant referred to during the course of the disciplinary hearing concerned a patient who had developed a large post-surgical abscess and had required transfer following the abscess rupturing. The claimant compiled a detailed report and considered, on examining her drug sheet, that the patients' antibiotics had been stopped without checking with himself or the consultant.

245. He states that he was informed by the person for whom he was asked to write the report, that he should only report on his own contacts with the patient, and that the additional information was not required. He said that when he pointed out the information was important, he was told it was not relevant to the request being made. He says he was sent a witness statement template which listed the information required and he duly completed this, omitting some of the previous information. He was unsure whether the information or insight he had provided was followed up on, but considered that the additional information was important and valuable to prevent possible similar future incidents.

246. The second matter is different to the first, because the claimant does make reference to a change in medication and does make comments that he was concerned about that, and that he was asked to remove those concerns from the report and again simply provide a factual statement about what he had done rather than any observations he may have about what others had or had not done.

247. This was a disclosure of information, and we agree that the comments made by Dr. Aboud during the course of the disciplinary hearing were capable, on the face of it, of suggesting that the health and safety of an individual had been, was being or was likely to be endangered, and/or the possibility that a person had failed to comply with a legal obligations in respect of record keeping.

248. The claimant's case is that he does now consider that there were breaches of legal obligations and health and safety risks disclosed. However that is not the test that we must apply. We must consider the reasonable belief of the worker asserting that he made a protected disclosure. The claimant must prove on balance of probabilities both, that he had a reasonable belief that the disclosures tended to show a failure to comply with legal obligations or a risk to the health and safety of an individual and that he held a belief at the time of the disclosures.

249. Dr Aboud states in his witness statement ,that he considers that patient safety and patient care regulations had been breached and that the patient suffered a harm as a result.

250. We find that this is not what he told the disciplinary hearing. Dr Aboud did tell the disciplinary hearing that he thought antibiotics had been stopped without consultation with him or another consultant; that he had been asked to remove that part from the report because it was not his remit and he had done so and that he was aware that an antibiotic had been stopped because the claimant had a sensitivity to penicillin. He suggested that in fact she had received penicillin with no adverse effects. He referred to *a mess up* but says he didn't make a complaint at the time.

251. Dr Aboud does not say that he was asked to change his report in order to cover up mistakes, although it appears that this is the inference that he wishes us to draw. Whether or not that is an appropriate inference we find that a reasonable employer would not have understood him to be suggesting at the disciplinary hearing that he thought he was being asked to cover up some form of wrongdoing. We find that the reasonable employer would have considered that he was raising a concern about process is followed, and that the appropriate thing to do would be to raise a complaint if he had concerns. We found in fact that this is what was said to him by his employer.

252. We find that he knew that the reason he was being asked to rewrite the second report was also to ensure that he recorded his contact with the patient and not other matters. Those other matters appeared within the patients records and it was not necessary for him to provide comment about them.

253. We understand that the whole point of such a report is to provide all the information to another person, who would have the job of assessing whether there had been any failures, errors or missed opportunities for example.

254. We all agree that Dr Aboud, as a senior and experienced Doctor, was well aware both of the reason why reports would be written and of the need to ensure that he provided a factual explanation of his own involvement and nothing else.

255. We conclude that he ought to have understood that what he was being asked to do was not in the nature of changing medical records, or of concealing information but was, on the contrary, about ensuring an accurate and factual account of each stage of a person's treatment.

256. Ms Veale asserts that the comments are capable of amounting to protected disclosures because it was reasonable for the claimant to believe that the information he gave to Fiona Conway at the disciplinary hearing tended to show that the standard of care and requirement of accurate recording in patient care notes had been breached.

257. We disagree, We do not consider that it was reasonable for the claimant to hold that belief but, more importantly, we have no evidence in front of us that he actually did hold such a belief.

258. We accept the submission that Miss Conway responded to the provision of the information commenting that he was making some quite serious allegations about incidents that the hospital.

259. We do not accept that her reaction to his comments is capable of curing a defect in his evidence about what he actually thought about the disclosures of information he had made.

260. Furter , in so far as it is necessary, when looking at the words he said at the time as set out in the paragraphs above we cannot conclude that he did believe at the time that he was disclosing information in respect of the second case which tended to show breach of a legal obligation. We cannot identify what the legal obligation would be from his words although it may be reasonable to assume there is an obligation to keep proper records.

261. We have considered risk to the health and safety of the patient.

262. We accept that he was reporting on an incident where a patient had suffered adverse health events. But that does not mean that he was disclosing information which he reasonably believed tended to show that the health and safety of those patients had been endangered, was being or was likely to be endangered. He was telling the disciplinary hearing that he had been asked to change a report he had written.

263. First Dr Aboud has not asserted anywhere in his evidence in chief that he reasonably believed when making the disclosures, that he was disclosing information which tended to show that thing. He bears the burden of proving that he has made a protected disclosure and it is therefore necessary for him to tell the tribunal in positive terms that he held a belief that the information he disclosed tended to show those things and to give the tribunal some evidence of the reason why it was reasonable for him to think so.

264. We conclude that Dr Aboud did disclose information about a patient which contained facts that tended to show that the individual's health had been impacted. we find that it is reasonable for him to have believed at the time he made the disclosure that he was disclosing information of that nature.

265. We have therefore considered the question of public interest. This is relevant both to the first matter if we are wrong in our conclusions and is relevant to our determination as to whether or not in respect of the second matter the claimant made a protected disclosure.

266. Ms Veale submits that Dr Aboud now believes that the matters disclosed were in the public interest. We find that Dr Aboud himself has not stated anywhere in his evidence that the disclosures were matters which was in the public interest or that he made his disclosures in the public interest.

267. We accept that had Dr Aboud been asked to change material factors within a report that was being submitted about a medical incident, it could amount to a failure to comply with legal obligations and it could potentially risk the health and safety of individuals. We also accept that it could be a matter of public interest.

268. To satisfy the legal test, the claimant must prove on balance, both his belief that the disclosures were in the public interest and that any disclosure was *made* in the public interest.

269. This means we must be satisfied that the matter was in the public interest, but also that the reason for its disclosure was that Dr Aboud thought it was in the public interest to make the disclosure.

270. In his witness statement the claimant states that he believes the matters that he raised amounted to a protected disclosure and that he believed that he was subject to a number of detriments as a result he states that he believes Miss Conway's decision to apparently broaden the scope of the allegation levelled at him to include the word potentially the expediting of the disciplinary hearing following only 20 minutes of deliberations and the severity of the disciplinary sanction will detrimental treatment.

271. He says nothing at all about why he considers the information to amount to a disclosure.

272. We find as fact that what Dr Aboud was that he was trying to indicate in the disciplinary, was that he was a good employee and we find that his motivation for sharing the information in respect of both matters was not because he believed it to be in the public interest but because he believed it would indicate to Fiona Conway that he was a loyal employee who was prepared to do as he was instructed by the respondent. His reasons for sharing the information were to support his assertions that he was a good employee, and were made in his own interests and not in the public interest.

273. We find that at disciplinary hearing, Dr Aboud gave no thought as to whether these were matters of public interest or not. On the claimant's own evidence, we find that the claimant shared information with the respondent in

his furtherance of his own interests. This is not , we find case where there were mixed motives.

274. We accept that he formed a view later, which was not unreasonable, that the matters were in the public interest.

275. We conclude that his reasons for sharing the information were to support his assertions that he was a good employee, and were made in his own interests and not in the public interest.

276. We therefore conclude that the disclosures were not public interest disclosures.

277. If we are wrong and if the claimant did make protected disclosures we have considered what impact if any those matters had on the allegation he faced within the disciplinary hearing on the finding that he had committed gross misconduct and the decision to dismiss him in our findings and conclusions below in relation to unfair dismissal and detriment

Discussion in relation to unfair dismissal; Automatic unfair dismissal and alleged detriment

278. From our findings, we conclude that this respondent carried out a full investigation prior to inviting the claimant to attend a disciplinary hearing.

279. Dr Aboud had admitted to conduct which was in breach of a number of the hospitals rules and procedures, the breach of which were capable of amounting to gross misconduct.

280. The allegation against him was that he had committed misconduct by his actions and that either he had brought the hospital into disrepute or that his actions were capable of doing so.

281. We all agree that whilst the wording of the specific allegation before the disciplinary hearing was unhelpful, that the claimant was fully aware of the concerns that the respondent had about his actions and their impact or possible impact upon the reputation of the hospital at the meeting.

282. Based on our findings of what was in fact said both at the investigation hearing then at the disciplinary hearing and subsequently at the appeal hearing, we conclude that Dr Aboud knew, if not at the outset, then certainly during the course of the disciplinary hearing, of the slightly different emphasis that the chair of the disciplinary hearing was putting up on the allegation. He knew what the allegation against him was.

283. Doctor Aboud alleges that he was subjected to detriment for having made protected disclosures, in that he alleges that the allegation was broadened to include the word potentially and that this was detrimental to the claimant.

284. We find that there was a confusion both on the part of the claimant and on the part of Miss Conway about of the precise allegation that Dr Aboud was facing.

285. Dr Aboud had not unreasonably focused on the wording of the allegation set out in the letter inviting him to a disciplinary hearing. We all agree that it is vital that respondents ensure that they are careful in particularising the allegation which a claimant faces in a disciplinary hearing.

286. In this case the respondent alleged that the claimant had behaved in a way which had *thus brought Spire into disrepute*. Dr Aboud reasonably considered that this must mean that there had been some actual damage to the reputation of Spire.

287. However we find that in the investigation report, Mr Griffiths identified what he was concerned about, was not actual damage but the possibility that damage to reputation could have been or might in the future be caused, by making reference to potential damage.

288. We find that Miss Conway believed that the allegation was broad enough to include both actual and possible reputational damage.

289. We also find that Miss Conway was of that view at the outset of the disciplinary hearing and that it was for this reason that she referred both to the wording in the investigation report as well as the wording in the letter.

290. We also find that when the claimant highlighted his concern about the difference in wording that Miss Conway maintained that she was concerned with *possible* damage to reputation and that she clearly identified this to the claimant during the course of the hearing.

291. We conclude that he had every opportunity to discuss and explain both why his actions did not, in his view, have any actual impact upon the reputation of Spire hospitals, but also why his actions did not have the potential to impact upon the reputation of Spire hospitals.

292. In cross examination of Miss Conway, Ms Veale for the claimant suggested that the claimant would have provided more information, if not interrupted and that the context of the information he was providing was as set out in various emails exchanged, as now disclosed by the respondent.

293. She suggested that Miss Conway had cut the claimant off and had done so because she became uncomfortable at his mention of the incidents he relies on as protected disclosures and sought to divert conversation away from the discussion.

294. Miss Conway did not accept this at all and asserted forcefully that the reason she had stopped the claimant from talking about the matters, was because she considered them to be of no relevance whatsoever to the matters which she had to determine.

295. We accept the evidence of Miss Conway. From our findings of fact we conclude that the only reason why Miss Conway moved the conversation on

was because she considered the matters the claimant was raising were irrelevant to the matters that she had to determine.

296. We find that she did not become uncomfortable at the mention of the matters but rather she indicated to the claimant the need to move forward.

297. Having read the notes of the meeting and heard evidence from both Miss Conway and Dr Aboud, we find that Miss Conway did attempt to move the conversation on and did tell claimant to focus on the matters in hand. She did remind him that he could raise complaints about these matters outside of the meeting if he wished to do so. In fact, the claimant was dismissed summarily at that meeting and only raised it as part of his complaint to the employment tribunal.

298. We find that Miss Conway was seeking to focus the claimant's attention on the matters that she considered to be relevant to the allegations against him. Dr Aboud was not prevented from making any comments or indeed from explaining why he had raised these matters at all. In fact, we find he interrupted Miss Conway a number of times before she was able to remind him of the focus of the meeting.

299. We find that her attempts to move the discussion on were fair and in keeping with her obligations as chair of the disciplinary hearing. The purpose was to focus on the matters that she had to determine rather than to allow discussion of matters which she considered to be of no relevance.

300. We are also satisfied from our findings of fact about the disciplinary hearing and the process followed by Miss Conway, that the disclosures of information made by Dr Aboud at the disciplinary hearing, had no influence whatsoever on her decision either that the claimant had committed gross misconduct or her decision that dismissal was the appropriate sanction.

301. Whilst there was a change in focus, we do not consider it fair to characterise this as a broadening of the scope of the allegation. Nor do we find that the reason for any change in scope was anything at all to do with the

fact that the claimant raised the issues about reports he had been involved in writing.

302. We find as fact that Miss conway's understanding of the allegations was different to that of the claimant from the outset and therefore that the comments he made, whether or not they could amount to protected to disclosures, were nothing to do with her understanding of the allegations.

303. We find as fact that Miss Conway did not consider the matters which the claimant had raised to be of any relevance whatsoever to the allegations that had been made against him.

304. We conclude that Miss Conway formed a genuine belief, based on reasonable grounds that Dr Aboud's conduct, which had been admitted, was in breach of a number of the hospitals rules and procedures; that the breach was a serious one and that whether or not there was any actual or possible reputational damage, the behaviour alone was sufficient to amount to gross misconduct.

305. We conclude that in reaching that decision Miss Conway acted reasonably and that her decision was a fair one.

306. We accept Miss Conway’s evidence that the reason she concluded that the gross misconduct was serious enough to dismiss was not because of potential reputational damage, but because of the actions of Dr Aboud. We find that she did not accept that any of the matters he put forward as mitigation, did in fact mitigate the seriousness of his actions. We conclude that this was a reasonable conclusion for her to reach on the basis of the information she had. It was within the range of reasonable responses

307. We also conclude that Miss Conway reached her decision based upon the facts before her. We conclude that the slight difference in the wording of the allegation in the initial letter and the allegation as discussed at the hearing made no difference to her decision on gross misconduct.

308. The claimant states that he believes that he was subject to a number of detriments as a result of his disclosures. He states that he believes Miss Conway's decision to apparently broaden the scope of the allegation levelled at him to include the word potentially the expediting of the disciplinary hearing following only 20 minutes of deliberations and the severity of the disciplinary sanction will detrimental treatment.

309. We have therefore considered what if any impact if any, and the disclosures made by Dr Aboud had on the length of the adjournment the decision that the Claimant had committed gross misconduct , or on the or the severity of the sanction being instant dismissal.

310. From our findings of fact we conclude that the disclosures made did nt have any effect on the length of the adjournment, on the decision that the claimant had committed gross misconduct or on the decision that the sanction would be instant dismissal. we conclude that the reason why miss Conway reached her decisions was that she held a genuine belief that Dr Aboud had committed the misconduct which was a belief based upon a full and reasonable investigation and was reached following a full and fair disciplinary hearing. she determined that the sanction of instant dismissal was an appropriate one based upon the information she had the guidelines available to her and the mitigation Dr Aboud had submitted.

311. The disclosures made by Dr Aboud had no impact or influence whatsoever upon any of those decisions.

312. Put another way we reject the claimant's submission that any disclosures he made was the reason or principal reason for his dismissal. We conclude that they were not.

313. Further we conclude form our findings that the appeal hearing gave the claimant every opportunity to address any atter which he felt had not been raised or fully addressed a the disciplinary hearing. Mrs Taylor conducted a very full enquiry of her own, and reached her decision to uphold the appeal on the basis if that investigation as well as the information she had about the

disciplinary investigation and the hearing, and the further information provided by Dr Aboud, in writing and at the hearing.

314. We are satisfied that had she considered that there had been any errors or any failings of flaws in the disciplinary process, she would have identified them, and overturned the decision , if she had felt that to be necessary and appropriate. She did not do so, and we find the reason was that she considered that decision that M Dr Aboud had committed gross misconduct was the right decision , and she did not change the sanction , because she considered that the sanction was a correct and reasonable one on the circumstances.

315. There is no suggestion that she was influenced in any of her thinking by any disclosures made by the claimant and he did not suggest at the appeal that Miss Conwey had been o influenced. We conclude that the disclosures made by Mr Aboud played no part whatsoever in the investigations, considerations or conclusions of Mrs Taylor.

316. We there for conclude that Dr Aboud's claim of wrongful dismissal.

317. We all agree on the evidence before us, that he had committed gross misconduct. The sanction of instant dismissal did not therefore breach his contract and his claim of wrongful dismissal fails.

318. We therefore dismiss all the claimants claims.

Employment Judge Rayner

Date: 22 July 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

7 August 2024

Jade Lobb
FOR EMPLOYMENT TRIBUNALS

tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

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