EMPLOYMENT TRIBUNALS

Claimant: Ms D Fenton

Respondent: Pennine Acute Hospitals Trust

Heard at: Manchester **On:** 19 to 30 January 2015; 29 February 2016 to 16 March 2016; 4 July to 7 July 2016 8,11 July 2016, 9 August 2017 (In Chambers)

Before: Employment Judge Holmes
Mrs C Linney
Mr S T Anslow

Representation:

Claimant: Mr G Mahmood, Counsel
Respondent: Ms A Samuel, Counsel

RESERVED JUDGMENT

It is the unanimous judgment of the tribunal that:

1. The claimant was unfairly dismissed.

2. The tribunal makes no reduction from the compensatory award on the basis of ***Polkey .***

3. The claimant contributed to her dismissal, and the tribunal, by a majority, makes a reduction in any basic and compensatory award of 50% for contributory fault.

4. The claimant's dismissal was not automatically unfair by reason of her having made any protected disclosure, and this claim is dismissed.

5. The claimant was not subjected to any detriments by reason of having made any protected disclosure, and these claims are dismissed.

6. The claimant's claims of age discrimination are dismissed.

7. The claimant's claims of breach of contract and unlawful deductions from wages have been resolved and are withdrawn.

8. The claimant is entitled to a remedy for unfair dismissal. The parties are to advise the tribunal in writing by **2 October 2017** as to whether any remedy hearing is required, and, if so, shall specify the issues to be determined, the estimated length of hearing, and dates to avoid.

REASONS

1. By a claim form presented on 2 October 2012 the claimant claims that she was unfairly dismissed by the respondent on 4 July 2012. She also complains of having suffered detriments because she had made protected disclosures, indirect age discrimination, breach of contract and unlawful deductions from wages. These last two claims have been settled during the course of the hearing, and are no longer before the tribunal.

2. The claims were first heard on 19 January 2015, for 10 days. Previous hearings listed in 2013 and 2014 had been postponed at the request of the parties, on the basis that the length of hearing would be insufficient. The hearing , however, could not be concluded in this first hearing. The claimant's own evidence took up almost the whole of that hearing (Joanne Bramall's evidence for the respondent being interposed), and it was thus re – listed for 27 July 2015. Unfortunately, due to the hospitalisation of the Employment Judge, that hearing had to be postponed. Attempts were made to have it re-listed in November 2015, but the parties jointly sought a further postponement, and it was not until 2 March 2016 that the resumed hearing was held, when the tribunal sat for a further 11 days. The hearing was still not concluded, and was then re-listed for 4 July 2016, when the tribunal sat for a further 8 days to 13 July 2016. The tribunal reserved its judgment , and has deliberated in Chambers from 8 July 2016 , and on other dates subsequently, most recently 9 August 2017. The tribunal has now arrived at this judgment, which is now given. The tribunal appreciates that the conclusion of this case has been delayed, and somewhat protracted. This has been in part due to external factors, such as the illness of the Employment Judge, and then of a panel member , and in part due to the volume of evidence and material that the parties wished to adduce before the tribunal. Finally, the delay in final promulgation of this judgment has been occasioned in part, too, by pressure of judicial business. The tribunal apologises to the parties for this delay, and thanks them for the considerable patience they have shown.

3. The claimant gave evidence , and called Gareth Griffiths, her union representative, Michelle Gray, her solicitor, had made a witness statement, but she was not called. For the respondent, Mark Livingstone, Philippa Jones, Sue Smith, Dawn Robinson, Cath Hignett, Chris Sleight, John Wilkes, and Joanne Bramall gave evidence. Hugh Mullen had made a witness statement, but was not called. There was an agreed Bundle, running to some 6 lever arch files. It is an unfortunate, but understandable, feature of this case that much of the documentation has been duplicated or triplicated in the Bundle. This is a result of some of the key documents being placed in the Bundle within other documents, to which

they were attached or appended, and then re-appearing elsewhere when they have been included again, as part of another document. There may thus be more than one reference in the enumeration to the same document. The tribunal has, in this judgment tried to keep references to pages in the logical context of the evidence being discussed, but, on occasion, an inappropriate, or duplicating page reference may appear. The parties, represented respectively by Mr Mamood of Counsel, and Miss Samuel of Counsel, made their submissions , which had been reduced to writing, on 7 July 2016 . Having heard and considered the oral and documentary evidence, and listened to the submissions of Counsel, the tribunal unanimously finds the following relevant facts:

3.1 The claimant was employed by the respondent as an Aseptic Services Manager in the Pharmacy department at the Royal Oldham Hospital. She had been employed by the respondent since 1981, and was appointed to this role in 1989. Philippa Jones had been her line manager, but in September 2009 Mark Livingstone was appointed Head of Pharmacy, and he then became the claimant's line manager. She had previously been in a role senior to Mark Livingstone. The claimant's role was a Band 8b role, in which she earned some £55,000 per annum, and was a member of the Pharmacy Management Team.

3.2 As a Pharmacist the claimant's professional body was the General Pharmaceutical Council, which regulates the profession and enforces standards of conduct.

3.3 Charlotte Ollerenshaw – Ward was appointed by the respondent, with the claimant's approval, as a Specialist Clinical Pharmacist , a post formerly designated the Deputy Aseptic Services Manager, in effect the claimant's deputy. Whilst her specific age was not before the tribunal, she was younger than the claimant.

3.4 The role of the Pharmacy was to dispense medicines to the Hospital. Accordingly, medicines would be supplied to the various Wards in the Hospital. As patients' needs varied, or patients were discharged, it was common for unused medicines to be returned from the Wards to the Pharmacy. Of these returned medicines, some could be taken back into stock, and dispensed again, but others would have to be disposed of securely. In order to determine which medicines could be retained, and which had to be destroyed, it was necessary for a member of the department to sort through them. The management of returned medicines was something of an ongoing issue in the Pharmacy in 2009 and 2010, as this was not something which was attended to on a regular basis, with the result that, from time to time, this returned stock built up in the Pharmacy. If left too long, some of it could go out of date. Returned products should have been either disposed of, or returned to stock, depending on their expiry date.

3.5 On 27 January 2011, the claimant sent an e-mail to Mark Livingstone (page 440 of the Bundle). In it she said:

"The other evening I pulled 2 vials of Omeprazole IV out of the bin, which should not have been thrown away.

I strongly think that ATO's should NOT be making decisions on what to throw out. They should be screened first."

The reference to "ATOs" is to assistant technical officers. Mark Livingstone did not reply.

3.6 On 23 February 2011, at 16:17, the claimant again sent an e-mail (page 447 of the Bundle) to Mark Livingstone. In it she referred to having pulled Linezolid and Pregabalin tablets out of the bin, saying there were "tons more" , and making the sarcastic observation that these were obviously "cheap" and did not need keeping. She went on to refer to the fact that the department had tried to implement systems to stop the destruction of drugs and wasting of money, but these systems did not seem to be working. She asked Mark Livingstone to do something about this, and raised some specific issues about drugs belonging to specific patients. She ended with "Cheap or expensive they should not be in the bin", and how they (i.e the department) were just creating their own workloads.

3.7 Mark Livingstone did not respond directly to the claimant, but raised the matter with Deborah Brierley , the distribution manager, by copying to her the claimant's e-mail on 28 February 2011. He asked if he could discuss with her how to address the claimant's comments. She replied , (page 447 of the Bundle) copying her e-mail to the claimant, saying that she agreed with the claimant, and did not think that anything should be thrown away. She was to work through the returns procedure with the ATOs, but lack of time was the main factor.

3.8 Mark Livingstone replied to Deborah Brierley by e-mail later that day, again copied to the claimant, amongst others. In this e-mail he addressed certain points made in her e-mail which he considered needed to be explored and progressed. At the end of his e-mail he said that he did not want to see clinical staff having to check through these drugs, as this would not be good value for money. He wanted to ensure that all ATOs were aware of their responsibilities , and were accountable for their actions. He went on to say that if they continued to find high expenditure items being wasted, as the claimant had reported, and it is not due to poor procedures and training, then the staff responsible must be identified and taken to task. This e-mail exchange between 23 and 28 February 2011 is at pages 447 to 446 (running in reverse order) of the Bundle.

3.9 On 5 May 2011 the claimant sent a further e-mail to Mark Livingstone (page 446 of the Bundle), which reads:

"The mountain of returned drugs/overdispensing are building up again in the back.

Out of the 600 drug lines on the computer we keep there are only 20 lucky lines that are rescued and booked back in.

Do you think perhaps we could increase this?

Also has anyone assessed the mix of these returns to see if they are discharges or temps?

Also do you happen to have the number to hand for the Dispatches reporters?"

3.10 This latter comment was a reference back to a television programme which had previously featured North Manchester General Hospital , part of the respondent Trust , and had cast it in a bad light. The claimant did not seriously expect Mark Livingstone to have, or to give her, that telephone number, but was making a facetious suggestion that she might contact the programme makers. There was no reply to this e-mail.

3.11 In June 2011 the claimant reported a pharmacy technician for stealing medication. This led to a formal investigation, and the claimant was interviewed for this purpose by Joanne Appleton, Chief Pharmacy Technician, on 7 June 2011 (see the notes at pages 449 to 451 of the Bundle).

3.12 On 23 June 2011 Mike Weston, Senior Pharmacist, sent an e-mail to Mark Livingstone , copied to the claimant and others, about the build up of 21 boxes of returned medicines in the stores, which he regarded as a potential hazard. Mark Livingstone replied the same day, agreeing , and asking what options were available. This too was copied to the claimant and others in the department (see page 457 of the Bundle).

3.13 On 7 July 2011 the claimant sent an e-mail to Mark Livingstone (page 458 of the Bundle) informing him that a large number of uncollected discharges (i.e medicines etc.) had been brought into the stores. She also pointed out that some of the stock had been in the back so long that it had gone out of date. She asked if there was any progress on booking these “potentially expensive and useful items” back. Mark Livingstone replied later the same day. He thanked the claimant for bringing the matter to his attention, and explained what steps he had been taking to deal with the issue. He made some suggestions as to how the situation may be addressed in the future. He attended the unit and took photographs of the boxes in the pharmacy, which have been provided to the tribunal during the course of the hearing.

3.14 For some time colleagues of the claimant had had concerns about how the claimant spent her working time. They were subordinate to her, and she had been critical of them in respect of their timekeeping, when they considered that her own timekeeping , and how she spent her own working day was not beyond reproach. Prior to September 2011 Mark Livingstone had received some informal complaints about the claimant’s use of the internet, and her mobile phone during work time. This latter issue had resulted in a memo being issued to the whole department dated 11 March 2011 (pages 1620 to 1621of the Bundle), but no further action being taken.

3.15 Around 26 September 2011 Joanne Bramall , Chief Technician, and an employee who reported to the claimant, contacted Mark Livingstone to raise concerns about the claimant’s use of e-mail, and the internet , whilst at work, to conduct her own personal business. Mark Livingstone told her that he would need some evidence in order to investigate. Joanne Bramall the following day provided him with a copy of a document, “heads of terms”, for a lease which she claimed the claimant had sent or received whilst at work. She told him that she was concerned that the claimant was using Trust time and equipment to conduct her business. She had seen the claimant sending e-mails from her work account, and delete the automatic signature

at the end. The next day she provided Mark Livingstone with copies of documents that she had printed out that she said showed the claimant's involvement in property letting.

3.16 On 28 September 2011 Mark Livingstone contacted the respondent's IT department to ascertain the process for monitoring the claimant's IT usage. He was advised that it was possible, but that the approval of his Clinical Director would be needed.

3.17 This was not the first time that Mark Livingstone had made enquiries about the claimant's use of her computer. Sam Byers had worked alongside the claimant a year or so previously, and had allegedly commented upon her internet usage, though she has denied this subsequently . In or about 2010 Mark Livingstone asked John Speight in IM&T how to monitor her usage, and had been advised what log-in to use. He did so, but found only generic usage which he could not attribute to any one individual. He did not raise any issues with her at this time. On or about 29 September 2011 he contacted John Speight again, to ask about monitoring the claimant's e-mail account. He was advised to speak to Mark Taylor , and that he may need the approval of the Clinical Director.

3.18 On 7 October 2011 Mark Livingstone looked at the claimant's preferred computer (several being available for use in the department) and found a number of files and directories that suggested links to residential property and property related matters.

3.19 On 10 October 2011 Joanne Bramall sent an e-mail to Mark Livingstone, in which she referred to her recent conversations with him, and said that she was finding it increasingly difficult to do her job properly due to the behaviour of the claimant. She said that she trusted that he would deal with the accusations that had been made by her, but expressed some scepticism, as , she claimed, that the claimant had "got away with such behaviour for many years". She went on to say that she had printed off the respondent's whistleblowing policy, and planned to go down that route should no action be taken. The terms of this e-mail, but not a copy of it, are set out in Mark Livingstone's personal record of events , contained at pages 467 to 479 of the Bundle, on the first page. This document is a typed version of notes that Mark Livingstone had started to keep at the time.

3.20 Having received this e-mail Mark Livingstone told Joanne Bramall that he had found more information on the computer which the claimant regularly used, and that he would be discussing the matter with Philippa Jones. Mark Livingstone did so on 12 October 2011 , and she advised him to speak to HR.

3.21 On 14 October 2011 Mark Livingstone spoke to Jane Waterhouse, HR Advisor for Diagnostics and Support. She later advised him that a request to access another employee's e-mail account would have to be authorised by a Divisional Director , and sufficient justification would have to be provided. She also advised that a preliminary investigation could be carried out without the employee being told about it. Mark Livingstone had asked what period of time the investigation should cover, and Jane Waterhouse suggested 2 months , but it may be necessary to go back further, perhaps 4 months. Statements would also be needed from witnesses. A note of this discussion is at page 466 of the Bundle.

3.22 On 19 October 2011 Mark Livingstone received a document addressed to him, and signed by Joanne Bramall, Joanne Appleton, Janet Rishton and Liz Craig, all subordinates of the claimant, in which they said this:

"We are writing to inform you of our concerns regarding Denise Fenton. Unfortunately it has come to our attention that she is using Trust facilities to conduct here (sic) *own business interests. This has been going on for sometime however more recently it has begun to take up a significantly large amount of her working day. Denise runs her own property business and also has a concern in Spain. On a daily basis she uses her Trust email account to conduct this business. She also types up documents , and utilises the phone, printer, photocopier and fax. This has gone on for some time but whereas it used to be confined to her lunch hour it now takes up a large proportion of her day. We feel that something must be done as she is doing less and less of her own job role and setting a very poor example to other staff. Her actions are noticed by many people in the Department who feel that she has 'got away' with abusing the system for a long time.*

It has not been an easy decision for any of us to come forward with these allegations but we feel we are all guilty of being a part of it if we do not inform you as our Manager as to what is going on."

3.23 This document (page 550 of the Bundle) is signed, and dated 19 October 2011 by its four authors. The same day Mark Livingstone went into the e-mail history on the claimant's computer (i.e the one he had identified as the most likely one that she had used), and noticed that recent files had been removed from the computer, though they were visible in the history.

3.24 Mark Livingstone spoke to Philippa Jones again and was told that Chris Sleight , the Divisional Director – Diagnostics and Clinical Support, had given his consent to the investigation being carried out. He then contacted Mark Taylor in IM&T, who informed him that he would contact Nick Hayes , of HR for his approval.

3.25 On 2 November 2011 colleagues of the claimant informed Mark Livingstone that the claimant had been arriving late at work, and not adjusting her flexi time records to reflect this, so as give back the time she was taking. Mark Livingstone looked into this and found that for two dates, 17 October and 25 October the claimant had not informed him that she would be late, but had done so in respect of 27 October 2011.He made a note of the dates in question (page 551 of the Bundle).

3.26 On 1 November 2011 the claimant was to have attended an off - site Aseptic working group meeting with John Landers , another Aseptic Services Manager. Mark Livingstone had assumed that she had done so, and the holiday sheet records showed that the claimant was due to attend it, but he learned on 2 November that she had not in fact attended that meeting.

3.27 There was, on 2 November 2011 an exchange e-mails between the claimant and Mark Livingstone between 10:05 and 19:13, involving also Joanne Appleton, in which there was further discussion about the drugs stock situation, and returns. Having initially questioned with Mark Livingstone in her first e-mail, sent also to Joanne Appleton, why , as she had been told, it was procedure that all drugs from

white boxes went in the bin, and saying to the recipients that they needed "to be more public with how you handle returns and how you use their money", in another e-mail at 18.48 the claimant stated that there was a need for clear guidelines, and said that the most important question was "who decided it was acceptable to throw any kind of drugs away ???". This exchange of e-mails is at pages 552 to 552e of the Bundle.

3.28 Also on 2 November 2011 Joanne Bramall told Mark Livingstone that the claimant been in touch with the BBC about the wastage of money by the respondent failing to return unused medication. Joanne Bramall had got this information from Joanne Appleton, who had claimed to have overheard the claimant on the phone to the BBC. Mark Livingstone contacted Philippa Jones about this. This was, in fact, not so, the claimant did not contact the BBC. Joanne Bramall also said that the claimant had completed the sale of a house on 1 November 2011.

3.29 At 15:59 that day John Landers , the Aseptic Services Manager at Crumpsall, sent an e-mail to Mark Livingstone to inform him that the claimant had just telephoned him to give her apologies for missing the previous day's meeting with him as she had had car issues (page 553 of the Bundle).

3.30 The same day Mark Livingstone checked the claimant's flexitime records, and noted her entry for 1 November 2011. He put a note on it for her to log her times for the dates in question. She sent him an e-mail later that day, which he has set out in his personal record document at page 470 of the Bundle, in which she said she had no recollection of what she had taken as unplanned flexitime on the dates he had referred to. She said she was sure she would have taken this time off her lunchtime or worked longer at the end of the day to balance this out. She did acknowledge that she must remember to write in all her overtime that she had never claimed for when she had worked her lunchtime or after 5.00 p.m. She thanked him for reminding her.

3.31 Later that day the claimant complained to Mark Livingstone that she was being treated differently from another employee who had come in late , but not recorded this on her flexisheet. Mark Livingstone said he would investigate this.

3.32 On 3 November 2011 Mark Livingstone carried out a further examination of the computer that the claimant had been using. He printed out a screen dump of activity on the computer in question from 26 September 2011 to the end of October 2011, but in some instances this printout relates to activity as long ago as 2005. This printout is at pages 482 to 489 of the Bundle.

3.33 Amongst items found by Mark Livingstone, which did not relate to the claimant's NHS role, were computer activities relating to:

103 High Street, Norton
An Assured Shorthold Tenancy Agreement
Commercial Property and Business Property Link
Completion Statement and other entries relating to Font Street, East Boldon
Insurance and rent for East Boldon property
Arrears and windows for Font Street

Land Registry Practice Guide
Norton Property Information
RBS Propertywise
Tenant Application Form
Hardship – Stockton
A Possession Notice

3.34 Mark Livingstone then had a further conversation with Philippa Jones, and contacted Nick Hayes. He was informed that Nick Hayes had given his permission to the investigation proceeding.

3.35 On 7 November 2011 in response to an e-mail sent to the rest of the Department including the claimant, in which Mark Livingstone stated that the value of stock returned on Saturday 5th November was £2632, and some 214 items were returned, the claimant replied "never mind the returns what was the value of what was thrown away!" . Mark Livingstone replied that e-mail by an e-mail at 9:46, in which he said "Who's counting ?", to which he added a "smiley face" emoticon.

3.36 On 8 November 2011 Mark Livingstone had a further discussion with Mark Taylor, and was told that he had asked Sue Smith , a Counter Fraud Officer , for her advice. Mark Livingstone met with her later that day.

3.37 Sue Smith then set about gathering information, and started to obtain details of the claimant's telephone, e-mail and internet usage. She received this information on 15 and 20 November 2011.

3.38 On 17 November 2011 Mark Livingstone looked up various phone numbers he had been provided with to assist Sue Smith in her investigation. He found that they were numbers for the North East, and were of estate agents , council offices and solicitors. Whilst he has said that he e-mailed his findings to Sue Smith, no such e-mail is contained in the Bundle.

3.39 On 22 November 2011 Joanne Appleton made a complaint in writing to Mark Livingstone about the claimant's behaviour on the previous day, when Mark Livingstone had been out of the office . Her account was set out in writing and signed by her, and is to be found at page 555 of the Bundle. In this document she reports how the claimant was using two phones in the office, and was speaking to her solicitor. She and others believed that the claimant was buying a house. She overheard the claimant giving her a contact e-mail (work e-mail) to an estate agent. She was looking at houses on the Internet. She said that the claimant's activities in the office had got to such a level that it was affecting her own work, she found it difficult to concentrate on her own work listening to the claimant's non- NHS activities. She reported how Charlotte Ollerenshaw - Ward had noticed the same thing , and how she too had found it difficult to work on the previous day. Finally Joanne Appleton reported that this sort of behaviour regularly happened when Mark Livingstone was out of the office and that the claimant's running of the business from the office was escalating to her spending most of her working day carrying out non-NHS business.

3.40 On that day Joanne Bramall also came to see Mark Livingstone. She informed him that the previous day she had answered the telephone to a solicitor wishing to speak to the claimant. She had told the solicitor that this was an office phone, and not to use it for personal use. The claimant had subsequently learned of this, and had questioned another colleague Debbie Greene , as to whether it was her who had answered the telephone. Joanne Bramall was concerned about this and wanted to tell Mark Livingstone about it. Joanne Bramall was also concerned about how the claimant would react if she found out about the investigation that was being conducted without her knowledge. Joanne Bramall also reported that the claimant had told her that she would soon be able to retire because of the income she had from her property business.

3.41 On 23 November 2011 Mark Livingstone spoke further with Philippa Jones, and subsequently met with Sue Smith who shared with him the results of her enquiries into the claimant's work e-mails.

3.42 On 24 November 2011 Mark Livingstone sent an e-mail to Philippa Jones, and Cath Hignett, the Acting Divisional Human Resources Manager. That e-mail is at pages 556 to 557 of the Bundle, and the subject line reads "Ongoing Investigation and Request to Suspend". In this e-mail Mark Livingstone refers to the information provided to him by Sue Smith, and attaches a statement dated 21st of November 2011 (whose statement this was is unclear). In this e-mail Mark Livingstone presents his case for the immediate suspension of the claimant. In it he sets out some nine points in support of his request. In point 2 he says that he has been shown evidence within her e-mail attachments that indicates the claimant is also dishonest, as well as using trust time and equipment. At point 3 he says that he did not think the claimant would stop doing this personal work when asked, but that she was likely to revert to doing it in her lunch hour and then argue the case when found out. He goes on to refer to her being a disruptive influence, and argues that although her suspension would have an impact on the Department, he did not consider they would notice, as staff in the aseptic section would be able to schedule their work accordingly. He went on to say that staff did not consider that the issue was being addressed, and he considered that this was undermining his managerial authority and respect if allowed to continue.

3.43 In this e-mail Mark Livingstone went on to say that he was still absorbing the ramifications of the extent of the evidence of her actions of dishonesty. There was the additional evidence of her saying she was attending training days when she was not, and he suspected that she may be claiming time back for completing work out of hours on days when she was doing her own personal work during working hours. He referred to this being a further reason to consider her to be a dishonest person. He concluded asking that there be an agreed clear plan to how to proceed in place for when he returned from leave on 28 November 2011.

3.44 Philippa Jones discussed the matter with Cath Hignett and Nick Hayes, and was given authority for the claimant to be suspended. On 28 November 2011 she was called to a meeting with Mark Livingstone and Philippa Jones, in which she was suspended by Philippa Jones from duty with immediate effect on full pay. She was provided with a letter from Philippa Jones, confirming her suspension dated 29 November 2011 (pages 562 to 563 of the Bundle) . She was informed that

allegations had been made that she had misused Trust equipment, facilities and time in relation to the pursuit of her personal business. Further, it was alleged that she had failed to attend planned offsite meetings on 31 October and 1 November 2011 and did not advise her manager of her non-attendance nor did she return to work on the days in question .

3.45 The claimant also received a letter of the same date (pages 560 to 561 of the Bundle) from Chris Sleight, Division Director of Diagnostics and Clinical Support. In that letter he informed the claimant that he had appointed Mark Livingstone to act as the Investigation Officer, and had also referred the matter to Sue Smith, the Trust's Counter Fraud Officer. Mark Livingstone was copied into this letter, but seemed unaware that he had been appointed the Investigating Officer.

3.46 The claimant wrote to Chris Sleight on 1 December 2011 (pages 567 to 568 of the Bundle). In that letter she challenged her suspension, questioning whether a prima facie case had been made out, and contending that it was precipitous and disproportionate. She pointed out that she had not been given any opportunity to provide an oral or written response. In relation to the alleged pursuit of personal business interests, she referred to an extract from the Information Governance Policy of the Trust, which defined "permissible use" as being "reasonable occasional personal use", and non – permissible use as accessing sites that may bring the Trust into disrepute. She contended that her use had been within the ambit of permissible use. She sought clarification of definition or examples of permissible use. In relation to the second limb of the grounds for her suspension , failure to attend off site training, she said this allegation was completely without foundation, and sought particulars of each and every allegation.

3.47 The same day the claimant instigated a grievance against Mark Livingstone. She did so by e-mail to Cath Hignett at 11:09 (page 571 0f the Bundle). She stated that she wanted to do so under the Trust Policy for Bullying and Harassment. She went on to ask that, in view of her complaint, Mark Livingstone did not act as the Investigating Officer. Later that day , in a further e-mail she stated that she had not detailed the allegations against Mark Livingstone, as she was waiting to see her union representative. In the meantime she said that she did not want to use the Informal process, but would go to the Formal stage.

3.48 Cath Hignett acknowledged the claimant's grievance, and her request, by a letter of 1 December 2011 (page 578 of the Bundle) and told her that an Investigating Officer would be appointed into the grievance, and her request for Mark Livingstone to be removed as the Investigating Officer into her disciplinary issues would be referred to Chris Sleight.

3.49 By letter of 2 December 2011 (page 579 of the Bundle) Sue Smith introduced herself to the claimant as a Local Counter Fraud Specialist , and invited her to a meeting on 19 December 2011, to investigate the allegations that she had misused Trust equipment, facilities and time in relation to the pursuit of her personal business, and two allegations that she had failed to attend off site training events. In this letter the claimant was told that the interview would be conducted under the provisions of the Police and Criminal Evidence Act 1984 ("PACE") , and that she could have a solicitor or other qualified legal representative present.

3.50 By letter of 5 December 2011 (page 583 of the Bundle) Chris Sleight informed the claimant that he had appointed Anne – Marie Smith, Associate Director of the Division of Diagnostics and Clinical Support as Investigating Officer for her grievance.

3.51 By a further letter of the same date (page 584 of the Bundle) Chris Sleight also replied to the claimant's letter to him of 1 December 2011 . He explained how she would be given her chance to respond in the interview that had been arranged for 19 December 2011. He said he would write separately regarding the position of Mark Livingstone.

3.52 Anne – Marie Smith wrote to the claimant on 6 December 2011 (pages 585 to 586 of the Bundle) making the arrangements for the claimant to be interviewed for her grievance on 16 December 2011.

3.53 The claimant responded to Chris Sleight's letter by e-mail of 12 December 2011 (page 587 of the Bundle) , in which she expressed her dissatisfaction with his response, and raised again the issue of Mark Livingstone's appointment as Investigating Officer, which had not been addressed. She asked for a copy of her contract of employment.

3.54 By letter of 13 December 2011 Chris Sleight wrote further to the claimant, in reply to her e-mail of 12 December 2011. In relation to the position of Mark Livingstone, he said he would take a decision once the claimant's Bullying and Harassment allegations had been considered by Anne – Marie Smith. He went on to deal with other points made in her e-mail, effectively reiterating the Trust's position.

3.55 In the event the grievance meeting of 16 December 2011 could not go ahead due to the non – availability of the claimant's union representative. It was re-arranged for 22 December 2011.

3.56 On 14 December 2011 Chris Sleight sent the claimant a copy of the Statement of Terms and Conditions of Employment dated 3 March 1997, and related documents.

3.57 On 19 December 2011 the claimant attended the PACE interview held by Sue Smith. She was accompanied by a solicitor, Jonathon Alweiss. The interview was conducted under caution and recorded. Another Counter Fraud Specialist, Allan Boyd, was also present. Prior to the interview Sue Smith had provided to the claimant's solicitor an e-mail analysis of the claimant's non – work related e-mails from 1 August to 28 November 2011, telephone records for the period 22 August to 28 November 2011, details of internet access from the computer and log in used by the claimant during October and November 2011, the Information Governance Policy and the Trust's Employee Handbook.

3.58 The notes of the interview were not originally contained in the Bundle, but were added during the course of the hearing. They are at pages 3055 to 3115 of the Bundle. The interview was conducted between 11:00 and 1:15, with two breaks, so that it has been recorded in three sections.

3.59 In the course of the interview the claimant was asked whether she had any business interests outside work. She said , no, her only real interest was in looking after her 85 year old mother, for whom she was solely responsible, and had to deal with insurance, banks, doctors' appointments and the like. She was asked about a company called Propertywise UK Limited, of which she was the sole Director. She explained how this was something her accountant advised her to do, and was a non – trading company. She had not declared this as an interest on the respondent's Declaration of Interest form because it was not something she saw as conflicting with the Trust.

3.60 The claimant was taken through her e-mails from the log provided to her solicitor. She agreed that she had used her Pennine Acute Trust e-mail account, but said that she had done this in time that she would deem her own. They would only have been sent of necessity, when the persons she was dealing with would not be available outside the hours of 9 to 5. She explained how they were fragmented throughout the day, as she did not take a dedicated lunch hour , and her lunch could be broken up into 5 or 10 minutes whenever she could take them. She did not leave the department, or go far away from it, and either had no lunch , or had a lunch that was spread out. She maintained that the e-mails had only been sent in time that would otherwise have been her own time. She was not in the habit of using NHS time for anything else.

3.61 The claimant went on to explain that it was quicker and easier to send an e-mail than to make a telephone call, which would require her to leave the Department to use a mobile phone outside of the hospital. Allan Boyd put it to the claimant that the use of e-mail was very extensive , and was not intermittent. It looked as if the claimant was coming into work and sending e-mails straightaway. The claimant replied that this was possibly in response to e-mails that had come in. She said that she did not sit on the Internet and socialise , and that it was common practice in the Department for people to use their PCs for personal e-mails .

3.62 The claimant was asked if she had ever told her manager that she used her computer for this purpose , and she said that she didn't believe that she ever had to tell him that , and she had no such understanding . She was a manager herself , none of her staff had ever requested from her that they could use their e-mails for their own personal use. She said that perhaps they were taking it as a right that they were using those e-mails , if it was in their lunch break, or in after work time, or before work started. She suggested that there was no contra- indication to using, receiving and sending e-mails within that account providing did not bring the Trust into disrepute. She stressed that the content of the e-mails was not obscene or anything that could bring the Trust into disrepute.

3.63 Sue Smith then put to the claimant that the content of the e-mails seemed to be in connection with properties that the claimant owned, and that this was not consistent with what the claimant had previously told her about the company Propertywise. The claimant disputed that the content of e-mails related to that company , but Sue Smith referred her to specific entries in the e-mails relating to properties at 99 Gerald Road, Salford , 18 Lydford Street , 83 Carlton Avenue , 34 Suffolk Street and 58 Front Street . The claimant denied that she bought and sold properties, or that she traded in properties. She said that she made enquiries about property

which might be of interest to her, but this was not for a trade. She denied that she operated a business or trade through the Trust. There was further discussion about the e-mails relating to 48 Heaton Street and communications with a solicitor. She accepted that she did look at property on the Internet , and did receive e-mails from sites such as Zoopla or Rightmove. She accepted that she had given her Trust e-mail address, but said that she had done so only when it was absolutely necessary. It was necessary because this was the only time, i.e. when she was at work, that people could catch her. She referred to looking for property around the end of November which she would ideally like to live in with one next door, or close by, for her mother, and perhaps a carer, to live in.

3.64 Sue Smith asked the claimant how many properties she actually owned. She said that she had two properties that she had previously lived in. She was pressed for details of the addresses, and went on to explain how her first property was 18 Livesey Street, she then moved to , firstly, 7, and then 8, the Stables.

3.65 Sue Smith then asked the claimant about a property in the North East, High Street Norton, which the claimant accepted was owned by Propertywise. She claimed that the company didn't trade. She went on to admit that she personally owned a property in Boldon, (in the North East) which she had had for a long time . Sue Smith put it to her that looking at the e-mails they seemed to relate to somebody who was running a business with regards to property . The claimant denied this, but Sue Smith pressed her that she was running a business, letting out property.

3.66 When Sue Smith put it to the claimant that she had previously suggested that she was not involved in Propertywise, the claimant said that she was simply interested in pursuing various properties and could have put 100 addresses onto the computer. When it was put to her that she had used the work computer for this purpose, the claimant said that this was in her own time. This led to a further discussion about the claimant's working day of her contention that she did not take her lunch hour, and used what was her own time for the sending and receiving of these e-mails. She said that she was entitled to a morning break , which she did not take and was entitled to 60 minutes a day unpaid time . Sue Smith asked her as to what hours she actually worked, when she would arrive and leave work. The claimant said that she started at 8.30 and was contractually expected to work 371/2 hours from 8.30 to 5 o'clock Monday to Friday. She said she inevitably worked over her contracted hours, but stayed later, which she did, not claiming time back because she was not allowed to claim time back. Sue Smith's understanding was that time could be claimed back, but the claimant said that it could not be , unless it was an authorised late night.

3.67 Allan Boyd put to the claimant there was extensive use. The claimant replied that there was only recent extensive use. She went on to say that it was justifiable because it was in her own time, she was not taking time out of Trust time. She was asked what she, as a manager, would do if she found a member of staff doing the same thing. The claimant said that she would look and see what time had been spent, and ask them if that was in their own personal time. She went on to say that she would be satisfied if they responded that it was, and if she walked past her staff when they were on the Internet, she would not interfere because that was their

protected time. She was asked if she was saying that this kind of usage was widespread, to which she replied that it was “absolutely widespread”.

3.68 The claimant’s solicitor at this point asked if there was any direction as to what was tolerable use, and Sue Smith referred to the Information Governance Policy. She read extracts from it, sections 18.6, and 18.6.1. Occasional reasonable personal use was permitted, provided this did not breach any Trust policy or interfere with the performance of a person's duties, or the duties of any others. She also referred to section 18.8.11, the last item of which prohibited the use of e-mail to promote personal business, or to provide personal or financial gain except as may be permitted by trust policy and procedures.

3.69 Sue Smith then asked the claimant whether she considered that her usage was reasonable personal use. The claimant replied that she did not believe that she had breached section 18.6, as she had not interfered with performance of her duties or the duties of any others. If she had done, she would have expected to have been told. She had put in more than her contractual hours with no expected repayment. All the e-mails were sent in her own time, time that never adversely affected her work in 31 years of working for the Trust. She confirmed that she thought her use was reasonable, and that use of her workplace e-mail was purely for convenience, and was a necessity when people needed to contact her. She liked to browse on things that were of particular interest during her spare time, or within her lunchtime, but she was not like most of the other girls, who look on sites such as Next or Amazon.

3.70 The discussion continued in this vein with Sue Smith putting it to the claimant that her e-mail communications suggested that she was involved in a property business. The claimant denied that she ran a business, and only responded to e-mails sent to her when it was absolutely necessary. She went on to explain that she did not have a normal time for break, there was no designated time for her to do so. She could not leave her desk and make a phone call like other people as she was in demand as part of a reactive service and could not plan her day.

3.71 After further detailed discussion about the claimant’s working day, in summary the claimant said that she reiterated that these activities were in her own time and not on Trust time. Allan Boyd summed up to say that what the claimant was saying , in a word , was that her usage was reasonable. The claimant replied that she had a reasonable belief that her usage was not any more than anyone else's in the Department. Sue Smith at this point said that that was not the question, but the claimant disagreed. In further discussing whether her usage was reasonable, the claimant said this:

“But there again I have no knowledge of how, what is reasonable because I don't know how many times other people send e-mails, personal e-mails and their account by was like that to be noted, and I would like to know whether a comparison has been made or have I just been singled out for monitoring this activity. I have never been disciplined or reprimanded for any activity that has interfered with my duties.”

3.72 Sue Smith, as the tape was approaching the end, proposed that there be a pause, which was then taken. She said nothing in response to the claimant's comments referred to in the preceding paragraph.

3.73 The interview continued some 6 minutes later, and at the beginning claimant went over some points from the previous interview in relation to the Register of Declared Interests, and the Information Governance Policy.

3.74 Sue Smith now wished to move on to the telephone calls, and it was to this topic that the interview now turned. It was put to the claimant that the log that had been provided to the claimant solicitor showed a considerable amount of usage. The claimant firstly stated that there did not appear to be any formal policy in relation to telephone calls, there was merely one line within a staff handbook which she had not received. There was then some discussion about the telephone in the office, which the claimant claimed was accessible to all staff in the Department. She had been through the log that had been produced and while she could associate herself with some of the calls, she did not recognise all of them. Their own analysis revealed that over a 14 week period the call log reflected a total of 587 minutes. That broke down to 41 min a week, and 8 minutes a day.

3.75 Sue Smith put to the claimant that a lot of calls were to estate agents and solicitors, and were obviously non-work related. The claimant accepted and recognised these calls. There was further discussion as to how many of the calls the claimant would accept she had made, and at one point she suggested that the total cost involved was some £4. After further discussion about the open accessibility of the telephone in question , the claimant went on to say that it was common practice, and commonplace, to use the phone in the hospital pharmacy Department for personal calls. As the staff are not allowed to use mobile phones she considers anybody who did use the telephone did so out of necessity. She had however witnessed people booking airline tickets, phoning schools, making hairdresser appointments, speaking to teachers and phoning chiropodists. She went on to say that if these calls were occasional and did not interfere with work this was acceptable and she did not impose any restrictions on her staff. She did not see that they would do anything wrong if they used the phone in this way, because they cannot use their mobile phones.

3.76 At this point Sue Smith said that she would stop that there because this was about the claimant really, rather than other people, at the moment. The claimant asked why it was only about her, but was told this was the reason why they were there.

3.77 There ensued further discussion about 23 November 2011 in particular. There had been particularly high level of activity recorded that day, and the claimant accepted that she had spoken to Mr Allweis, her solicitor, that day . Sue Smith then pointed out that there was another call later that morning to her solicitors, and then to estate agents, and further calls from the solicitors. The claimant pointed out that one of these was only 30 seconds long, but Sue Smith said that she was not talking about the length, these were all interruptions, calls either coming in or going out . There was an awful lot of activity at that time. She asked the claimant was something happening on the 23 November that she was dealing with, particularly because

there seemed to be lot of calls made between her and her solicitor, and estate agents at this time.

3.78 The claimant replied that, from recollection, she thought that she had expressed an interest in the particular property, and was trying to arrange viewings. It may be that she was looking at a property, but this was nothing illegal or immoral. Sue Smith said that there was nothing illegal or immoral, but there were a lot of phone calls on that day. She also highlighted the times at which they were made, 9:34, 9:36, 10:13, 11:10 and throughout the day. She asked the claimant if she saw that this was reasonable usage , and the claimant replied that it was occasional. When pressed as to whether this was reasonable use, the claimant went on to say that she had never seen a staff handbook, and she had not seen any policy, only a one line statement. She did then say that she did not think that it was unreasonable.

3.79 There was further discussion as to precisely what telephone numbers the claimant recognised and would accept that she made , but any such calls were reasonable, and made out of absolute necessity. She repeated that it was common practice for the people in the department to use the phone for personal use.

3.80 Sue Smith then went on to point out that she had compared the e-mail usage and telephone usage for 23 November 2011. There had been extensive use throughout that day and she asked the claimant if was something occurring on that day which necessitated her making a lot of phone calls and sending lots of e-mails. The claimant checked her annual leave record, and on 22 and 24 November she had taken annual leave. She said therefore that Sue Smith was absolutely correct in her assumption that there was some activity, for her to need to take those days as holiday. She went on to say that there must have been a bit of the crisis then, and, on reflection, she should have taken 23 November off work as well.

3.81 Sue Smith asked her what the crisis was, but the claimant could not recall. Sue Smith said that this did not seem to be related to her mother, but did involve ringing solicitors, Right Move, solicitors again, estate agents solicitors again and another firm of estate agents.

3.82 There was further discussion about this day, and about the calls to her solicitor. The claimant contended that the call to her solicitor were not around the property business, as Mr Allweiss did not do conveyancing. Mr Allweiss confirmed that he was usually more focused on litigation.

3.83 The interview then moved on to discuss further dates of activity, such as on 17 November, the 9th (of which month is unclear) and how the claimant's work was not disrupted by these interruptions.

3.84 In answer to Allan Boyd putting to the claimant that there was extensive and abnormal use, and asking how she could justify that, she said this:

"If you make that assumption, even if those phone calls were made by myself, even if, the total sum does not exceed the time which are not paid by the trust and I am entitled to do what I like. I can go and stand on my head in the car park if I want to. I can run around naked if I want, but I choose to do what I want to do in that time .

Now, okay, you're saying it may be in breach of the policy. I don't say it's unreasonable. I haven't exceeded (sic) *to any*. *By the fact that the head of Department walks in when people are on the phone and never makes a judgement and never says anything. He has acquiesced to the fact that it is acceptable to use the department phone. I've told you I've never had a staff handbook. I do not think that unreasonable not have not, I know you have put a spreadsheet together, but you cannot attribute every single one of those phone calls if that explains it and that sum total does not exceed any time that I'm not paid by the Trust."*

3.85 At this point Sue Smith proposed that they move on and asked Allan Boyd if he had any further questions on this topic . He did not, saying to the claimant that she was saying that some of the calls were not hers, but that they did not want her to "go off at a tangent in terms of use by other staff". The claimant replied that she appreciated this, but asked if this was not a snapshot part of a larger picture, because "in fairness and equality" what she was doing had to be compared to what other people do as a right ? Allan Boyd responded and asked if she was saying that this was custom and practice, for people to misuse or abuse these things. The claimant said that she was not saying that this was misuse or abuse. Sue Smith summed it up as the claimant was saying that she considered this to be reasonable use, which she agreed.

3.86 The interview then turned to address the internet usage. As the tape was running out the interview was again interrupted at 12:30, and continued after a short break at 12:35. Before the break , Sue Smith had produced material relating to October and November, and appreciated that some of this would represent only one click of a computer mouse each time. She had discounted many items, and only included those which were obviously not work related. There was discussion as to which PC had been examined, and this was identified as the generic PC used by the department on the desk that the claimant used. It was used by everyone, the claimant said. Sue Smith identified Zoopla as a site the claimant had visited. It was put to her that this had been at 10:58, and hence not at lunchtime. The claimant responded that the term "lunch hour" was a loose term, and did not really apply to her situation. She took very fragmented breaks. She had analysed the material that had been disclosed, and over a four week period the average usage was 19.6 minutes per day for October, and 21 minutes per day for November. This was well under any time allowed in her free time or for a dedicated lunch time.

3.87 Just before the break to change tapes, Sue Smith referred the claimant to section 15.4 of the Information Governance Policy. She highlighted how reasonable, occasional , personal use was permitted , with the permission of the line manager. She asked the claimant again if she thought her internet use was reasonable occasional use, to which she replied that she did.

3.88 Upon resumption of the interview at 12:35 the interview turned to the issue of documents stored on the claimant's work computer which were personal and not work related. She agreed that she had stored such documents on her work computer, and explained as her reason for doing so that she did not have a good facility for this at home. Her home computer had crashed a couple of times and she had lost information. There ensued a discussion of specific documents relating to specific properties, and the claimant was asked if she simply stored documents on

her work computer , or worked upon them as well when at work. She said she only worked on them when she was not working , or on a dedicated break time or lunchtime. Sue Smith referred her further to the Information Governance Policy, and section 10.14.1 which provided that all Trust IT equipment and IT systems must only be used for legitimate Trust business purposes only. The claimant looked at this, and went on the say that she thought this was in contradiction of section 18.6.which allowed occasional , reasonable personal use. She suggested the policy was selective, which Sue Smith denied. She recapped that the claimant had said that she used her computer to store personal documents, which she agreed she did occasionally, but went on to say that she did not think that she was different to any other person in the office.

3.89 There followed a more general discussion, where the claimant was offered the chance to ask questions, and her solicitor raised the issue of her contract of employment which had been requested. Sue Smith said she would check into the position. The claimant also mentioned days when she had been on holiday, and these too needed checking.

3.90 The claimant then went on to make reference to having made protected disclosures within the last two to three months, including one relating to a member of staff stealing medication. She queried why this had not been reported to Counter – fraud, but she had been . Sue Smith said it would not be reported to her if it was theft, as she only dealt with fraud.

3.91 The claimant then said this:

"Right, so I have made a protected disclosure about that and I have made another protected disclosure about practices in health and safety patient concern and my concern, which I want noted for the record, is that any allegations concerning this, why I have been singled out, why I have been victimised, are in retaliation of those whistleblowing disclosures and I want to make that absolutely clear at this stage, because it appears to me that I am the only person in the Department who has come under scrutiny will stop that I'm the only person whose PC has been monitored and the only person whose phone has been monitored and I am the only person whose e-mails have been monitored and therefore (sic)*."*

3.92 In reply, Sue Smith pointed out that this was her investigation about the claimant alone, and that these things are being done because she had instigated it.

3.93 There ensued a conversation between the claimant and Allan Boyd, from which it transpired that she had previously spoken to him by telephone in November 2011. This is a slightly odd and cryptic conversation upon which nothing turns.

3.94 Sue Smith then proceeded to move onto another allegation in relation to the claimant's non-attendance at training events. The claimant asked who had made this allegation , and was told that Sue Smith could not tell her. She went on to explain the allegation related to 31 October 2011 and the claimant was booked to attend a training event. The allegation was that she did not perhaps attend the full meeting. She asked the claimant what she wanted to tell her about this, and she said that she did attend. She expressed concern that there had been such an

accusation relating to something so professional. Sue Smith continued to ask if she attended for the full day from 10.00 until 4:30 p.m. The claimant replied that she came out to take some phone calls, and she did not have the lunch was provided. She said she could provide a copy of the certificate of attendance. The claimant went on the say again that she was being singled out and victimised , facing allegations that were totally without foundation, because she had whistleblown, and this was retaliation.

3.95 Sue Smith then moved on to the next allegation which was in relation to an NWASG meeting at Whiston Hospital on 1 November 2011. The claimant agreed that she did not attend this meeting. She explained that her normal practice would have been to attend the meeting in the morning and take the afternoon as flexitime. The meetings had previously been at Wythenshawe, but she did not go to this one, as she had to look after her mother. She would have taken this day as carer leave, and would have informed Mark Livingstone of this. Sue Smith questioned her as to whether she did in fact telephone Mark Livingstone, and the claimant was unsure. In terms of any paperwork or form, she said that she would complete such a form but not always the same day. She was unsure if she had rung in on that day, or indeed had completed a form for carer leave . There was further discussion about the detail of that morning on whether and when the claimant would have rung . She said that without exception, her practice was to phone. She may have phoned the office and spoke to someone else, but if Mark Livingstone was unaware of this, it may not have been actioned.

3.96 Sue Smith then produced the holiday form relating to this date, and the apparent alteration thereon to show an “F” in place of an “M”. There ensued further discussion about entering of holidays and flexitime and whether people entered their own or forms were completed by others. After further examination of her annual leave revealed that the claimant was in the following day, and she considered that the flexitime entry would have been made retrospectively. There was further discussion as to how the claimant would have recorded the flexitime if she had gone to the meeting. She went on to say that she had not submitted any petrol claims or had attempted anything fraudulent for that day by saying that she had attempted to attend the meeting.

3.97 Sue Smith then summarised the claimant's responses in relation to the various allegations that have been made, which the claimant and her solicitor agreed were a fair summary. Her solicitor additionally prompted the claimant to add that she used her own personal resources for the benefit of the Trust, for example, by making phone calls at weekends when on – call, for which she had never claimed any money back. She had, however, not been particularly vigilant in completing and filing petrol claim forms, and if she owed the Trust anything, there may be a set-off.

3.98 There was discussion as to the next steps that would be taken and where Sue Smith’s report would be sent when completed . The claimant was told it would be shared with HR to decide whether it was to go down a disciplinary route, prosecution route, or report to a professional body or the like. The interview ended at 1:15 p.m.

3.99 By letter of 20 December 2011 (page 603 of the Bundle) Philippa Jones extended the claimant's suspension for a further 4 weeks from 25 December 2011.

3.100 The claimant wrote a letter dated 20 December 2011 to Chris Sleight, in reply to his letter of 13 December 2011 (page 604 of the Bundle). In that letter she requested that Mark Livingstone be removed as investigating officer in the light of her bullying and harassment grievance against him. She confirmed that she had attended the interview with Sue Smith, and raised other issues in connection with her suspension confidentiality and her contract of employment.

3.101 On 21 December 2011 someone from the Trust (it is unclear who) rang the claimant to check that she would be attending the meeting arranged with Anne - Marie Smith to investigate the claimant's grievance on 22 December 2011. The claimant said that she would not be attending this meeting , and that she wished to attend early in the New Year after she had had a meeting with her barrister (see page 605 of the Bundle) .

3.102 Anne - Marie Smith wrote to the claimant on 21 December 2011 (pages 606 to 607 of the Bundle) acknowledging that the claimant was unable to attend the meeting arranged for 22 December, and saying that this was unfortunate that she was unable to carry out the investigation without details of the claimant's complaint. She therefore asked the claimant to submit details of the complaint together with any evidence that she had to support the grievance in writing by 5 January 2012. She went on to say that if she did not receive information as requested by the above date she would be unable to proceed with the grievance and the matter would be closed.

3.103 On 22 December 2011 Jane Waterhouse, HR Advisor, rang the claimant at the request of Anne-Marie Smith to inform her of the contents of her letter of 21 December 2011. Jane Waterhouse made a note of that telephone call which is at pages 612 to 613 of the Bundle. She read out to the claimant the contents of the letter, and recorded that the claimant was unhappy with it. The claimant had said that she wanted to wait for the outcome of the disciplinary investigation before proceeding with the grievance. Furthermore, she considered it unreasonable for her to have to attend the grievance meeting in the same week as the investigatory meeting with Sue Smith. Jane Waterhouse discussed the allegations with her, and how the respondent had a duty to proceed to investigate them unless the claimant wished to withdraw them. The claimant confirmed that she did not wish to withdraw the allegations, and that she was going to "bring it all up".

3.104 Jane Waterhouse in her note made the following comment at this stage:

"This confirms that her B & H allegations are only being made as a knee-jerk reaction to the disciplinary case, and I guess she suspects that ML has made the allegations against her."

The reference to "B & H" was to bullying and harassment, and ML was Mark Livingstone.

3.105 In this conversation the claimant made reference to Chris Sleight's letter of 13 December 2011, in which he had said that he would await the outcome of the claimant's grievance before making a decision on Mark Livingstone's involvement in the disciplinary investigation. The claimant said that she had been told by her solicitor that this was ridiculous , and Chris Sleight did not have a clue what he was doing. Reference is made to going to a tribunal, even if the claimant was not dismissed. The claimant had said to Jane Waterhouse in this conversation if the grievance was dealt with first, whether the allegations are proven or not, Mark Livingstone would still be influenced by the fact that she had made allegations about him, and this would prejudice the disciplinary investigation if he was to investigate. Jane Waterhouse added in this note her own comments at this juncture as follows:

(" She may actually have a point there, and should the matter progress to a tribunal it may well go against us. It may be advisable to Chris to confirm now that after some consideration, he has decided that someone else is being appointed to carry out the disciplinary investigation to remove this potential weakness.)

3.106 Jane Waterhouse's note continued to record the discussion with the claimant in which she had said that the allegations were ludicrous and that she would be seeking redress against the persons who reported the allegations. Sue Smith, however, would not tell her who these individuals were. The claimant also complained about her suspension in this conversation and alleged that Philippa Jones had been grinning during the suspension meeting. There was discussion of a letter that the claimant had received from Philippa Jones, which Jane Waterhouse presumed was to confirm the extension of her suspension.

3.107 Jane Waterhouse added some further thoughts of her own at this point, saying that she suspected that the claimant would not submit anything to Anne-Marie Smith by 5 January 2012 , and asking how the recipient (whose identity is unclear, but was presumably someone in HR, or senior management) wanted to "play it" thereafter, in view of the content of the claimant's telephone call. She had in that call explained to the claimant the timescale set out in the bullying and harassment policy, and explained that this was why Anne-Marie Smith had invited her to 2 meetings within quick succession. The claimant ended by saying that she felt she had done nothing wrong, and the Trust was treating her very badly.

3.108 In early January 2012 the claimant prepared a document setting out her grievance against Mark Livingstone entitled "Bullying, Harassment and victimisation-D Fenton January 2012". The final version of this document is at pages 622 to 628 of the Bundle. This is a seven page document, containing some 24 paragraphs, in which the claimant sets out a number of complaints about Mark Livingstone. In it she identifies two instances of whistleblowing, the first relating to her reporting of a member of the pharmacy staff on suspicion of theft of tablets, and the second relating to her grave concerns in relation to wastage of drugs and medicines.

3.109 In relation to this second issue, the claimant set out in some detail the problems with returns of drugs and medicines in the pharmacy at the Royal Oldham Hospital. She raises, however, other issues in this grievance alleging that Mark Livingstone had been verbally abusive towards her, was overbearing in a supervision of her

flexitime, constantly scrutinising her comings and goings, constantly criticising her, made false accusations of her not verifying her time off, and in various other ways undermined her position.

3.110 At paragraph 12 (page 625 of the Bundle) of this document the claimant makes reference to an incident in November 2011, when she was on holiday, and a telephone call was received at work from an estate agent for her regarding an urgent matter. Someone answered that call, and told the estate agent that the phone in question was for hospital business only, and not for personal calls. She went on to say that she was surprised to hear this, as the phone in the office that she shared had always had incoming calls for the staff of a personal nature. She went on to say that following her suspension in November it became clear that certain staff in the Department were privy to the fact that phones are being monitored , and that the internal arrangement had changed. She claimed that this put her in a vulnerable position, as she had not advised contacts not to call her in the office. She said that this was deliberate in order to catch her out, and that she was set up to fail.

3.111 The grievance went on to raise other behavioural issues, one of which related also to Joanne Appleton and herself being treated differently to other members of staff. She raised other issues as well, claiming also that she had been victimised because she had expressed concern over the selection of North Manchester staff attending a Quality and Values course.

3.112 On the final page she said that she felt that Mark Livingstone would like to get rid of her, and that his life would be easier if he could do that. She went on to say that she felt that Mark disliked her because, to use her own words,:

"I was once senior to him
I show independence of thought
I am assertive
I identify risks
I strive for perfection
I am vocal
I am an expert in my field and an often the person to whom others come for advice, either personal or professional. When switch do not get an answer from the on-call they call me as first-line.
I have a well-defined set of values
I have a strong sense of integrity"

3.113 She concluded by alleging that Mark Livingstone was also guilty of favouritism towards the dispensary manager.

3.114 On 11 January 2012 Sue Smith submitted her report to Mark Livingstone (see page 630 of the Bundle). It was not provided to the claimant. For her report Sue Smith had interviewed other witnesses, namely Joanne Appleton, Joanne Bramall, Elizabeth Craig and Janet Rishton on 9 and 10 January 2012, and had prepared signed witness statements from them .

3.115 The meeting to consider the claimant's grievance was held on 12 January 2012 Anne-Marie Smith, who was supported by Jane Waterhouse, the claimant was accompanied by Gareth Griffiths her union representative. The notes of that meeting with the claimant's annotations added, pages 639 to 647 of the Bundle. In the meeting the claimant went through her grievances as set out in the document that she had prepared.

3.116 16 January 2012 Chris Sleight wrote to the claimant (page 653 of the Bundle) saying that he understood that Sue Smith had completed her investigations into the allegations, which he set out in the three bullet points in this letter. He went on to state that Mrs Smith had recommended that the matter be dealt with under the Trust's Conduct the Disciplinary Procedure. He went on to say that he was appointing Dawn Robinson, Interim Directorate Manager for the Pain Service, as investigating officer in place of Mark Livingstone. Jane Waterhouse was the Human Resources Advisor assigned to the investigation, and Dawn Robinson would contact the claimant to invite her to attend an investigatory meeting to be held in accordance with the trust's policy.

3.117 By letter of 19 January 2012 Philippa Jones extended the claimant's suspension for a further four weeks until 19 February 2012 (page 654 of the Bundle).

3.118 The claimant replied to Chris Sleight's letter of 16 January by an e-mail of 23 January 2012 (pages 657 to 658 of the Bundle). In her e-mail she questions why she has to attend a further interview given that she has already been involved in a lengthy and comprehensive interview with Sue Smith. She suggested that any additional questions could be put to her in writing. She went on to ask for a copy of the recommendations made by Sue Smith, a copy of the report, and the transcript of the notes made at the meeting Sue Smith had with her on 19 December. She also went on to seek clarification of her position during suspension, expressing that she was concerned that she was isolated and her clinical knowledge skills and experience were being eroded given the lack of access to training and development. She went on also to request that she was allowed full legal representation at any further meetings. Finally, she asked what was happening regarding the protected disclosure which she said was of a very serious nature.

3.119 Chris Sleight sought advice as to how to respond from Cath Hignett, the Acting Divisional HR Manager. She gave him advice on the points raised by the claimant in an e-mail of 23 January 2012 (see page 2327 of the Bundle) . At point 2 she advises that the claimant cannot have the copies of Sue Smith's investigations and notes that she had asked for, as Sue Smith had said that she was not obliged to share them with the claimant. She also advised that the claimant could not have legal representation. Finally she made reference to the claimant's comment about protected disclosure, saying she was not sure what the claimant was referring to, and observing that it was "separate". She went on to say: *No doubt DF will try to link it – attack best form of defence".*

3.120 In relation to point 3 raised by the claimant, relating to her position whilst subject to suspension (see pages 656 and 657 of the Bundle) Cath Hignett sent a further e-mail, after Chris Sleight had sent her a draft reply to the claimant.

3.121 Chris Sleight duly wrote to the claimant on 25 January 2012 (pages 659 to 660 of the Bundle). In this letter he explained that the claimant had not yet been interviewed under the Trust's Disciplinary Procedure, the interview with Sue Smith had been under caution in accordance with the Counter Fraud procedures. He said he was unable to provide the claimant with a copy of Sue Smith's recommendations, report or transcript of the notes of the interview, as Sue Smith had informed him that she was not obliged to share them with the claimant. In relation to the claimant's suspension he merely stated that she would remain suspended until such time as the investigation was completed. He informed the claimant that she could not have legal representation at meetings, she was not entitled to legal representation as defined by the Trust process. She was reminded that she was entitled to have a workplace colleague or trade union representative to accompany her at any meeting. Finally he sought clarification of what protected disclosure the claimant had referred to in her e-mail.

3.122 On 25 January 2012 Dawn Robinson interviewed Joanne Bramall, with Jane Waterhouse present. The notes of the interview are at pages 1397 to 1400 of the Bundle.

3.123 Dawn Robinson interviewed Janet Rishton on 25 January 2012. The notes of that interview are at pages 1401 to 1403 of the Bundle.

3.124 Dawn Robinson interviewed Joanne Appleton on 25 January 2012. The notes of that interview are at pages 1404 to 1407 of the Bundle.

3.125 Dawn Robinson interviewed Elizabeth Craig on 25 January 2012. The notes of that interview are at pages 1412 to 1413 of the Bundle.

3.126 Each of these witnesses were shown their previous statements that they had made to Sue Smith in the course of her investigation.

3.127 Dawn Robinson also interviewed Mark Livingstone on 30 January 2012. The notes of that interview are at pages 1414 to 1418 of the Bundle.

3.128 On 30 January 2012 Anne – Marie Smith wrote to the claimant (pages 661 to 662 of the Bundle) referring to their meeting on 12 January. She confirmed that the matter would be pursued through the Trust's Bullying and Harassment (Dignity at Work) policy, and summarised the six allegations that the claimant had made against Mark Livingstone, as:

1. An incident of verbal abuse in October 2011
2. "Overbearing" supervision of flexitime
3. Her exclusion from undertaking ward duties
4. Her exclusion from the communication afforded to other staff in the department regarding the personal use of hospital telephones
5. Her exclusion from general communications afforded to other staff, e.g. acknowledging presence/ greeting in the morning
6. Mark Livingstone's favouritism towards other staff

3.129 She advised that this may involve further investigatory meetings with the claimant and any identified witnesses.

3.130 Mark Livingstone was interviewed by Anne - Marie Smith, with Jane Waterhouse, on 2 February 2012. The notes of the interview are at pages 710 to 712 of the Bundle. Ann Lenhardt and Joanne Appleton were similarly interviewed that day (see pages 713 and 714 of the Bundle).

3.131 On 16 February 2012 Dawn Robinson interviewed Gavin Leahey, the notes of which are at pages 1430 to 1432 of the Bundle.

3.132 On 22 February 2012 Mark Livingstone sent to Philippa Jones an e-mail at pages 670 to 680 of the Bundle in which he identified areas of potential cost savings in the Pharmacy Directorate. This was against the background of a need to make savings (under a Cost Improvement Programme) at the Oldham site of some £50,000. His proposal was for a new structure which would have resulted in a saving of £154,300. Having identified in this document these potential savings, however, he went on to make the case for them being ignored, and not applied to the Oldham site. The claimant's Band 8B post was identified and referred to in this document, but at the outset Mark Livingstone stated that he had taken the approach of locking down all posts that were currently filled. He commented on the number of Band 8B posts at North Manchester General Hospital ("NMGH"), compared to Oldham, which was doing more with less staff, and lower salary costs. He then said this:

"Depending on future events there may well be a further review of the Band 8B posts at Oldham which could further widen the gap between us and NMGH but mean parity between us and FGH" (a reference to Fairfield General Hospital).

3.133 On 22 February 2012 Dawn Robinson wrote to the claimant (at pages 681 to 682 of the Bundle) to introduce herself as the investigator appointed to investigate the allegations which she set out as:

"

- *Using Trust equipment , facilities and time in relation to the pursuit of your personal business*
- *Non – attendance at the afternoon session of a study day on 31st October 2011*
- *Non – attendance at a full day meeting of Aseptic Managers held on 1st November 2011"*

3.134 The claimant was required to attend an investigatory meeting on 1 March 2012 , for the purpose of enabling Dawn Robinson to obtain as much information from the claimant as possible, and provide her with a full opportunity to respond to the allegation prior to a decision being taken on any further action. The claimant was reminded of her right to be accompanied, and advised of the availability of the counselling service. No other documents were enclosed with this letter, and she had not yet been provided with a copy of Sue Smith's report, nor of her own interview notes from 19 December 2011.

3.135 On 25 February 2012 Anne - Marie Smith completed her report into the claimant's allegations of bullying and harassment by Mark Livingstone. Her report , with appendices , is at pages 683 to 719 of the Bundle. Her conclusions were, firstly, that there should be a separate investigation into the storage and disposal of drugs. This was carried out by Anne - Marie Smith, and was the subject of a separate report at pages 720 to 725 of the Bundle. In relation to the other complaints raised by the claimant, Anne - Marie Smith concluded that it was not possible to substantiate her allegations, and she concluded that no further action was required.

3.136 On 1 March 2012 the claimant attended the investigatory meeting with Dawn Robinson. She was accompanied by her union representative, Gareth Griffiths. Jane Waterhouse was present , and notes were taken by Joanne Ward. The notes are at pages 796 to 807 of the Bundle

3.137 On 3 March 2012 Chris Sleight responded to the claimant's concerns about wastage of drugs (see page 808 of the Bundle). He informed her of the results of the investigation. He was satisfied that the arrangements in place were currently satisfactory, but had asked Philippa Jones to monitor the situation.

3.138 By letter of the same date (pages 810 to 812 of the Bundle) Chris Sleight dismissed the claimant's grievances of bullying and harassment against Mark Livingstone. He referred to the investigation carried out by Anne - Marie Smith, and concluded that the evidence did not support the claimant's allegations. She was advised of her right to appeal.

3.139 By e-mails of 7 and 8 March 2012 (page 794 of the Bundle) the claimant had questioned whether Chris Sleight be replaced as chair of the disciplinary meeting.

3.140 By an e-mail also on 7 March 2012 to Dawn Robinson (pages 812 to 813 of the Bundle), the claimant reflected on her interview on 1 March 2012, and made some additional points relating to the allegations against her and the evidence of the other witnesses. They were, summary:

1. The witness as to her being in her car for 40 minutes took a different lunch hour, so would not be in the office at the relevant time.

2. The office is shared between four people, so anyone could overhear any conversation, so her behaviour could not be "blatant".

3. No solicitor accepts credit card payments (i.e so any evidence that she was giving credit card details to a solicitor was not correct).

4. If she did ask the Spanish speaking pharmacist to translate a document this would not be an unusual request, and any assistance would have been during his break or lunchtime.

5. It was strange that Mark Livingstone had kept a text from November , and she questioned why he had done so.

6. It was , as she had said, common practice for members of staff to send and receive e-mails of a personal nature on their PCs, and some did so more than others. She was not aware of anyone else's PC being monitored in this manner, and she wondered why this was. She said that if the others were checked it would substantiate her claim that her activities were in line with other users.

3.141 Dawn Robinson replied later the same day that her comments were noted (page 812 of the Bundle).

3.142 Around this time the claimant was in contact with Jane Waterhouse , and voiced her concerns at Chris Sleight hearing her disciplinary. This prompted Jane Waterhouse to send an e-mail on 9 March 2012 to Chris Sleight (page 2337 of the Bundle) in which she said this:

"I have been contacted a couple of times by phone and e-mail by [the claimant]. Denise has expressed concern that you are "adjudicating" in the various cases currently under investigation involving her, i.e the B & H case, the Whistleblowing case and the disciplinary case, and has questioned your impartiality at being involved in all of the cases.

I assured Denise that in view of the fact that different Trust Policies were being used to deal with the variety of issues being addressed in the cases, I did not think it was a matter for concern. However, she remains unhappy, saying that she has been advised that there should be an independent opinion on whether you should be involved in all the cases. I don't know whether this advice is from her Union or her Solicitor.

I understand the B & H case is done, (for the time being) , so it is therefore for you to decide whether to pass the Disciplinary case over to another Senior Manager to deal with, or to retain your involvement. Cath is aware of this situation."

3.143 Chris Sleight replied by e-mail to Jane Waterhouse , with a copy to Cath Hignett later the same day (pages 2336 to 2337 of the Bundle). He said this:

"Jane/Cath. I do not understand the grounds for her concerns. The reasons I am "adjudicating" is that that is my role in each process. I have not met her so there is no "history". So what are her reasons to question my impartiality? All the cases I ever hear are based on information presented to me by the investigating officer, in line with Trust process, and without prejudice. Our processes dictate it should be me do they not?

She has a right of appeal against my decision on the B & H case. The whistle-blowing case I had investigated on her request and I am satisfied with the conclusion.

I was planning to hear the disciplinary, and I am independent ! However, her accusation I will not be can only result in me thinking another senior manager should hear the case!! The whistle-blowing and B&H were of course raised by her AFTER she was suspended on the disciplinary issue. Neither the whistle-blowing or B & H investigations resulted in any evidence there was a case to answer.

I think the decision whether I hear it or not should be at Exec level – if I make it I could be accused of bias!!!!

I am happy either way."

3.144 Cath Hignett replied later that same day (same page) to the effect that as they were having a 1:1 on Monday , they could discuss it then. There is no record of any discussion that then ensued, but by letter of 14 March 2012 (page 820 of the Bundle) Chris Sleight replied to the claimant's suggestion that he did not hear the disciplinary case about her , declining to recuse himself , saying that his impartiality was not, and would not be, compromised.

3.145 Dawn Robinson completed her report, entitled "Management Statement of Case" on 14 March 2012 (see pages 821 to 833 of the Bundle). Appended to the report , as Appendix A , is Sue Smith's Counter Fraud Investigation Report , with its own Appendices (pages 834 to 850, and pages 851 to 1246 of the Bundle). There then ensue Appendices B to V to Dawn Robinson's own report (pages 1247 to 1453 of the Bundle). Of the documents appended to Dawn Robinson's report, N to U are witness statements obtained in the course of her own investigation, and V is the claimant's disciplinary interview with Dawn Robinson.

3.146 Dawn Robinson's recommendations were that the claimant had a disciplinary case to answer in respect of three matters:

That she misused Trust equipment, facilities and time in relation to the pursuit of her own business.

That she failed to attend an afternoon session of a study day on 31 October 2011.

That she failed to attend a full day meeting of Aseptic Managers held on 1 November 2011.

3.147 On 30 March 2012 the claimant wrote to Chris Sleight (pages 1463 to 1469 of the Bundle) . This letter covers a number of topics. Firstly, the claimant notes his position in response to her previous letter questioning his impartiality. Secondly, she referred to her grievance complaint of bullying and harassment, pointing out that she made 20 allegations, but only 6 were investigated, and of these, only 5 were referred to in Chris Sleight's letter of 3 March 2012. She went on , thirdly, to further complain about the wastage of drugs, and her raising of such concerns under the Whistleblowing Policy. She went on to suggest that her suspension was more than coincidental with the making of these disclosures, and that it breached the respondent's own procedures. Finally, she raised again the issue of legal representation, citing the Court of Appeal judgment in ***Kulkarni*** .

3.148 Hugh Mullen, Director of Operations, was appointed to hear the claimant's grievance appeal, and he wrote to her on 5 April 2012 (pages 1471 to 1472 of the Bundle). He informed her of what she would, and would not, be permitted to adduce in the appeal, and sought her written statement of appeal by 27 April 2012.

3.149 By letter of 10 April 2012 (page 1474 of the Bundle) Philippa Jones extended the claimant's suspension from duty until 13 May 2012.

3.150 On 13 April 2012 Chris Sleight replied to the claimant's letter of 30 March 2012, and her complaints about his involvement (page 1476 to 1477 of the Bundle). In this letter, which was drafted by Cath Hignett (see page 1475 of the Bundle) the claimant's request for legal representation was further considered, but refused, Chris Hignett saying that the Trust's Conduct and Disciplinary Policy and Procedure did not allow for this.

3.151 In the meantime, the claimant had sought, and had been granted access to her work e-mail account, which she wanted for the purposes of her grievance appeal. She attended on 19 April 2012 for this purpose, but there was a technical problem. This led to an extension of time being granted to her for the submission of her grievance appeal to 4 May 2012 (see pages 1478 and 1490 of the Bundle).

3.152 The claimant duly attended the office again for this purpose on 25 April 2012. Andrew Evans of HR was present. In addition to access to her e-mail account, the claimant had also requested sight of certain copy documents.

3.153 Mark Livingstone was on site, and Andrew Evans came to see him whilst the claimant was accessing the e-mails and the documents. She was therefore briefly left alone. In an e-mail to Andrew Evans of 25 April 2012 (page 1511 of the Bundle) Mark Livingstone , acknowledging that this sounded somewhat "*conspiracy theory – ish*", asked whether Andrew Evans could be certain that the claimant did not insert something into the pile of papers when she was alone, saying : *"I know this sounds like cloak and dagger, but I have known her for over 20 years."*

3.154 In his reply on 27 April 2012 (same page) Andrew Evans assured Mark Livingstone that he did not believe that she could easily have done what he had suggested she might , and that he did not observe anything suspicious.

3.155 On 1 May 2012 the claimant submitted her written appeal against her grievance outcome (pages 1512 to 1518 of the Bundle) to Hugh Mullen.

3.156 On 9 May 2012 Philippa Jones further extended the claimant's suspension until 12 June 2012 (page 1561 of the Bundle).

3.157 By letter of 15 May 2012 from Chris Sleight the claimant was informed that she was to face a disciplinary hearing (pages 1562 to 1563 of the Bundle). The allegations against her were stated to be:

That she misused Trust equipment, facilities and time in relation to the pursuit of her own business.

That she failed to attend an afternoon session of a study day on 31 October 2011.

That she failed to attend a full day meeting of Aseptic Managers held on 1 November 2011.

At this point the claimant was not told of the date of the hearing, nor was she provided with the management statement of case, which was to follow.

3.158 By letter of 22 May 2012 (pages 1564 to 1565 of the Bundle) the claimant was advised of the date and arrangements for the hearing on 14 June 2012. The management statement of case was at that point provided to her. She was also informed of the fact that Chris Sleight would be supported by Cath Hignett , Divisional Human Resources Manager, Dawn Robinson would present the management case, and she would be supported by Jane Waterhouse , Human Resources Adviser. The claimant was also informed that the management intended to call Sue Smith, Joanne Appleton, Joanne Bramall, Ann Lenhardt, Janet Rishton, Mark Livingstone, Elizabeth Craig and Charlotte Ollerenshaw – Ward. The claimant was advised that she may call witnesses, and told how to arrange this. She was told to submit any written statement for the hearing on 14 June 2012 within reasonable time.

3.159 This letter also advised the claimant of her right to be represented by a trade union representative or workplace colleague (*scilicet* , the word is actually omitted from the letter) , and she was advised that the outcome could result in disciplinary action up to and including dismissal.

3.160 The claimant on 28 May 2012 sent an e-mail (page 1566 of the Bundle) to Chris Sleight , saying that her union representative, Gareth Griffiths, was not able to represent her at the disciplinary hearing, and requesting that she be allowed to have representation by a friend, or legal representation.

3.161 The claimant's solicitor made a further request by letter of 29 May 2012 (pages 1567 to 1568 of the Bundle) for legal representation . He referred to the consequences of an adverse finding being extremely serious for the claimant, and that there were legal issues that required consideration. In support of this request reference was made to the Court of Appeal judgment in ***Kulkarni v Milton Keynes Hospitals NHS Trust [2009] IRLR 829 CA*** , and an extract from the headnote (or other summary) was quoted . The solicitor stated that it was intended to instruct Mr Mahmood of Counsel to represent the claimant at the disciplinary hearing. Finally, in the event that the respondent refused this request, the solicitor reserved the right to seek injunctive relief in the High Court without further notice.

3.162 Chris Sleight replied , to the claimant directly, by letter of 31 May 2012 (pages 1569 to 1570) . He cited the relevant extracts from the Trust's Policy, saying that the respondent had abided by this. He was, however, willing to make an exception, if the claimant could not have her union representative, or a work colleague, present , to allow her to be accompanied by a friend, but that person would not be able to support her in any legal capacity, nor could they present her case or answer questions on her behalf.

3.163 The claimant received this letter, and replied to it on late 31 May 2012 (page 1573 of the Bundle) . There ensued an e-mail trail between the claimant and Cath Hignett from 09:11 the following day, 1 June 2012 up until 17:09 that day (pages 1573 to 1571 of the Bundle). In short, Cath Hignett reiterated the respondent's position, that it was not obliged to allow legal representation, and citing s.10 of the Employment

Rights Act 1999, and the ACAS Code of Practice. The claimant replied that she had made the request to be accompanied by a friend before she had sight of the management case alleging fraud. Cath Hignett's reply was that it would be for the panel to determine whether or not the allegations , if proven, did constitute fraud.

3.164 In reply the claimant wrote back (pages 1576 to 1578 of the Bundle) alleging inconsistent treatment and requesting disclosure of the telephone records of other employees. Further , she wrote alleging bias , and asking that Chris Sleight be replaced as chair of the disciplinary panel. In the first paragraph of her letter she says this:

"..... I allege in clear and forthright terms that the vast majority of the employees in my department have been doing exactly that which is alleged against me and reasonableness should be established by reference to others ie :using the phone/internet/email and NHS facilities such as printers and photocopiers for their personal reasons.

No colleague has sought or obtained permission to use these facilities, nor have they been investigated following their usage, yet I have been targeted."

3.165 The claimant went on, in order to demonstrate this, and further her defence that she was not guilty of misconduct, but in reality had been unfairly targeted by her manager because she had previously made a protected disclosure, to require disclosure of telephone usage for the same period of incoming and outgoing telephone calls for each of the witnesses giving evidence, and likewise internet usage , and personal emails for each such witness. She also required records of her swipe card entries for August to November 2011, and records of her suspension reviews.

3.166 The claimant, in this letter, went on to elaborate upon her request for legal representation, citing Article 6 of the ECHR and the right to a fair hearing. Reference was made again to the ***Kulkarni*** judgment . The claimant said, in support of her request:

"As a pharmacist , I take these allegations very seriously, particularly given that an allegation/ finding of Fraud will almost certainly end my career both in the NHS and the Private Sector."

3.167 The claimant went on in this letter to make further complaint about the composition of the disciplinary panel, again citing Article 6, and caselaw thereon, and referring to Chris Sleight's prior involvement in her grievance, and the disclosures she had previously made, which she contended made it difficult, if not impossible to see how he could apply an impartial mind to the process.

3.168 By letter dated 7 June 2012 (although a version dated 1 June 2012 appears earlier in the Bundle) Cath Hignett replied, in the absence of Chris Sleight, to the claimant's letter (pages 1583 to 1584 of the Bundle). She refused the claimant's first two requests on the basis that to accede to each "would be a breach of the Data Protection Act". In relation to the request for copies of swipe card entries, she

said she was making enquiries to see if this information was available, and that the suspension review records would be provided to the claimant in due course.

3.169 In relation to the requests refused on the basis of the DPA, she went on to say that the requests were "not deemed reasonable" , would breach the Act, and that there were no relevant allegations against any of the witnesses and they were not under investigation.

3.170 In response to the legal representation request, Cath Hignett reiterated what she had said in her previous e-mail, making reference against to s.10 of the Employment Rights Act 1999 and the ACAS Code of Practice. Her response to the request for Chris Sleight to stand down from the disciplinary hearing was to advise that this would be considered , and a decision would be advised in due course.

3.171 By letter also dated 7 June 2012 (page 1585 of the Bundle) addressed to the claimant's solicitor, Cath Hignett advised that legal representation of the claimant would not be permitted , and that the respondent would continue to communicate directly with her. She also sent an e-mail to the claimant the same day (page 1587 of the Bundle) in similar terms, but adding:

" The allegations against you – yet to be considered at a hearing – if proven , could constitute misconduct of a personal rather than a professional nature, as such your request to be legally represented at a disciplinary hearing is refused."

3.172 The claimant sent an e-mail on 8 June 2012 to Cath Hignett (page 1586 of the Bundle) in reply. She disagreed with Cath Hignett's analysis. She referred again to ***Kulkarni*** . She reserved her rights to refer to this "substantial breach if and when matters progress to a Tribunal/High Court." She then went on to ask exactly what a "friend" could or could not do at the hearing. She said that her preferred friend was Ghazan Mahmood , a friend of many years, and a barrister at St Johns Buildings Manchester. She went to ask that , as there was no fraud allegation, Cath Hignett ensured that all references to fraud or dishonesty be deleted from the report .

3.173 Between 7 and 11 June 2012 Cath Hignett and the claimant spoke, and discussed the disciplinary hearing. By e-mail of letter of 11 June 2012 Cath Hignett replied to the points raised by the claimant (pages 1590 to 1592 of the Bundle). In this e-mail she again refused the claimant's request , and maintained that allegations of fraud on the part of the claimant would form part of the case . She attached a letter to this e-mail (pages 1592 to 1593 of the Bundle). The position of the respondent was that there was no right to legal representation, and other caselaw (***Puri v Bradford Teaching Hospitals NHS Trust*** , ***Hameed v Central Manchester Foundation Trust*** and ***Mattu v The University of Coventry and Warwickshire NHS Trust***) was referred to. The respondent's position was that the allegations were of personal, not professional misconduct. The role of a friend in the disciplinary hearing was explained, and it was confirmed that such a person could not cross – examine witnesses, and could not make submissions. It was confirmed that the respondent would not accept Mr Mahmood as the claimant's friend for these purposes. Finally, Cath Hignett stated that the allegations would remain as stated, it being for the panel to determine whether or not the allegations amounted to fraud or dishonesty.

3.174 It was also confirmed in the e-mail that the claimant may consult with another union representative, Gary Owen, and may be seeking an adjournment.

3.175 The claimant prepared a Statement of Case for the disciplinary hearing, dated 12 June 2012 (pages 1597 to 1616 of the Bundle, with Appendices A to M at pages of the Bundle 1617 to 1653). This is a substantial document. In the first 17 pages (pages 1599 to 1616 of the Bundle) the claimant sets out her case in detail, dividing this documents into 12 sections, the first 11 being her responses to her suspension, the interviews and the investigation, her request form legal representation and the allegations as a whole, and her grounds for refutation of the charges, and the 12th being Appendices in support of her case.

3.176 In terms of the specific allegations, the claimant said this:

"9.1 Alleged Misuse of emails

[after an analysis of her e-mails during November 2011 and October 2011, when some were sent after working hours]

It is hard to see how the above activity , plus my other duties amount to less than 1.5 hours a day which is the allegation made in the witness statement.

I do not believe that my personal e mail usage is greater than other individuals in the department. It is common practice for staff to send and receive emails in relation to their personal business . This includes e mails to partners, relatives, for social contact and event planning or just for idle chat.

Without a shadow of a doubt certain staff in the pharmacy department at the Royal Oldham Hospital , use the e mail system for their own personal affairs all day long.

The allegation state that my usage was excessive. It appears there is no Trust definition reasonable nor of excessive. As no comparisons have been made it is difficult to see how the allegation of excessive [sc. usage] is being made."

3.177 The claimant went on to dispute that her use of other Trust resources was excessive, it was occasional, and not on a daily basis. These resources were used by many staff in relation to their personal business, and it was common for them to print off family photographs, personal letters, invitations and the like. She added:

"Interestingly enough, three key witnesses are among the biggest users both of the email system and the other resources mentioned above."

3.178 The claimant continued:

"c) As reasonableness is by comparison to others an expectation that a fair and equitable approach to the investigation would have been undertaken by management.

In order to support the management allegations against me, the entire investigation is expected to have been thorough and conclusive, in that without any doubt whatsoever, that my usage of the resources mentioned were , by comparison , any different to the usage by another individual in the department or within the Trust, and whether the sanctions applied in this case (suspension) were also fair and equitable with those applied to other individuals in the same circumstances.

Unfortunately this comparison has never taken place despite being requested on more than one occasion. Under these circumstances I feel it could be deemed that a full and thorough, proper investigation was not undertaken."

3.179 The claimant went on to deal similarly with the allegations of misuse of the internet and telephone systems, pointing out that her usage was no more, and possibly less than that of other persons, the lack of clear guidance on what was and what was not acceptable use, and that she used these facilities in what was her own time.

3.180 Copies of the claimant's swipe card entries, and records of the suspension from duty discussion , were provided to the claimant under cover of a letter dated 13 June 2012 (pages 1654 to 1658 of the Bundle) from Cath Hignett. The claimant had also requested a second copy of the Management Statement of Case, which was provided to her by hand.

3.181 By e-mail of 13 June 2012 to Hugh Mullen the claimant sought the outcome of her grievance appeal, and complained of the delay, which was in breach of the Trust's stated policy (page 1659 of the Bundle).

3.182 By letter of 14 June 2012 (pages 1661 to 1662 of the Bundle) Chris Sleight confirmed the new date for the disciplinary meeting as 25 June 2012. He stated that the allegations to be considered remained unchanged from his letter of 22 May 2012. She was told that the witnesses to be called by Management were Sue Smith, Joanne Appleton, Joanne Bramall, Ann Lenhardt, Janet Rishton, Mark Livingstone, Elizabeth Craig and Charlotte Ollerenshaw – Ward. She was also advised that if she wished to call any witnesses she should inform Cath Hignett.

3.183 By letter dated 22 June 2012 , but sent later (page 1672 of the Bundle) the claimant's grievance appeal was dismissed by Hugh Mullen. This letter was drafted by Cath Hignett. It is a brief letter, in which Hugh Mullen stated that he had reviewed the appeal documentation and Sue Smith's investigation. He was satisfied that Chris Sleight had reached his decision based on a sound and impartial investigation, and upheld his decision for the same reasons as stated in Chris Sleight's letter of 3 March 2012, that there was no case to answer in respect of the five listed allegations due to lack of evidence.

3.184 The claimant, through her union representative, raised a further grievance (page 452 of the Bundle) dated 22 June 2011, but actually 2012, addressed to Cath Hignett, in which she raised issues in connection with the disciplinary process. Some seven points were raised, including at points 3 and 4:

"3. Concerns relating to impartiality due to previous involvement including a conflict of interest that the manager holding the disciplinary meeting may have.

4. The disciplinary meeting may be biased."

The letter went on to refer also to management's refusal to allow the claimant to be accompanied by her friend who is a barrister, and that there was possible discrimination. This document is entitled "Issuance of Formal Grievance" and is signed by Gareth Griffiths as the claimant's union representative.

3.185 On 25 June 2012 the disciplinary hearing was held. It was chaired by Chris Sleight, and he was supported by Cath Hignett. The claimant attended and was accompanied by Gareth Griffiths , union representative. The management case was presented by Dawn Robinson, who was supported by Jane Waterhouse Waterhouse of HR. The management called Sue Smith, Joanne Bramall, Charlotte Ollerenshaw – Ward, Mark Livingstone, Joanne Appleton, Janet Rishton, Elizabeth Craig and Ann Lenhardt to give evidence. The claimant called no witnesses. The handwritten minutes of this meeting are at pages 1779 to 1817 of the Bundle, and the typed version is at pages 1918 to 1975.

3.186 The allegations against the claimant were those set out in para. 3.157 above. In answer to them, the claimant's contentions, as set out in her Statement of Case , in summary , were that she had not misused Trust equipment, facilities and time in pursuit of her own business, she had not been aware of any definition of what was and what was not reasonable use, she had only done this in her own time, and her usage had been no more than many others' in the department. In relation to the other two charges she accepted that she had not notified

3.187 The meeting started at 9.40 a.m. At the outset of the meeting the claimant raised her letter of grievance of 22 June 2012. In particular reference was made to Chris Sleight's previous involvement , and whether he should chair the meeting. Cath Hignett mentioned the previous request for representation by Mr Mahmood, and that had been dealt with. There was a 10 minute adjournment whilst these issues were considered by Chris Sleight with Cath Hignett .

3.188 Upon resuming, Chris Sleight noted the claimant's grievance, but assured her that her case would be heard impartially, and would consider the evidence. The claimant also tabled a further submission in relation to Sue Smith's report (pages pages 1829 to 1859 of the Bundle) the lateness of which she apologised for. There was a further adjournment, and upon resumption Chris Sleight went through the seven points in the grievance letter of 22 June. He refuted points 1 and 2, and in relation to point 3, he reassured the claimant of his impartiality. Point 4 he acknowledged was the claimant's view, whilst not accepting it. In relation to point 5, management would address this. In relation to point 6, he explained again the reasons why Mr Mahmood was not permitted to accompany the claimant. He refuted point 7.

3.189 Chris Sleight's reasons for not recusing himself at this point were that the claimant had raised these matters previously, and, in relation to his involvement with the grievance process, he considered that this did not mean that he could not be impartial.

3.190 In the meeting the claimant additionally tabled further documents, see pages 1674 to 1778 of the Bundle. Amongst these are:

a non – work e-mail sent from Joanne Bramall to the claimant on 2 December 2010, entitled First Christmas Greeting (page 1675 of the Bundle) which appears to be a picture of a naked man clearing snow;

another e-mail of 5 August 2011 (page 1674 of the Bundle) , apparently non – work related to do with a picture of a puppy, but the image attached to it has not been printed;

a non – work e-mail from Ann Lenhardt (pages 1736 to 1737 of the Bundle);

a non – work e-mail from Joanne Appleton about Take That tickets (pages 1777 to 1778 of the Bundle);

e-mails from the claimant to her staff about time keeping and absence reporting (pages 1678, 1680, 1696);

e-mails about drug management;

e-mails about staffing levels;

some of her mobile phone bills;

a letter from Alllweis & Co. dated 22 June 2012 stating that the firm did not accept credit or debit card payments, and that no completion had occurred in relation to 48 Heaton Street, Salford which the claimant had intended to purchase (page 1706 of the Bundle , twice for some reason);

a company search on Propertywise (UK) Limited (page 1707 of the Bundle);

a letter from Peter J Gibbons, her accountant dated 3 February 2012, stating that she was not a “Trader” within the HMRC definition, and had never declared any trade on her tax returns since 2006 (page 1708 of the Bundle);

an analysis of work e-mails sent and received (pages 1709 to 1711of the Bundle);

monthly Workload Figures;

printouts of sent e-mails;

mobile phone itemised calls;

a record of scans carried out by Ann Lenhardt;

an undated handwritten note from Mark Livingstone to the claimant , “Sam” and “Jo” saying that he was working at home that day, as his daughter was off school ill (page 1750 of the Bundle);

the e-mail correspondence with Mark Livingstone about the wastage of drugs;

a sequence of messages from Liz (Elizabeth) Craig and Barbara Stacey (pages 1759 to 1760 of the Bundle);

her personal Development Review and Objectives (pages 1773 to 1774 of the Bundle) and related e-mails;

3.191 The management case was heard. Sue Smith was called, and questioned, then Joanne Bramall,and Charlotte Ollerenshaw – Ward. The meeting was then adjourned, as there was insufficient time to conclude it, and it was re-convened on 27 June 2012, at 9.10 a.m. Dawn Robinson was then assisted by Andrew Evans, in place of Jane Waterhouse, but otherwise the persons attending were as previously. Mark Livingstone, Janet Rishton, Joanne Appleton, Elizabeth Craig, and Ann Lenhardt then gave evidence, and were questioned . This took up to 2.50 p.m, and then the claimant started her case.

3.192 The claimant was questioned by Dawn Robinson on behalf of management. Chris Sleight then put questions to her, at some length (typewritten notes, pages 1972 to 1975 of the Bundle) . The meeting was then concluded (the time is not recorded), without Chris Sleight making a decision, which he said he would then consider, and sent to the claimant by post within five working days.

3.193 The management statement of case for this meeting is, in totality, with Appendices, at pages 821 to 1453 of the Bundle . It includes Sue Smith's investigation, Dawn Robinson's investigations, and has numerous appendices. Various documents which had been obtained were produced during the investigations as evidence of the claimant's e-mail , telephone or internet usage. Summaries of the claimant's usage for three of the four days in question were provided and included in the investigation report, showing the type of activity and the times that it took place, as follows:

Appendix B (pages 1247 to 1249) is a summary of the claimant's non – work e-mail and telephone usage for 23 November 2011

Appendix C (pages 1250 to 1252) is a summary of the claimant's non – work e-mail and telephone usage for 20 October 2011

Appendix D (pages 1253 to 1254) is a summary of the claimant's non – work e-mail and telephone usage for 23 November 2011

These communications are variously to or from:

The claimant's solicitors, J Allweiss & Co

Other firms of solicitors

Estate Agents

Telefonica (Spanish mobile phone service provider)

Insurance brokers

Car dealerships

Contractors

Local authority rates office in Stockton – on – Tees

Salford City Council

And relate to various properties, namely:

99 Gerald Road

48, Heaton Street

103 – 107, High Street, Nordon

A tenanted (or formerly tenanted) property in Spain

3.194 In particular, among the e-mails produced as part of the investigation are to be found the following:

e-mail 23 November 2011at 12.54 from the claimant to her solicitor in which the claimant simply said "WHHHEEEEE !!!!" and referring to having completed the purchase of a property (page 1645 of the Bundle), of which her colleagues were aware and had given evidence about her activity on this day

3.195 The disciplinary meeting was adjourned and deliberations were held.

3.196 The evidence before the disciplinary hearing from the claimant's colleagues, contained in the statements that they had made in the two investigations, and in oral evidence from the main witnesses called to the hearing was , in summary, as follows:

Joanne Appleton

She was aware of the claimant's property interests , and that she had pursued these during office hours. This was an issue, but in summer 2011 the activity had increased to unacceptable levels. She had seen the claimant send and receive e-mails and making or receiving calls on her mobile or the landline, and had seen her regularly accessing the internet for property related sites. She referred to an occasion in October 2011 when the claimant was on the telephone discussing the possibility of the sale of two properties. She had seen her type up tenancy agreements and letters, and had asked a secretary to scan private documents. On 21 November 2011 she had seen the claimant was logged onto a banking site . The rest of that day she was looking at houses on the internet, and other personal work. As a result she wrote a note to Mark Livingstone (who was on annual leave) which she provided to him , (page 1238 of the Bundle) setting out the claimant's

activities on 21 November 2011, and her concerns about this level and type of activity.

She went on to describe the claimant's activities on 23 November 2011 , when the claimant told her that she had previously put a deposit on a property, and then spent time on the telephone trying to complete its purchase. After this, around 1.00 p.m the claimant told her that she had completed the sale. In the afternoon she said the claimant had spent time in the tea room on her mobile phone for about 20 minutes, which meant that Joanne Bramall had to check an aseptic product for a doctor. She also had recorded the times when the claimant had come into the office late, which she set out in her evidence. None of these related to the days upon which Chris Sleight focussed in October 2011.

She reported too a telephone call she heard the claimant take, after which she suggested that she had not stayed for the afternoon workshops at a course she attended on 31 October 2011. She checked the claimant's annual leave or flexi – time for that afternoon. She made a note of this incident too, and provided it to Mark Livingstone (page 1239 of the Bundle). She also commented upon the claimant's break times, and the effects of her activities on the department, and thought she set a bad example.

Joanne Bramall

She was not based in the same office as the claimant, who was her line manager, but was aware of her property interests , as the claimant discussed them with her, and had said that she was trying to earn enough from her portfolio to earn enough to leave work. She commented on the claimant's start times, and how she was critical about staff who were a few minutes late back from lunch. She too had recorded the claimant's arrival times, and confirmed that on two days in October 2011 she had not arrived until 11.00 a.m. She too checked the claimant's flexi – time records. She commented too on the claimant's break times, and lunch break. She agreed that she did not have a designated lunch break, but said , as a smoker, she went out of the office to her car. She stated that she had seen the claimant using the office phone for personal calls, or having people call her back on it.

She related an incident on 22 November 2011 when she answered the office phone to a caller for the claimant, who said it was about a personal matter. She told him that the work phone was not for personal calls. The claimant then told her that her solicitor had rung and been told not to ring on the work phone.

She too said she had seen the claimant typing up non – work related documents. She made reference to an incident in 2010 when the claimant asked Spanish locum to do some translation for her.

She too gave an account of the events of 23 November 2011, and the claimant's purchase of a property that day, of which the whole department was aware. She also corroborated Joanne Appleton's account of the claimant being in the tea room on the phone, and how she had then had to deal with a doctor.

She also made reference to the claimant not attending a meeting (because the claimant had told her she had not), and she had reported this to Mark Livingstone. She commented upon the amount of time that the claimant spent on outside work interests and the effect that it was having on the department, on her personally, and her ability to perform her role.

3.197 The evidence of Elizabeth Craig and Janet Rishton was in similar vein and somewhat historic, but they did not specifically refer to the claimant's activities on the four days upon which Chris Sleight focussed.

3.198 The decision was taken that the claimant had committed acts of gross misconduct, and by letter of 4 July 2012 (pages 1977 to 1979 of the Bundle) she was summarily dismissed. In this letter Chris Sleight set out the three allegations, as previously. He set out his findings in a different order, dealing first with allegation 2, then 3, and finally , 1.

3.199 From the evidence of the investigations, the witnesses, and the documents before the disciplinary meeting, Chris Sleight concluded that the claimant had misused Trust equipment, facilities and time. In particular he found the following in respect of 4 specific dates:

<u>20 October 2011</u>

1 hour 16 minutes of non – work related internet usage

33 non – work e-mails

60 minutes – non – work related telephone usage

Between 08:45 and 15:08

<u>17 November 2011</u>

33 non – work e-mails

38.98 - minutes – non – work related telephone usage

Between 08:56 and 17:21

<u>21 November 2011</u>

35 non – work e-mails

1 hour 15 minutes – non – work related telephone usage

Between 10:12 and 17:56

<u>23 November 2011</u>

27 non – work e-mails

1 hour 40 minutes – non – work related telephone usage
Between 09:03 and 15:14

3.200 In relation to allegation 2, that the claimant had failed to attend an afternoon session of study on 31 October 2011, he did not uphold this allegation, as there was no evidence that the claimant had not attended the afternoon session. He noted, however, her admission that she had left one hour early, which he accepted would not warrant disciplinary sanction, but he would have expected to be reported to her line manager.

3.201 In relation to allegation 3, that the claimant had failed to attend a full day meeting of Aseptic Managers on 1 November 2011, Chris Sleight found that she had failed to attend this meeting, and had not followed Trust policy for reporting her absence, as she had only done so retrospectively, when she applied for special leave. He found this was "general misconduct".

3.202 In relation to allegation 1, that the claimant had misused Trust equipment, facilities and time in relation to the pursuit of her own business, he found that she had, on her own admission , used Trust facilities for non – Trust related activities, and had failed to seek approval from her manager for this. He concluded that *"on the 4 identified days of 20 October 2011 and 17, 21 and 23 November 2011"* her use of Trust facilities was excessive and unreasonable. He considered that her usage was undertaken throughout the whole of the identified days, and during times when she would have been expected to be fulfilling her contractual duties.

3.203 Having found that the claimant had breached specific provisions of the Trust's Information Governance policy, he added (on page 1979 of the Bundle):

"In addition, you abused your position as a senior manager by instructing junior staff to breach Information Governance rules."

3.204 This had not previously formed the basis of any allegation in the disciplinary process. By this Chris Sleight was referring to the claimant asking Ann Lenhardt to carry out scans for her. He believed this was a breach of the Trust's Internet Governance rules, but in cross – examination was unable to identify what precise rule was broken.

3.205 He went on to conclude that "this allegation" was upheld, and that the nature and severity of the claimant's actions constituted gross misconduct. He went on to deem the claimant's actions to constitute gross misconduct and summarily dismissed her, her last day of service being 4 July 2012.

3.206 At the conclusion of this letter the claimant was advised of her right of appeal.

3.207 The claimant had asked in the second hearing on 27 June 2012 about two versions of the Information Governance Mandatory Training , one on the intranet, and the other accessible by e-learning. She requested a copy of the one that it was said she had undertaken on 27 October 2011, and by e-mail of 5 July 2012, Chris Sleight sent it to her (page 1981 of the Bundle, with the Training at pages 1982 to 1985q).

3.208 The claimant appealed by e-mail of 24 July 2012 (page 1986 of the Bundle, with supporting Statement of Case at pages 1987 to 1992 of the Bundle) . In her Statement of Case for the appeal the claimant set out some 25 grounds for appeal (pages 1988 to 1990 of the Bundle). Whilst in general terms the claimant appealed on the basis that the sanction was excessive, and the conduct alleged ought not to have been considered gross misconduct, amongst specific grounds she advanced by her were (adopted the enumeration in the document):

"iii. Concerns over impartiality and bias of both panel members were raised on several occasions both prior to and at the hearing as both members had been involved with investigations prior to the case including Whistleblowing and a case of Bullying and Harassment brought against my manager who acted as a witness.

One panel member had a conflict of interest with regard to costs savings to be made within his own division.

xiv. Whistleblowing made prior to dismissal has been ignored. This issue was cited to Chris Sleight in correspondence early in 2012.

It is more than coincidental that these allegations have surfaced after I made protected disclosures .....

I believe that I am being victimised as a result of this and it has led to my suffering a detriment namely suspension , disciplinary action and subsequent dismissal.

xxv. Concerns were raised at the Investigatory meeting on 1st March 2012 to Dawn Robinson and Jane Waterhouse that three of the witnesses namely Joanne Appleton, Ann Lenhardt and Joanne Bramall were also frequent users of the same Trust facilities which I had been accused of using yet, as far as I am aware, no investigation or further action was taken."

3.209 In further points made in paragraphs 3 to 9 of this letter the claimant amplified some of these issues, and argued why her dismissal had been unfair or an act of victimisation. In para. 9 she said this:

"9. I have been deprived of my right to a fair trial since I requested legal representation at the disciplinary hearing which was denied. I believe the recent court of appeal decision (referred to in my letter dated 30 March 2012) extends to my position and the allegations against me as a worker in the public sector since my career and reputation in the health sector has been severely damaged as a result of my dismissal."

3.210 The claimant went on to make a request under the Freedom of Information Act 2000 for the history of all staff suspended from the Trust for the last two years , and the reasons for their suspension, and similarly for all staff dismissed in the same period. In summary she considered that the respondent had failed to have regard to internal policies, employment law and her human rights, her dismissal was procedurally and substantively unfair, and the real reason for it was not related to misconduct but was because she had raised a protected disclosure, or in the

alternative that costs savings (equating to her salary) needed to be made. She requested that the disciplinary process commended afresh, and that her dismissal was suspended pending the appeal.

3.211 The claimant received a response, from Mary Smith, PA to Nick Hayes, the Deputy Director of Human Resources. That was probably dated 25 July 2012, but is not in the Bundle. The same day, however, she sent an e-mail to Chris Sleight and Cath Hignett (page 1998 of the Bundle). In it she asked for the management statement of case and said that once this was received "the allocated Clerk can determine whether it will be a full hearing or a review".

3.212 It seems likely that the claimant was written to in similar terms, as by e-mail of 27 July 2012 (page 1993 of the Bundle) the claimant made reference to this phrase, and repeated her request that the disciplinary process commences afresh and the decision to dismiss is suspended pending a rehearing.

3.213 Mary Smith replied (same day, same page of the Bundle) that this was not "part of the process" and that the process was now to arrange the appeal.

3.214 By letter of 31 July 2012 from Mary Smith the appeal was arranged for 10 October 2012, to be heard by a panel comprising Mr T Wilders, Mrs N Nicholls and Mrs C Guereca. The claimant was advised of her right of accompaniment by a trade union or professional body representative, or a workplace colleague. Nothing was said as to the form that the appeal would take.

3.215 The claimant could not arrange for her union representative to attend on the proposed date, so the appeal was postponed from the original date. There was some communication about the delay, and the claimant complained about it.

3.216 By letter of 11 September 2012 (pages 2011 to 2012 of the Bundle) Mary Smith wrote again to the claimant to re-arrange the appeal. The panel now was to comprise of Mr J Wilkes, Executive Director of Facilities, Mr V Crumbleholme, Associate Director of Nursing, and Mrs C Mayer, Non – Executive Director, and the hearing was to be held on 19 November 2012. Again nothing was said as to the form of the appeal, and the claimant's right of representation remained as previously advised.

3.217 On 2 October 2012 the claimant submitted her claim to the tribunal.

3.218 By letter dated 6 October 2012 (pages 2227 to 2267 of the Bundle) the claimant set out her Statement of Case for the appeal. This 42 page document largely repeats and amplifies the 25 grounds of her previous appeal letter. In section 5 "Issues", the claimant sets out her case on protected disclosures, and then age discrimination in connection with the appointment of Charlotte Ollerenshaw – Ward as a younger, and cheaper, replacement.

3.219 During October 2012 Chris Sleight and Cath Hignett liaised over the Management Statement of Case that was to be presented for the appeal. Cath Hignett provided him with a draft by e-mail of 15 October 2012 (page 2269 of the Bundle) , and the final version was produced on or around 22 October 2012, being sent to the

claimant by letter of 25 October 2012 (page 2275 of the Bundle), in which she was sent a copy (not in the Bundle) of the procedure for the appeal on 19 November 2012.

3.220 On 12 November 2012 the claimant submitted an addendum to her appeal, based on information she had received following a Freedom of Information Act request (pages 2276 to 2287 of the Bundle). She attached some 20 Appendices to that document, which she had obtained through her request. Many of these documents are ones which have also been disclosed in these proceedings, but the claimant was unaware of them until this request had procured them. They relate , in the main, to the actions of Mark Livingstone, and the subsequent process of the claimant's grievance and disciplinary processes. Similarly, many , if not all, of these will not have been available to the investigators, or Chris Sleight.

3.221 At Appendices 12 and 13 to this document the claimant attached copies of e-mails she had obtained relating to her request for legal representation at her disciplinary hearing (pages 2320 to 2323 of the Bundle).

3.222 At the end of this document, pages 2285 to 2287, the claimant makes further, or repeats, allegations about the various colleagues who were witnesses against her. In the case of each of them she makes reference to their own internet and e-mail usage.

3.223 By letter of 15 November 2012 to Michelle Waite, clerk to the Appeal, (pages 2338 to 2339 of the Bundle) the claimant requested legal representation at the appeal. She had not previously done so, but now did so, having seen the e-mail communications dealing with her previous request (which she had attached at Appendices 12 and 13 to her appeal document) , and in particular Cath Hignett's e-mail of 28 May 2012 to Chris Sleight, in which she said this:

"My view is that the case is around a general misconduct rather than a professional misconduct and as such should continue within the Trust C & D policy. Whatever the outcome, she will have a right of appeal against any decision.

I have sought legal advice on this in the event that the outcome could result in the severest of penalties, which could be career ending even though her pharmacy skills are not in question. The advice was that we could choose to allow her legal representation at the disciplinary stage (which would be outside our procedure) ; if we chose not to and a sanction was issued , the right of appeal can be exercised and this would be an opportunity to consider whether to allow legal representation at appeal. Whilst this would be out of procedure, it would demonstrate that the Trust was being flexible and accommodating.

At this stage her registering body has not been informed of the case. If the outcome is severe , then a referral would have to be made to the Pharmacy council. I cannot anticipate what their view would be, eg if they would deem it serious enough to remove her registration and thus end her career as a pharmacist."

3.224 The claimant quoted the above words from Cath Hignett's e-mail in her e-mail to Michelle Waite, and said that the hearing outcome would have a significant effect on her future as a pharmacist.

3.225 Michelle Waite replied to the claimant by e-mail at 16.57 the same day (page 2338 of the Bundle) saying that as Cath Hignett had said, the case was about personal misconduct rather than professional misconduct , and as such to allow legal representation would be outside of procedure. She was unable, however, to speak to the chair of the panel , as he was on leave until Monday (the day of the appeal) , but it was her belief that the claimant's request would be declined. She therefore could not give approval to her request.

3.226 Cath Hignett on 16 November 2012 prepared 17 questions for Chris Sleight to put to the claimant in the appeal (pages 2342 to 2346 of the Bundle)

3.227 The claimant prepared more documentation for the appeal , namely an undated document (pages 2370 to 2380 of the Bundle).

3.228 The appeal was heard on 19 November 2012 by John Wilkes, Victor Crumbleholme and Chris Mayer. The management case was presented by Chris Sleight, supported by Cath Hignett. The claimant was accompanied by Gareth Griffiths, her union rep. Michelle Waite was the Clerk and Notetaker.

3.229 The notes of the appeal are at pages 2381 to 2544 of the Bundle. The appeal was heard over four days, and took the form of a re-hearing. It is unclear when that decision was taken, and whether it was ever communicated to the parties. It was announced at the opening of the hearing. At the outset there was discussion about the procedure, and the claimant was asked if she was happy with the constitution of the panel, which she was. No further request for legal representation was made by the claimant or her representative.

3.230 Chris Sleight proceeded to presented the management case, and called Dawn Robinson. The claimant questioned her herself. In particular she asked why the four days in question had been chosen. Dawn Robinson said she could have chosen more, but she did not have time. The claimant asked her for comparison of phone calls made by other members of staff, to which Dawn Robinson relied that the others were not under investigation. This was later repeated , when Dawn Robinson said that comparisons with others was not the scope of the investigation.

3.231 Gareth Griffiths also asked questions, and he too probed whether the claimant usage was compared with others, and how much information had been obtained from Sue Smith's report.

3.232 Sue Smith then gave evidence. She was asked questions by Chris Sleight about her report. She was asked if was her opinion that the claimant was running a business, and she stated that she did. She stated her view that the claimant's use had been excessive. The claimant questioned her, particularly about the view that she was running a business. The claimant asked Sue Smith if she had compared her usage with that of others, and Sue Smith reiterated that the allegations were about her.

3.233 Gareth Griffiths also asked questions of Sue Smith, and in particular whether there had been any similar cases, and whether there had been dismissals. Sue Smith said that it was inappropriate to comment.

3.234 One of the appeal panel members, Chris Mayer, asked Sue Smith if it was necessary to investigate others in order to reach her conclusion. She replied that it was not, the evidence gathered was sufficient. Chris Mayer asked if there had been allegations regarding others, and Sue Smith said there had not been.

3.235 John Wilkes asked Sue Smith if she believed that fraud had been committed, and she replied in the affirmative.

3.236 Mark Livingstone was then called, and questioned by Chris Sleight, and then the claimant and Gareth Griffiths, with the panel members also asking questions. Neither the claimant nor Gareth Griffiths put to him that he had instigated the investigation, or the claimant's suspension, because she had whistleblown. Questions were put with reference to Charlotte Ollerenshaw – Ward becoming qualified, and to the need to make savings of £50k, but it was not put to Mark Livingstone , by either the claimant or her union representative, in terms that his actions had been motivated by the desire to promote Charlotte, or to save the claimant's salary.

3.237 Joanne Appleton was the next witness. She gave her account to Chris Sleight's questions and explained how the claimant's activities impacted on her and her colleagues.

3.238 At one point in his questioning of Joanne Appleton (page 2420 of the Bundle) Chris Sleight asked her if others used the internet/e-mail/phones for personal use. She replied yes, during their breaks. He asked if they did so to the same level as the claimant, and Joanne Appleton said no, certainly none of the technicians used them to the same extent as the claimant.

3.239 Joanne Bramall was the next witness. Again she was questioned by Chris Sleight, and the panel, and cross – questioned by the claimant and Gareth Griffiths. She was the last witness that day.

3.240 On 22 November 2012 Chris Sleight at 08.58 sent an e-mail to Cath Hignett , to which he attached a list of questions for the claimant at the appeal, now some 62 in total (pages 2347 to 2354 of the Bundle).

3.241 The appeal was then reconvened on 22 November 2012. Janet Rishton was the next witness, then Charlotte Ollerenshaw – Ward, Elizabeth Craig. At one point in her questioning (pages 2457 and 2458 of the Bundle) , Victor Crumbleholme asked Elizabeth Craig what happened if she said "no" to the claimant, and John Wilkes asked if she regarded the claimant as a bully. The claimant objected to this line of questioning, stating that bullying and harassment was not part of the investigation.

3.242 Ann Lenhardt was the next witness. When her questioning by Chris Sleight was finished, the claimant started her questions by asking if she misuses Trust

equipment . Cath Hignett interjected to say that she had answered that question, and when it was repeated, John Wilkes stated that Ann Lenhardt was present as a witness.

3.243 After an adjournment, the claimant was invited to raise any questions with Chris Sleight, which she did at some length. After Gareth Griffiths questioned him, the panel also did so. At one point Victor Crumbleholme asked Chris Sleight about the claimant's intent , and whether he believed that she had "intent". He replied that he believed that the claimant knew what she was doing was inappropriate, and she therefore misused Trust equipment . At the conclusion of his questioning, John Wilkes asked if he agreed that fraud had been committed, and Chris Sleight said "Yes" (page 2474 of the Bundle) .

3.244 There was then an adjournment until 14 December 2012, when the appeal re-convened. The claimant presented her case, and there was discussion as to the issues she had raised over her suspension and the impartiality of the previous process. John Wilkes reiterated that this was a re-hearing, and all the evidence given would be considered. The claimant continued to make her presentation for her appeal. In the course of this (pages 2477 to 2478 of the Bundle) the claimant again referred to the issue of legal representation, and her numerous requests for it. She referred to Cath Hignett's communications, and stated that her reason for requesting it was that the process could be career ending , and had referred to fraud. John Wilkes stated that fraud was not the reason for dismissal, and went on to say how at the beginning of the appeal the claimant had stated that she was happy with her representation. There was further discussion about this matter, with Cath Hignett explaining her view that the claimant's case was one of personal misconduct.

3.245 Cath Hignett then is recorded as having said this in the appeal (page 2478 of the Bundle) :

"CH : Stated there was no request from DF regarding a legal representative. Stated she took advice and had demonstrated it had been given fair and due consideration. DF relied on the Kulkarni case which was a professional misconduct case. DF's case was personal misconduct."

3.246 The claimant raised further issues with Cath Hignett's involvement, and the grievance and appeal process with Hugh Mullen.

3.247 She returned to the issue of legal representation shortly afterwards (page 2479 of the Bundle) , the notes recording her saying, and Cath Hignett's reply:

"DF:..... Continued that she wanted legal representation as it was potentially career ending.

CH: No firm decision was made and she was looking at all options, in line policy, and case law and she took advice. Advised that she can't determine any decision from the professional body and that she stayed within policy."

3.248 The claimant said she believed that Cath Hignett had made a mistake, and she acknowledged that this was her view.

3.249 On several occasions when the claimant sought to make reference to the conduct of others such as Mark Livingstone and Joanne Bramall, John Wilkes stopped her, referring to what she had said as "aspersions", and saying they were not there to defend themselves. They had, of course, been witnesses.

3.250 Chris Sleight cross – questioned the claimant extensively. The day ended without the appeal concluding, and it was re-convened on 30 January 2013. The panel then questioned the claimant. Chris Mayer went through the various properties referred to in the documentation, and asked the claimant about each one. Her questions were extensive, then Victor Crumbleholme asked his questions, and finally John Wilkes asked his. The panel further explored with her the relevance of her bullying and harassment complaints, and whistleblowing, to her case.

3.251 The claimant's presentation having concluded, the management side , presented its summing up, in a written document (pages 2517 to 2526 of the Bundle). That document at page 2522 does touch upon the claimant's complaint that her human rights had been breached, which was refuted.

3.252 The claimant likewise prepared a written appeal summary (pages 2528 to 2543 of the Bundle). On page 2536 of the Bundle the claimant refers to being entitled to legal representation, and she does again, under the heading ***"Legal Representation"*** on page 2538, where she alleges that legal representation was deliberately withheld by Chris Sleight and Cath Hignett, and actually says that this will be *"focus point for the tribunal"* , her claim having, of course, already been lodged. In summary, Gareth Griffiths addressed the appeal hearing (page 2544 of the Bundle) stressing that he would like the Panel to conclude that the claimant was not dishonest, and saying that he considered the case could have been nipped in the bud by one manager.

3.253 The appeal hearing ended at 2.40 p.m on 30 January 2013, and the panel adjourned to reach their decision.

3.254 On one day of the appeal hearings , the claimant and her union representative left the room before Cath Hignett and Chris Sleight , so that they were still present in the room with the Appeal Panel for a few minutes. There is no evidence of anything improper occurring during that brief period of time.

3.255 By letter of 6 March 2013 the claimant's appeal was dismissed by John Wilkes on behalf of the Appeal Panel (pages 2546 to 2552 of the Bundle). In dismissing the appeal, he went through the 25 grounds of appeal set out (in roman numerals) under para. 3.1 of her "Reasons for Appeal" document, and gave the Panel's reasons for dismissing each one.

3.256 In relation to ground (xxv), the claimant's contention that three witnesses (i.e her colleagues) were also frequent users of the same Trust facilities , but no investigation had been undertaken, or further action taken, the letter states that if

there was evidence of others misusing Trust facilities , equipment and time this would be dealt with separately.

3.257 Having been through each of these, the letter goes on to set out the Panel's decision in relation to each of the three allegations which were before the disciplinary hearing. It upheld Allegation 1 , and agreed that fraud had been committed. It found that the claimant had been guilty of misconduct , that this amounted to gross misconduct and that dismissal was the appropriate sanction. The ensuing paragraphs on pages 2551 and 2552 set out the findings. No dates are specified, but the finding was that the claimant's "usage was excessive". The letter went on to deal with Allegations 2 and 3, the former not being one which Chris Sleight upheld, and the latter being one which he considered only general misconduct. No mention is made in this letter of the alleged denial of the right to legal representation of which the claimant had complained, or any comment made upon the documents she had submitted with the Addendum document she had submitted on 12 November 2012.

3.258 This exhausted the claimant's right of appeal.

3.259 In a document produced for the purposes of the Pensions Agency (page 2272 of the Bundle) the reason for the claimant's dismissal is stated as "fraud".

3.260 During the claimant's suspension Charlotte Ollerenshaw – Ward acted up as the Aseptic Services Manager . The claimant's post remained in the structure. No steps were taken to find a permanent replacement until the conclusion of the appeal in January 2013. In July 2013 a review of Aseptic Services was carried out to consider how best to deliver the service across the respondent Trust. In November 2013, however, John Landers, the Aseptic Services Manager at NMGH resigned, and the decision was taken to have a new single Head of Technical Services post , at Band 8c (i.e the Band above the claimant's) to cover both Oldham and NMGH. In the interim , an interim Aseptic Services Manager post was advertised on 18 December 2013. Charlotte Ollerenshaw – Ward applied and was appointed in April 2014. Whilst the new post of Head of Technical Services role was advertised, no suitable candidates were found, and the decision was taken not to proceed with that post.

3.261 The respondent accordingly decided to recruit instead to a permanent Band 8b Aseptic Services Manager post, but one which covered both Oldham and NMGH sites. There were two applicants , one of which was Charlotte Ollerenshaw – Ward, who was successful and appointed to the role. The appointment was made by Chris Poole and Mark Jackson.

3.262 Cath Hignett for the respondent did carry out enquiries into the usage of the internet and e-mail systems by the claimant's colleagues. These enquiries were carried out in early 2013 some 7 months after the claimant's dismissal, and some 14 months after the period (August to November 2011) to which they related. The investigation was conducted by Gill Catlow and Laura Dean taking 6 random days of usage by the three employees in the period September to November 2011.

3.263 The results were that it was found that of the three persons investigated, Joanne Bramall, Joanne Appleton and Ann Lenhardt , one had no case to answer, the other

was found to have had minimal e-mail usage, and the third, (probably, the documents are redacted) Joanne Appleton was found to have a case to answer in relation to her usage, which was found to have included 15 personal e-mails sent or received during the working day, including personal shopping orders, and not restricted to break times. The internet usage of these three individuals could not be checked, as the history was deleted after 12 months. Each was found to have made telephone calls to mobile telephones, but these may have been to NHS numbers. No further enquiries were made into these calls. Cath Hignett's (undated) Summary of an investigation is at pages 2706a to 2706b of the Bundle.

3.264 None of the three members of staff were interviewed, or referred to the Counter – fraud investigators. All three members of staff were written to with letters dated 23 January 2014 (pages 2706c to 2706h of the Bundle). The letter to Joanne Appleton did specify that her levels of personal usage were identified and considered excessive . This usage included personal emails sent and received at various times throughout the working day, and was not limited to break times. The usage included personal shopping orders. She was advised, however, that after due consideration on this occasion no formal action would be taken , and the matter was considered closed. She was reminded that inappropriate use of Trust facilities , as well as time, on personal matters was an issue that was taken very seriously, and would be delat with accordingly.

3.265 The letter ends, as do those to the other two members of staff, with an expression of gratitude for the recipient having participated as a witness in the two hearings. These letters were all from Chris Sleight.

Policies and Procedures.

3.266 The respondent, at the material time, had in place the following Policies, which applied to the processes that were undertaken with the claimant, namely:

a) Counter Fraud in the NHS – pages 112 to 198 of the Bundle;

b) Conduct and Disciplinary Policy – pages 212 to 231 of the Bundle;

c) Bullying and harassment (dignity at work) Policy – pages 232 to 260 of the Bundle;

d) Whistleblowing Policy – pages 316 to 332 of the Bundle;

e) Anti – Fraud & Corruption Policy and Response Plan – pages 333 to 353 of the Bundle;

f) Management Guidelines – investigations: conduct and disciplinary cases – pages 354 to 378 of the Bundle;

3.267 In the Conduct and Disciplinary Procedure , the following is provided:

"3.General Principles and Responsibilities

3.1 Early intervention when problems are identified is encouraged as enabling a proactive, developmental or educational rather than a punitive approach to be taken…..

3.2 While the provision of supported development and encouragement are essential in moving away from a culture of blame to develop one of trust and freedom for staff to give of their best , it is accepted that there are occasions when the avoidance of disciplinary measures would be inappropriate and/or dangerous.

3.3 It is the responsibility of managers in implementing this policy to be open, honest, air, consistent and timely in dealing with members of staff and to act in the best interest of patient care."

9.Disciplinary Hearings

9.4 A manager who has had no involvement in any investigation relating to the case will conduct the disciplinary hearing and will be supported by a member of the HR team."

The claimant's suspension extensions.

3.268 Following her initial suspension on 28 November 2011, her suspension was extended on the following occasions:

20 December 2011 – page 603 of the Bundle

19 January 2012 – page 654 of the Bundle

15 February 2012 - page 669 of the Bundle

15 March 2012 - page 1455 of the Bundle

10 April 2012 - page 1474 of the Bundle

10 May 2012 - page 1561 of the Bundle

6 June 2012 - page 1582 of the Bundle

These suspensions extensions were by letters from Philippa Jones. The formal requirements for review of suspension are contained in section 8 of the Conduct and Disciplinary Procedure, in particular, section 8.2(ii) which provides :

"Suspension will always be for as short a period as possible and any extensions beyond that which the employee is originally informed will be confirmed in writing. Therefore all suspensions will be reviewed on a four weekly basis by the investigating officer, in conjunction with the Head of HR."

Section 8.2(iii) provides:

"A named person with delegated authority , in line with delegated authority to dismiss, will normally carry out the suspension. This should not be the person responsible for potentially carrying out any resulting disciplinary sanction."

3.269 The claimant has not worked since her dismissal, certainly up to the point of the last hearing in July 2016. She has attempted to mitigate her loss by taking up locum posts. She has not been prevented from practising as a pharmacist.

4. Those are the relevant facts. The tribunal apologises for the amount of summary of, or direct recital from, in particular, interviews and meetings, but unless anyone perusing this judgment is to spend almost as long as the tribunal did in reading large tracts of the material in the Bundles, this has been necessary to demonstrate the salient facts upon which the tribunal has reached this judgment. Whilst not a case in which the credibility of witnesses was the sole issue, then tribunal found most of the witnesses called by both sides to be honest and truthful in their recollections and accounts, with the exceptions of the claimant , in respect of her property dealings and personal interests upon which she was very unconvincing, and Cath Hignett of the respondent, whose explanations and accounts of her highly prominent role and conduct throughout this process, from start to finish, the tribunal found unsatisfactory.

The Submissions.

5. The parties' Counsel made, as one would expect given the volume of evidence and material to be considered by the tribunal, extensive written submissions which are on the tribunal file and which it is not intended to repeat here.

6. There was initially some discussion as to whether the tribunal could decide issues of reduction of any award on the basis of ***Polkey***, or for contribution. In her submissions, at para. 105 Miss Samuel had reserved "the right to argue for a reduction on the grounds of contribution and/or ***Polkey***". She contended that it may be difficult to make detailed submissions until the tribunal's findings of fact were known. In any event, the respondent would be contending for a high level of reduction , particularly in the event of a finding of "ordinary" unfair dismissal on procedural grounds. The position was less clear if the tribunal found that the dismissal was automatically unfair.

7. For the claimant. Mr Mahmood submitted that issues of contribution and/or ***Polkey*** should be determined at the liability stage, and invited the tribunal to make findings. He contended that if the tribunal found that the reason, or principal reason for the dismissal was any protected disclosure, issues as to reduction would become irrelevant. Miss Samuel went on to agree with Mr Mahmood in relation to ordinary unfair dismissal.

8. To the extent that they added to, or departed from their written submissions, the tribunal records that , for the claimant, Mr Mahmood's in his oral submissions went on to comment on the respondent's written submissions , which had been provided to him and the tribunal. He highlighted that the contention on page 42 that the claimant had herself taken the appeal panel from the issue of protected disclosures was not accurate, was "cherry picking", and ignored the claimant's written submissions to the appeal. Similarly,

the suggestion that the claimant had not requested legal representation at the appeal was disingenuous. The claimant had made the request to … Waite, and it was inconceivable that she would not pass it on to John Wilkes. He concluded by saying that there was one simple solution to the case - Mark Livingstone could simply have warned the claimant about her conduct, and no one has really explained why this was not done.

9. For the respondent, Miss Samuel in her oral submissions supplementing her written submissions firstly sought to comment upon the authority of ***John Lewis plc v Coyne [2001] IRLR 139*** cited by Mr Mahmood on the issue of dishonesty. She did not dispute it, but pointed out that the claimant had not misused one resource of the respondent, but a number of its resources over four days. She had done this virtually non – stop over the four days, working on her property empire. This shows the claimant thought she was above reprimand. She did this whilst Mark Livingstone was not present. This suggests she was dishonest. In relation to the claimant's claim that Article 6 was breached this had not been pleaded, certainly not as a free standing claim. Cath Hignett considered there was a discretion to allow legal representation, but the tribunal would have to decide whether she was right.

10. She invited the tribunal to check the plan of the layout of the department , which would help show what the witnesses could and could not have seen that they spoke of in their evidence. She also invited the tribunal to check its notes of the cross – examination of Cath Hignett , and the decisions made about the claimant's suspensions. In relation to the protected disclosures, she referred to the claimant's submissions and the alleged detriments. Whilst some disclosures were accepted, there was no causal link to the alleged detriments.

11. There was no breach of contract in suspending the claimant. Turning to the case cited by the claimant , ***Jones v. GEC Elliott Automations Limited [1972] IRLR 111*** in relation to warnings, she pointed out that this was a case relating to performance issues, not conduct. The respondent's Policy did acknowledge that there may be occasions when the avoidance of disciplinary procedures would not be appropriate.

12. In response to para. 19 of Mr Mahmood's submissions which relate to the respondent's express procedure for the need for a referral to the Director of Finance for a counter – fraud investigation, this had not been pleaded, and the respondent could not have anticipated this point. She corrected the use of the term "transcript" of the appeal used by Mr Mahmood, pointing out that the record in the Bundle was not a transcript, but notes.

13. In relation to the contention at paras. 13 of Mr Mahmood's submissions which referred to the prohibition on covert investigations at para. 8.4.3 of the Anti – fraud and Corruption Policy , this had to be viewed in context, as the prohibition was against investigations into suspected fraud. When Mark Livingstone first made his enquiries he did not consider that this may be fraud, which only arose after he had spoken to IMT.

14. There was some discussion as to whether the tribunal should also consider the issues of any reduction , should the claim of unfair dismissal succeed, on the basis of ***Polkey*** or for contribution. For the claimant Mr Mahhmood submitted that contribution and ***Polkey*** reductions should not be considered, if the dismissal was automatically unfair for the claimant having made protected disclosures. He invited the tribunal to assess those

issues, however, as part of the liability hearing in respect of "ordinary" unfair dismissal. For the respondent Ms Samuel did not agree with the former submission, but accepted the latter.

The Law.

(i)Unfair Dismissal.

15. The relevant statutory provisions are set out in the Annex to this judgment. In addition to the statutory provisions the tribunal has also had to have regard to the relevant caselaw on protected disclosure. In terms of "ordinary" unfair dismissal, in dismissals for conduct , the test to be applied to determine whether dismissal for misconduct is fair in circumstances where the employer suspects that a particular employee has committed the misconduct in question, is set out in the judgment of the EAT in ***British Home Stores Ltd v Burchell [1978] IRLR 379***, as follows:

''What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further.

It is not relevant, as we think, that the tribunal would itself have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before him, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure" as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter "beyond reasonable doubt". The test, and the test all the way through, is reasonableness, and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstances be a reasonable conclusion'.'

16. Further, in reaching its conclusions the Tribunal must not substitute its own views, but must consider whether the decision of the employer fell within the band of reasonable responses, procedurally and substantively, open to a reasonable employer in the circumstances (see ***Foley v. Post Office; HSBC Bank v Madden 2000 ICR 1283.)***

17. In relation to whether there should be any reduction , if the claimant succeeds, the law on this point is derived from the decision in ***Polkey v A E Dayton Services Ltd [1988] ICR 142*** a House of Lords judgment which held that if there has been an unfair dismissal, a tribunal may reduce the amount of the compensatory award , on the basis that it was just

and equitable to do so, where , had, for example, a fair procedure been followed, the claimant would have been dismissed in any event. This can be by up to 100% when the tribunal is satisfied that the claimant would have been dismissed, or a lesser per centage, where a tribunal is not so satisfied, but considers that there was a per centage chance of such a dismissal.

18. The law was helpfully reviewed by Elias J in ***Software 2000 Ltd v Andrews [2007] ICR 825*** and has more recently been summarised in ***Grayson v Paycare (A Company Ltd by Guarantee) UKEAT/0248/15/DA***, where Kerr, J, considers the judgment in that case and says:

"21 Elias J's summary provides a useful reminder that Tribunals need to disentangle in their minds distinct questions that may need to be addressed in particular cases. The following are possible formulations of the questions that may arise in particular cases:

(1) How long the employee would have continued working for the employer, but for the dismissal; this is the question that in ordinary cases must be answered on the balance of probabilities, to assess loss;

(2) Whether either party has adduced evidence entitling the Tribunal to conclude (the burden of satisfying the Tribunal being on the employer) that the employee would or might have ceased to be employed in any event had fair procedures been followed;

(3) Is the evidence relied on to support a Polkey reduction in compensation too unreliable or vague to be useful, and is the exercise of seeking to reconstruct what would have happened too uncertain to ground any sensible prediction based on it?

(4) If not, what is the chance - not the probability or likelihood - that that would have happened at a time in the future, and if so at what point in the future might that chance have produced the relevant event, namely the end of the employment?

(5) Has the employer satisfied the Tribunal that there was a chance of the employment terminating in the future, and if so how great or small was that chance? This is commonly expressed as a percentage.

(6) Has the employer satisfied the Tribunal that employment would have continued, but only for a limited fixed period, whether or not for reasons wholly unrelated to the circumstances relating to the dismissal itself?

19. The tribunal will accordingly apply this approach in relation to the claimant's dismissal, in the event that it is found to be an unfair dismissal, particularly on procedural grounds.

(ii)"Right" to representation.

20. In relation to the law on the "right" to legal representation, the question whether there is any implied right to legal representation in disciplinary proceedings, particularly by application of art 6 of the European Convention on Human Rights) or because denial of legal representation may in the circumstances undermine mutual trust and confidence, or be unfair. The principal authority on the Convention point is now ***R(G) v Governors of X School [2011] IRLR 756***, but two other decisions of the Court of Appeal each add important points: ***Kulkarni v Milton Keynes Hospitals NHS Trust[2009] EWCA Civ***

789*, *[2009] IRLR 829*,** and ***Mattu v The University Hospitals of Coventry and Warwickshire NHS Trust [2012] IRLR 661*,** , disapproving an important obiter comment of Smith LJ in ***Kulkarni but not doubting the ratio of that case that as a matter of construction the disciplinary procedure gave Dr Kulkarni an express right to be legally represented). All these authorities have been cited in Counsel's submissions. ***Kulkarni*** concerned the disciplinary procedure applicable to a hospital doctor accused of professional misconduct. The Court of Appeal, reversing the High Court, held as a matter of construction of the Trust's procedure that the doctor was entitled to be represented by a lawyer provided by his professional association; as the procedure was based on a nationally negotiated procedure for clinicians employed by all NHS Trusts in England, this point is of relatively wider significance than the construction of a single procedure might otherwise be.

21. In ***R (G) v Governors of X Schoo*l *[2011] IRLR 756*** , the Supreme Court further considered the issue. The facts of this case were that the applicant, G, a teaching assistant at a school, was alleged to have engaged in sexually inappropriate conduct with a 15 year old pupil. This would, if established, have been a criminal offence but the Crown Prosecution Service declined to prosecute. That left the matter of disciplinary proceedings by the Governors of the school; however it was not *just* a matter of disciplinary proceedings, since the Governors if they found the allegation proved would be bound to report G to the Secretary of State for consideration of the exercise of powers under the Education Act 2002 to bar him from working with children (which in turn would end his career as a teacher, subject to a right of appeal. G asked to be permitted **l**egal representation at the disciplinary hearing, but this was refused. He was found guilty by a committee of the Governors, dismissed and reported to the Secretary of State and the ISA. When G's request for legal representation for his appeal against dismissal was also refused, he sought judicial review of the decision to dismiss him, relying principally on his Article 6 rights.'

22. The Court of Appeal agreed with the High Court that the employee was entitled to **l**egal representation, because of the consequences for him of an adverse finding. The principal judgment was given by Laws LJ. It was not necessary for the Court to decide whether the proceedings could be categorised as criminal, since civil proceedings could attract the right to legal representation if the issue at stake was sufficiently serious, as where the right to practise one's profession was in issue. Although the internal disciplinary proceedings would not directly decide whether G could continue to work as a teacher, the Court concluded that they would have a substantial influence on the course of the subsequent proceedings which *would* entail such a decision. The Court held that there was no hard and fast rule as to what would trigger the right to legal representation; the issue was fact-sensitive, depending on the degree of influence that the internal proceedings would be likely to have on the ultimate decision, and the nature of that decision and the further safeguards within the decision making process. The test, as articulated by Laws LJ after a close analysis of the Strasbourg jurisprudence on art 6, was that art 6 would be likely to be engaged if 'the [disciplinary] decision in the relevant proceedings has a substantial influence or effect on the later vindication or denial of the claimant's Convention right' (at para 32). In this case, the decision of the Governors, if adverse, was likely to have sufficient influence on the decision whether to put G on the barred list to justify an entitlement to legal representation at the disciplinary hearing, since it would involve not just a finding as to the facts but giving an indication of where on a scale of gravity those facts lay.

23. The Supreme Court reversed the Court of Appeal's decision, by 4-1 (Lord Kerr dissenting on the result but not the applicable principles): ***[2011] UKSC 30***, ***[2011] IRLR 756***, ***[2011] ICR 1033***. The leading judgment was given by Lord Dyson, who reviewed in some detail the Strasbourg authorities, concluding that the test enunciated by Laws LJ was the right one, but then went on to consider the way in which the ISA would be required to consider Mr G's case before deciding whether he should be placed on the barred list. It was on that point that Lord Dyson (and the Justices who agreed with him) parted company with the Court of Appeal. It was not inevitable that an adverse decision of the Governors would lead to an adverse finding by the ISA, and G was not without rights in relation to the process to be followed; there were specific opportunities to make representations, and it should not be assumed that any representations would not be fairly considered. It was accepted that if the outcome of proceedings A determined proceedings B, or would have a major influence on their outcome, fairness in proceedings B required the same procedural safeguards in proceedings A; and on the facts Lord Dyson also accepted that if that were the position, the seriousness of the allegations, and consequences for G, were such that the application of art 6 would require that he be permitted legal representation before the Governors ('proceedings A'). However the ISA was required to make its own findings of fact and reach an independent judgment, and the fact that it did not hold oral hearings did not detract from that; it would be rare for the demeanour of a witness, for instance, to be so determinative as to make it impermissible for the ISA to make findings of fact without hearing the witnesses. The effect of the decision in ***R(G)*** is considered not to close down entirely the possibility of a right to legal representation in disciplinary proceedings, but to underline the need for a substantive correlation between the outcome of the internal proceedings and the related, subsequent decision which falls within the ambit of art 6(1) as a 'determination of the claimant's civil rights and obligations'. The issue in ***R(G)*** was distinct from that more generally arising in cases where the fact of dismissal for misconduct is claimed to impede, or even prevent, the re-employment of the claimant in his or her profession, since the threat to G was that a separate agency would act in reliance on the findings of the Governors to exercise its statutory powers to bar him from teaching.

24. Finally, in ***Mattu v University Hospitals Coventry and Warwick [2012] IRLR 661*** the Court of Appeal reviewed the position, and held that as Article 6 was not engaged when an NHS Trust dismissed a consultant for conduct issues. He was not legally represented at the hearing , and one of his grounds of appeal against the refusal of the High Court to declare his dismissal ineffective was that he had a right to legal representation before the disciplinary hearing. That argument was rejected, and the Court of Appeal ruled that Article 6 was not engaged, even though a consequence of the dismissal may well have been that the consultant would not be able to practise again, and may be referred to the GMC for consideration of Fitness to Practise proceedings. There was no reason for the relevant regulatory body, the GMC, to rely on Dr Mattu's conduct towards his employers as rendering him unfit to practise medicine more generally. Ms Samuel relies upon para. 76 of the judgment in her submissions.

25. She further refers to ***Ministry of Justice v Parry UKEAT/0068/12/ZT*** , which reviewed the authorities and made observations upon the circumstances in which Article 6 will be engaged. The decisions in ***R(G)***, and in particular ***Mattu***, have been regarded as closing down altogether the argument that disciplinary action leading to dismissal, in a conventional employment context at least, can engage Article 6 and confer a right to the safeguards of legal representation. On an analysis of the authorities the crucial question is whether the disciplinary proceedings themselves may result in the loss of the right to carry

on a profession, without further action or intervention by any other body. If not, then as in ***R(G)*** , where this is a further function to be discharged in relation to professional entitlement to practice, Article 6 will not be engaged at the disciplinary stage.

Discussion and Findings.

i).The whistleblowing claims.

25. Given that one of the claimant's claims is that she was dismissed because she had made protected disclosures, it is logical to determine whether she had done so, and if, so whether that was the reason, or the principal reason for her dismissal. As the claimant also brings detriment claims for having made protected disclosures, and these pre-date her dismissal, it would seem logical to determine these at this stage as well.

26. The first issue therefore is whether the claimant made any protected disclosure. The respondent (in paragraph 14 of Ms Samuel's written submissions) , concedes that the disclosures made on 27 January 2011, 23 February 2011, 5 May 2011, 7 July 2011, 2 and 4 November 2011, six in total are factual disclosures made in good faith by the claimant to her employer. The respondent does not concede that these disclosures constituted protected disclosures for the reasons set out in paragraph 16 of the written submissions. The respondent does, however, concede that the disclosure in relation to the accumulation of a large number of boxes in the stores, which posed a potential health and safety risk, would fulfil the legal test for protection, and that this particular disclosure was accordingly a protected disclosure.

27. The respondent has also conceded that if the tribunal found that the claimant reasonably believed there was a failure to comply with a legal obligation, the six disclosures referred to in the preceding paragraph would amount to protected disclosures. The respondent, however, has contended that the claimant has failed to show the nature of the legal obligation with which she really believed respondent had failed to comply. The respondent relies upon ***Sim v Manchester Action on Street Health UKEAT/0085/01*** which does indeed point out the requirement for whilstleblowing claims to be adequately pleaded, in terms of the basis upon which they are contended to fall within the relevant sections of the ERA. Guidance upon the law relating to this topic is also to be found in ***Fincham v HM Prison Service UKEAT/0925/01*** and ***Western Union Payment Services UK Ltd v Anastasiou UKEAT/0135/13/LA*** . Whilst the former did hold that a worker has to identify, albeit not in strict legal language, the breach of legal obligation which he or she has in mind when disclosing information , the latter qualified that by making reference to the context in which the disclosure was made. If the context makes the relevant legal obligation sufficiently apparent, the precise legal obligation need not be identified. It is not necessary for a claimant to specify the precise statutory or other provisions which the claimant believes the employer has breached.

28. In this instance, the claimant clearly believed that the respondent was wasting public money by the manner in which it was failing to restock drugs which could still be used in the health service. The tribunal is satisfied the claimant genuinely believed that this was the case, and further that this belief amounted to a reasonable belief that the respondent was in breach of a legal obligation to safeguard public funds. That the claimant was unable to identify the precise source of that obligation is, in the view of the tribunal, not relevant. What is essential is that the source of the obligation must be a legal

requirement, be that statutory or contractual. This is doubtless partly intended to distinguish this type of obligation from mere moral obligations. It was not, and could not have been, seriously argued that the respondent was not in fact under a legal duty to safeguard public funds , and consequently the tribunal finds that the claimant's belief that the respondent was in breach of such a legal obligation was one that she reasonably held. Further, some of her disclosures also related to the claimant's reasonable belief that patient health and safety was, or was likely to be endangered, because of delays in getting the right drugs to them. The respondent has conceded (para. 17 of Ms Samuel's submissions) that the accumulation of a large number of boxes in the stores posed a (different) potential health and safety risk, and would qualify for protection as a disclosure.

29. The tribunal accordingly finds that the claimant did indeed make the six protected disclosures referred to in paragraph 20 above. The remaining disclosures identified by the claimant (in the table contained at para. 44 of Mr Mahmood's submissions) are not found by the tribunal to be protected disclosures, and in any event, post date many of the detriments relied upon by the claimant.

30. To some extent whether the claimant made one, or more, protected disclosures may not matter greatly, once it is conceded that she made any. The real issue is that of causation, and it to that we now turn. On the basis that the claimant has established that she made at least six protected disclosures, the next issue is whether she has been subjected to any detriment, or dismissed, "because" she made any such disclosures. These are, of course, different claims, the detriment claims and the dismissal claim, and each must be examined separately.

31. In terms of the detriments , those relied upon at the conclusion of the hearing are:

a) that Mark Livingstone bullied and harassed her by calling her a liar , and accusing her of dishonesty;

b) that Mark Livingstone undertook covert monitoring of the claimant or allowed others to do so;

c) the claimant's suspension;

d) covert monitoring by her colleagues, some of whom she managed;

e) being subjected to the disciplinary process

32. The point is taken by Ms Samuel, on behalf of the respondent, that the claimant did not plead that the nature of the investigation into, and/or the outcome of, her grievances were detriments as a result of any protected disclosures, and that she cannot do so sow.

33. In relation to all of these, they have the common denominator of Mark Livingstone. It is to him that the disclosures were made, and he who the claimant alleges is behind all of these actions, even if he did not carry them out himself. The respondent points out that whilst he had sought it, and he agreed with it , the decision to suspend the claimant was ultimately taken and carried out by Philippa Jones. In terms of the burden of proof, once the claimant establishes the making of any protected disclosure , and the suffering of any

detriment thereafter, the burden of proving that the detriment was not the making of the disclosure, or, if more than one, the making of the disclosures.

34. In this case we are satisfied that the making of the protected disclosures was not the reason for any of the detriments that the claimant suffered. This is so for a number of reasons. Firstly, whilst the claimant makes much of the timing of the disciplinary action in relation to her disclosures, this does not bear scrutiny. The claimant knows now, but did not at the time, of course, that Mark Livingstone first contemplated an investigation into her activities in late September 2011. In terms of her disclosures, the most recent before that had been the e-mail of 7 July 2011. Over two months then elapsed before Mark Livingstone started to consider an investigation. Secondly, and most pertinently, it is abundantly clear that the reason that Mark Livingstone then acted at all was the initial complaint of Joanne Bramall, then supported by three colleagues. This is well documented and clearly established on the evidence, and was first raised on 26 September 2011. Further, it is also clear that Mark Livingstone himself was under some pressure to act, because he had failed to do so before, and was now being threatened by Joanne Bramall that she would use the whistleblowing policy to take matters further if he continued to fail to act.

35. All that in itself overwhelmingly, in our view, demonstrates that the making of any protected disclosures was not the reason for Mark Livingstone's actions in late September to December 2011, and no detriments that the claimant suffered as a result were by reason of her having made protected disclosures. Finally, and perhaps unnecessarily, we also found that Mark Livingstone's somewhat dismissive response to the claimant's concerns, in the e-mail of 7 November 2011 (page 554 of the bundle) in which he said "Who's counting", and attached a "smiley face" emoticon, may betray a somewhat cavalier lack of concern, the very thing the claimant was complaining of, about the issues that the claimant was raising, but this in our view makes it even more unlikely that any concern on his part that she had whistleblown in any way motivated his treatment of her thereafter .

36. Of further note is the claimant's reaction to her suspension, in the form of the letter that she wrote to Chris Sleight on 1 December 2011 (pages 567 to 568 of the Bundle). In that letter she makes no mention of her treatment being the consequence of her whistleblowing, despite having been told by Chris Sleight in his letter that it would be Mark Livingstone who would be the Investigating Officer, though this was subsequently rescinded. That the claimant did not at that stage make the connection between her whistleblowing and her treatment, is, in our view, telling, and further persuades the tribunal that there was no such connection. Again, interestingly, in her interview with Sue Smith on 19 December 2011 (third section, page no. 6) the claimant refers to her own reporting of the employee for theft, and that she had made protected disclosures. She does then go on (page 7) to allege that she had been singled out because of these disclosures, but she makes no direct reference to Mark Livingstone. Again, in the course of the disciplinary hearing with Chris Sleight , no challenge was put to Mark Livingstone that he had been motivated by the claimant's whilstleblowing, nor was this the basis of any submissions made then. It was only in her appeal documentation that the claimant advanced this as an allegation, but in the hearing neither she nor Gareth Griffiths put this allegation to Mark Livingstone. In the appeal , on day four, when she was being questioned by the Chair, John Wilkes (see pages 2512 and 2513 of the Bundle) , she was very vague, and suggested that the whistleblowing was not relevant to the true reason for the hearing.

ii).Unfair dismissal.
a)The reason for dismissal.

37. The tribunal's first task is to examine whether the respondent has established a potentially fair reason for dismissal. This , to some extent, elides into the determination of other claims as well, as the claimant contends that her dismissal was by reason of her having made protected disclosures, or was an act of age discrimination. For the purposes of the unfair dismissal claim, however, the first issue is the reason for dismissal. The respondent's case is simple, the claimant was dismissed for the potentially fair reason of conduct. Whether that was fair or not is not the issue at this stage, which is simply whether or not that was the reason.

38. The tribunal unhesitatingly finds that the claimant's conduct , in the form of the conduct that was alleged against her in the disciplinary proceedings, was indeed the reason for her dismissal. The tribunal considers that this is overwhelmingly so, given the evidence that the genesis of her dismissal was the making of complaints about her conduct by her colleagues. It was they who had instigated the whole process, by their complaints to Mark Livingstone. They were clearly becoming fed up with her conduct, which they found hypocritical, and which led them to threaten to take matters further if no action was taken. Action was then taken, which led to the claimant being suspended, disciplined, and eventually dismissed. Thus the action against her had been instigated not at senior level, or even by Mark Livingstone, but at "shop floor" level, and derived from what her colleagues saw as the claimant's increasingly unacceptable conduct.

39. That does not, of itself, the tribunal accepts, preclude the tribunal from finding that thereafter there were other motivations at play, so that the claimant's conduct ceased to be the effective reason for the action that was then taken against her, but the tribunal can see no basis upon which such a finding would be warranted. At the time of her dismissal, the tribunal is quite satisfied that the respondent, in the persons of, initially Chris Sleight, and then , on appeal, the appeal panel members held a genuine belief that the claimant had committed acts of misconduct , of which there was ample evidence, and it was for that reason that she was dismissed.

40. Whether that belief was a reasonable one, after a reasonable investigation, and whether dismissal was a sanction which fell within the range of reasonable responses, of course, are subjects for the next stages of the enquiry, but the respondent has satisfied the tribunal of the first matter in issue, the reason for the dismissal. The claim of automatically unfair dismissal under s.103A of the ERA accordingly fails.

Fairness.

41. The next issue, therefore is whether the dismissal was fair in overall terms, having regard to the procedure, the investigation, and the sanction. There has been sustained attack on all three elements of the dismissal. Taking them in chronological order, we start with the investigation(s), and then the procedure.

(i)The investigations.

42. There are, we agree, some odd and disturbing elements in the procedure that the respondent adopted. As much has been made by Mr Mahmood of the "covert"

investigation allegedly carried out or instigated by Mark Livingstone, we should address it. It is relied upon in two respects, of course. One is as a detriment for the claimant having whistleblown, the other is in the context of the fairness of the dismissal, and it is in that context that we are considering it here. In principle, we do not consider that an employer necessarily acts unreasonably if, rather than choosing to put an employee on notice that they are under suspicion , he carries out some investigation to monitor their behaviour. That may, on occasion, look like a form of entrapment – waiting to see and allowing the employee to commit the misconduct before taking action, but we can see how it is reasonable for an employer , rather than run the risk of "tipping off" the employee , and giving have them a chance to cover their tracks and modify their behaviour, chooses instead to test whether they can be trusted when not under scrutiny. Of itself, we do not see that as objectionable, but where, as here, an express policy provides for early intervention rather than a punitive approach (as does 3.1 of the General Principles and Responsibilities section of the Conduct & Disciplinary Procedure, page 216 of the Bundle), and section 8.4.3 of the Anti Fraud & Corruption Policy and Response Plan expressly, in bold font, prohibits employees in any circumstances to take it upon themselves to investigate suspected fraud, and should not carry out any surveillance, we do consider that these are matters which we can take into account in our overall assessment of the reasonableness of the dismissal, and the investigations undertaken. Whether Mark Livingstone encouraged the claimant's colleagues to obtain and bring to him information about her from late September 2011, the fact is they clearly did so, and he clearly had begun his own investigation in breach of the Anti – Fraud & Corruption Policy and Response Plan. That this course was chosen, rather than to have an advisory word with the claimant, whilst not of itself unreasonable, is, we consider redolent of a recurrent theme of this case, which is that Mark Livingstone clearly held the belief that the claimant had been abusing her position for some time, but he had not obtained enough evidence to prove that, nor, until prompted by her colleagues, had he actually made any serious attempts to get any. We consider that having the strongly held view, which he expressed, for example in the case he put forward for the claimant's suspension (pages 556 to 557 of the Bundle) he was clearly then assembling evidence to build the case against the claimant.

43. That said, Mark Livingstone was replaced as the investigating officer. To some extent , it may be considered that Mark Livingstone's actions and investigations before the formal investigations started are of no real significance, as they then effectively started the process afresh. The tribunal can see the force in that, but is left with a lingering concern at the extent to which the strongly held views of Mark Livingstone , based on what were , at the very least questionable investigations, in breach of at least the Anti – Fraud & Corruption Policy, informed and tainted what followed. A further important feature of all this is that, whilst the claimant's colleagues from late September 2011 were aware that she was under scrutiny, and were also clearly (and quite properly, for the tribunal does not criticise them for this) bringing issues to the attention of Mark Livingstone, she was not, and those colleagues themselves would be aware that scrutiny of their own timekeeping, e-mail and internet usage would also possibly take place. Thus whilst we do not consider that the conducting of the "covert" investigation by Mark Livingstone, of itself, renders the dismissal unfair, it is a factor which we consider is a relevant one when considering the fairness of what ensued.

44. The formal investigations started with Sue Smith's counter – fraud investigation. As has been pointed out in Mr Mahmood's submissions, Sue Smith interviewed the claimant

before she interviewed the witnesses, thereby not complying with section 4.1.8 of the respondent's Counter - fraud policy statement (page 136 of the Bundle), which suggests that the evidence against the employee will be gathered first and then the employee will be given an opportunity to comment upon it. Then, having turned the matter over to Counter – fraud, with Sue Smith interviewing the claimant for 4 hours or so, and then making a recommendation for disciplinary action, the respondent, in the person of Chris Sleight, refused to allow the claimant to see her report, recommendations or even the claimant's own interview notes (see page 659 of the Bundle). We cannot see how that was reasonable. The respondent was relying upon the material to decide to proceed to a disciplinary , but was denying the claimant access to it. Had the converse been the case, i.e there was to be no disciplinary, but perhaps a prosecution, or other civil action, that decision would have been understandable, but we cannot see how it was reasonable at that stage, once the decision to proceed to a disciplinary hearing had been taken, to withhold this material. The claimant asked for it from 23 January 2012 , but was refused by Chris Sleight on Cath Hignett's advice, itself based upon Sue Smith's assertion that the claimant was not entitled to it. The claimant did not receive it until 28 May 2012. Whilst the point is made that she received it before the disciplinary hearing, she did not receive it, and in particular did not receive the notes of her own interview, before the disciplinary interview with Dawn Robinson.

45. Thereafter the respondent appointed Dawn Robinson as the investigating officer for the purposes of the disciplinary procedure. She was, unlike the claimant, provided with a copy of Sue Smith's report, and the interview that the claimant had given her, along with the statements of the four witnesses whom Sue Smith had then interviewed. Notwithstanding this, for reasons that the tribunal cannot understand, Dawn Robinson re-interviewed those witnesses . She was already in possession of the results of Sue Smith's enquiry, but she went about re-interviewing these witnesses. Further, she did so before she interviewed the claimant. It is to be noted that when the claimant was first interviewed by Sue Smith, she was not given any statements from any of the witnesses , as Sue Smith had not yet interviewed them. She had, however, been in considerable contact with Mark Livingstone. Sue Smith did, however, subsequently interview witnesses, and their evidence formed part of the basis for her recommendation for disciplinary action. The respondent, however, did not provide the claimant with Sue Smith's report, the evidence she had obtained, or even the claimant's own interview before the matter was handed over to Dawn Robinson. She had all this material, plus she re-interviewed the witnesses before she invited the claimant to her investigatory interview on 1 March 2012. Further, she interviewed four further witnesses who had not been interviewed in Sue Smith's investigation. None of this material, however, was provided to the claimant before that interview. Thus the respondent had obtained a considerable body of evidence , including the claimant's own interview account, with which the investigating officer Dawn Robinson was very familiar, but with which the claimant was not. Four of the witnesses, in effect the claimant's "accusers" had had two opportunities to give their accounts, which had not been provided or put to the claimant prior to her investigatory interview with Dawn Robinson. The tribunal notes the contrast in how the four witnesses , when interviewed by Dawn Robinson , were at the very outset allowed to see and, invited to confirm their previous statements. The claimant, however, was not allowed to see her interview notes, though they were in the possession of Dawn Robinson who was conducting the interview. It thus looks very much like the management witnesses were given assistance, in that their statements were provided to them, so they would be more likely to be consistent, whereas the claimant went into the interview "blind", and was more likely to be "tripped up" by

discrepancies between her interview with Sue Smith and that with Dawn Robinson. Whilst this may well not have been intentional, the tribunal in these circumstances does have considerable misgivings about this lack of a level playing field. The possession of all this material which was not shared with the claimant before her investigatory interview with Dawn Robinson does lead the tribunal to conclude that the investigation , conducted in this way, at this stage was not a reasonable one. It is of significance, we consider, for instance, that when one reads the notes of that meeting on 1 March 2012 (at pages 796 to 807 of the Bundle) Dawn Robinson makes, from the very outset, reference to Sue Smith's report, and also, frequently, to what "witnesses" had stated. She does not make it clear whether they had so stated to Sue Smith, or to herself, or both. She also made references to what the claimant had said to Sue Smith in her interview with her, but the claimant had not been provided with a copy of the notes of this interview.

46. Had Dawn Robinson come in, and carried out her own investigation, and not relied upon Sue Smith's investigation at all, the tribunal would not have such misgivings. Had the respondent provided the claimant with Sue Smith's investigation report, or at least her own interview notes, before her investigatory interview with Dawn Robinson, the tribunal would have been less concerned. What the respondent did, however, in the tribunal's view , was the worst of both worlds. It carried out one investigation, with Sue Smith, it decided on the basis of her report to proceed with a disciplinary procedure, it allowed that material to be provided to Dawn Robinson, but not the claimant, and it allowed Dawn Robinson to gather even more material before she even interviewed the claimant, and then did not disclose any of that to the claimant before conducting what was her first investigatory interview under the disciplinary procedure. The tribunal appreciates that in procedural as well as substantive matters it must not substitute its own view , and must look at the range of reasonable responses. Standing back, however, and considering those basic, uncontroversial facts, the tribunal does consider that , viewed objectively, that was not a reasonable manner in which to conduct such an investigation, particularly when what was being alleged was tantamount to fraud (as it was originally put to Sue Smith, and as Chris Sleight ultimately described it to the appeal panel).

47. Whether or not this was a deliberate attempt to "catch out" the claimant, the tribunal does consider that this approach did put the claimant at a disadvantage when interviewed again by Dawn Robinson. The tribunal appreciates that, at the investigatory stage, an employer need not , as it were, disclose its hand. There is no requirement not to allow the employee to incriminate themselves by letting them know all the evidence against them before deciding how to respond. There are, however, limits, and putting to an employee, for example, that "witnesses" have said such and such without telling them who they are inevitably handicaps the ability of the employee to respond to the allegations. Furthermore, whilst there may , in some instances, be good reasons for an employer not to disclose its hand at the investigatory stage, so as not to give the employee an opportunity to wriggle out of something, no such rationale was advanced here, only "policy" was relied upon. The tribunal can see no good reason why the claimant could not have been provided with the evidence against her, assembled initially in Sue Smith's investigation, and then added to by Dawn Robinson's , before her investigatory interview. Even if there may have been an argument for not disclosing the evidence from other witnesses, the tribunal cannot see any good reason why the claimant could not have been provided with a copy of her own interview notes. It is to be noted that Dawn Robinson relied upon them heavily in her questioning of the claimant in the investigatory interview she carried out on 1 March 2012.

48. The only justification advanced for not allowing the claimant access to this material is the respondent's "policy". This is a reference to , firstly, section 9.2 of the respondent's Conduct and Disciplinary Procedure, which does indeed (at page 221 of the Bundle) provide that if it is determined that there is a prima facie case to answer, then, at least 10 days before the any disciplinary hearing , management will provide the employee with copies of all relevant documentary evidence. There is also reference to section 8.2 of the Management Guidelines Investigations, Conduct & Disciplinary Cases (page 361 of the Bundle), which similarly states that " *at no time during the investigation stage should copies of any written complaints/statements, witness interview notes be provided to the person accused or their representative*" the point being made that this material will form part of the investigation report which will be disclosed in advance of any disciplinary hearing. Reference is also made to section 15 of the same Guidelines (page 366 of the Bundle), which is in similar terms as to confidentiality and access to statements and notes.

49. The respondent's submissions, with respect, however, miss the point. It is not the failure to provide the claimant with the notes of her disciplinary investigation interview , or anyone else's, which is at issue. It is the failure to provide her with the notes or other record (and it was recorded under the provisions of PACE) of her counter fraud interview before conducting the disciplinary interview that is in issue. The policies referred to above do not apply at this stage at all, as Sue Smith's investigation was a counter fraud, and not disciplinary investigation..

50. There was a considerable risk of unfairness, it seems to us, in some of the respondent's managers or HR being aware of the report and what the claimant had said in interview, without the claimant having a copy herself. That could have led to ambush, in any interviews or hearings, or, without the claimant being aware, persons comparing what she said in the course of the disciplinary proceedings with what she had said in that interview. All this goes, in our view, to the reasonableness of the second, the disciplinary, investigation. The claimant not having access to the record of her counter fraud interview when the investigators did , in our view, undermine the reasonableness of that investigation.

51. Further, the claimant's case in this regard is not confined to the investigation into her own use of the respondent's facilities and time, but the lack of it into her colleagues'. The point is made that examination of her colleagues' usage of the internet and e-mail may well have revealed, at least up until the time they had "shopped" the claimant, and would thereafter be on guard in relation to their own use of IT facilities, that the claimant's usage was not excessive, or that others were at least as culpable as she was in this regard. This is a matter the respondent refused to investigate, despite the claimant from an early stage urging it to do so, until very late in the day, after the appeal stage, some 14 months after the event, and long after the claimant's dismissal.

52. Another fundamental aspect of the claimant' case has been that the respondent refused to supply her with any records of her colleagues' telephone and internet usage at the relevant time. The claimant was asking for these before her disciplinary hearing, and clearly stated her case that her usage was no worse than anyone else's. This request was refused by Cath Hignett. Her rationale for doing so was "data protection". This was unreasonable for a number of reasons. Firstly, it confuses investigation with disclosure. It may not have been appropriate to disclose to the claimant all personal or even work e-mails of her colleagues at this stage, but that does mean that the respondent did not need,

if it was to carry out a reasonable investigation, to carry out such an enquiry itself. It cannot have been the case that data protection issues would have prevented it from doing so – it did so in the case of the claimant, so why not anyone else? The results may not have been disclosable to the claimant, but a reasonable investigation into the degree and extent of the claimant's use in the context of her department as a whole clearly required these enquiries to be made.

53. Secondly, the respondent's refusal to explore these issues, even when expressly put on notice of them by the claimant as a major plank of her defence, is a recurrent feature of this case. It first arose in the context of Sue Smith's investigation. There too, she and Allan Boyd refused to be drawn into any evaluation of the claimant's conduct in comparison to that of any of her colleagues. That is, perhaps, understandable, given the nature and possible consequences of Sue Smith's enquiry. It was akin to a Police enquiry, a feature reinforced by the use of interviews under caution under the Police and Criminal Evidence Act. Its understandable focus was on the guilt of the "accused". Just as a Police officer would not be very interested if a suspect in interview stated that he knew of others who had done as he had, but would focus on the conduct of the suspect, so Sue Smith , as a Counter Fraud investigator, had her main focus on the conduct of the claimant. She declined to carry out any further enquiries into the claimant' assertions about the level of usage of others.

54. When , however, it came to the disciplinary aspect presided over by, first Dawn Robinson, and then Cath Hignett (as adviser to Chris Sleight) there was repeated refusal to investigate the claimant's assertions.

55. In relation to Cath Hignett's justification for refusing to disclose any details of the usage of others in the department, or it seems, to investigate it, in her letter of 1 June 2012 (or thereabouts) that there were no relevant allegations against any of the witnesses and they were not under investigation , the claimant's whole point was that they should have been. A common theme, for example, in Sue Smith's questioning by Chris Mayer in the appeal hearing, has been that there were no allegations against anyone else, so there was no need to make any enquiries. This ignores the fact that there had been allegations, but they were from the claimant. This, however, appears to have been discounted because of that very fact. The impression is that had anyone else made these allegations they would have been investigated, but because it was the claimant who made them, they were ignored.

56. The respondent's position, however, was not consistent, because, for example, when Joanne Appleton appeared before the appeal panel, Chris Sleight specifically raised with her (pages 2420 of the Bundle) the issue of the level of usage by the claimant in comparison with her colleagues. It thus formed part of the management case, but, other than to ask witnesses about it, no further enquiries were made until after the claimant's dismissal. The respondent was therefore seeking to have it both ways – it refused to carry out any proper investigation into the level of usage by the claimant's colleagues, but did question them about this in the appeal hearing, and accepted their answers at face value.

57. In the view of the tribunal this refusal to carry out the line of enquiry that the claimant repeatedly asked for also renders the investigation unreasonable. The justification advanced by Cath Hignett is, with respect, specious, and in any event is no justification for not investigating, even if the results of that investigation would not

necessarily be material to which the claimant was entitled. Further, it lies ill in the mouth of the respondent to state that no such investigation was called for when, in the course of the appeal Chris Sleight himself specifically asked Joanne Appleton (page2420 of the Bundle) about the level of usage by other staff when compared to the claimant. When the claimant, in the course of her appeal (page 2462) of the Bundle), asked Anne Lenhardt if she thought that she misused Trust equipment , she was stopped by John Wilkes, saying that she was there as a witness. It was thus apparently acceptable for Chris Sleight to elicit answers from Joanne Appleton about the claimant's level of usage when compared to her colleagues, but the claimant was stopped from asking one of her colleagues about the same thing.

58. With respect to the respondent , the tribunal has found it hard to understand why these investigations were not made at the time, before the claimant's dismissal, particularly when she was expressly asking that they should be. Whilst her own usage may well have been viewed as excessive , putting it into context by an appropriate comparison with the usage of her colleagues was, in the view of the tribunal, an obvious and reasonable step to take. This is particularly so given that it was these very same colleagues (or at least some of them) who had complained about her conduct. The conduct of her "accusers", as it were, was a matter which it was, in the tribunal's view, reasonable for the respondent also to investigate, but it refused or failed to do, until after the appeal , months later. By that time, of course, it was too late to do so, for a number of reasons. Firstly, and obviously, it was long after the claimant's dismissal, secondly, by dint of the elapse of time, the quality of the investigation, and what it could then elicit, were severely compromised, making it difficult if not impossible to establish the level of other colleagues' private usage at the material time. This therefore precluded the respondent from carrying out a true comparison, and from fairly assessing the true culpability of the claimant's conduct. The only reason these enquiries were made at that time, the tribunal suspects , was to seek to establish a basis for a ***Polkey*** reduction, as the claimant had presented her tribunal claim long before this. Whatever the position, for all these reasons, though the tribunal finds that the respondent's belief in the conduct of the claimant was genuine, it was not formed after an investigation that was reasonable in all the circumstances.

(ii)Procedural fairness.

(a)The role of Chris Sleight.

59. A further concern in relation to the decision to dismiss is the involvement of Chris Sleight. He, it will be recalled, dealt with the claimant's bullying and harassment , and whistle-blowing grievances. He dismissed them. Whether he was right to do so is not the issue. The issue, raised by the claimant at the time, was whether in those circumstances, he should have gone on to hear the disciplinary allegations. The tribunal does not consider or find that he was actually biased against the claimant, the issue was rather the risk of appearance of bias, and a lack of independence. The obvious reason why Chris Sleight should not have heard the disciplinary was that in the course of the grievances he dealt with, and formed a view of the evidence of the claimant and Mark Livingstone. Both were, of course, likely to give evidence before him in the disciplinary. Mark Livingstone was not a minor player in the disciplinary, he was a significant witness, against whom the claimant made serious allegations. Additionally , Joanne Appleton and Janet Rishton , also

witnesses in disciplinary proceedings , were interviewed for the grievance. Chris Sleight, however, had already made, in effect, a determination in favour of the Mark Livingstone.

60. Whilst appreciating the natural desire to prevent employees from "forum shopping", and how, sometimes there is potential benefit for consistency in having the same manager deal with a grievance and disciplinary matter, even if the two are connected, when there is serious concern being expressed by the employee about this, it seems almost perverse to press on in the face of those objections. Chris Sleight's e-mail of 9 March 2012 to Jane Waterhouse and Cath Hignett recognises this, and he expresses himself as happy to proceed "either way". He then meets with Cath Hignett, following which he writes to the claimant on 14 March 2012 stating that he is not compromised. The content of the discussion with Cath Hignett, of course, is not known, but the tribunal finds it not without significance that it was she who advised Chris Sleight at the disciplinary hearing, When the application was made again, this time by the claimant's trade union representative, following a formal grievance being entered on 22 June 2012, at the outset of the hearing, it was after a further adjournment when Chris Sleight was again advised by Cath Hignett, that the position was maintained, and he proceeded to hear the disciplinary hearing.

61. Finally, and significantly , the respondent acted in breach of its own procedure. Section 9.4 of its Conduct and Disciplinary Procedure provides that the disciplinary hearing would be conducted by a manager who has had no involvement *"in <u>any</u> investigation relating to the case".* The tribunal has highlighted the word "any" as it is important. True it was that Chris Sleight had no involvement in the investigations into the claimant's alleged conduct issues, but he dealt with the grievance that she raised against Mark Livingstone. He was the claimant's line manager, and a crucial witness in the ensuing disciplinary case against her. In her grievance (page 622 of the Bundle) , at para.1 , the claimant says:

"I also believe that this victimisation has culminated in the issues I am now having to deal with and being off work as a consequence which I cannot disclose in this meeting."

In para. 25 (page 628 of the Bundle), the claimant says this:

"I feel that Mark would like to get rid of me and his life would be easier if he could do that."

62. Thus, whilst it may not have been immediately apparent when starting out on the grievance process that there may be some interrelation with the disciplinary process that the claimant was being taken through, by the time of the disciplinary hearing, that much would have been, or ought to have been, apparent. Even if it was not, Chris Sleight was faced with the claimant clearly, and repeatedly, right up to the start of the hearing, making application that he recuse himself. At that point a formal grievance was issued (page 452 of the Bundle) by Gareth Griffiths on behalf of the claimant. In it he acknowledges that there was no express provision in the Policy for a grievance to be lodged during a disciplinary process. Nonetheless , he requested that the grievance be dealt with formally, informal resolution having proved unsuccessful Mr Mahmood made much of the fact that , instead of Chris Sleight then referring the grievance to an independent manager, as required under the Policy, he effectively dealt with it himself, and rejected it, as he then carried on with the disciplinary procedure.

63. The tribunal appreciates that employees cannot be permitted to de-rail or delay disciplinary procedures by raising grievances against the person hearing the disciplinary matter. The tribunal would not find the dismissal unfair simply by reason of Chris Sleight's failure to then instigate a formal grievance procedure, and thereby delay the disciplinary process. As Gareth Griffiths observes, there was no procedure for bringing a grievance during a disciplinary process, and this may well be for good reason. The significance, however, is that this is another instance of the claimant making it clear that she objected to Chris Sleight dealing with the matter, rejecting his prior assurances that he would be independent, and mounting a serious and sustained application that he recuse himself, which he did not refer to any other senior independent manager, but sought advice from Cath Hignett. It is true, and the tribunal acknowledges this, that the claimant is recorded as having said in the disciplinary meeting that she thought Chris Sleight had been impartial (page 2084 of the Bundle), but that the tribunal considers is no more than a comment upon the manner in which Chris Sleight conducted the hearing, indicating that he had not done anything to demonstrate any lack of impartiality. It does not affect whether, before conducting the hearing, he should have considered further whether he should be doing so, or at least refer the matter up to more senior management to consider, as this was a formal grievance against him. Whether it was his decision or Cath Hignett's to press on in these circumstances , it was, the tribunal considers one which was outwith the band of reasonableness, and the dismissal was potentially unfair for this reason too.

64. For completeness, the tribunal does not consider that there were any other grounds for recusal, such as have also been advanced by the claimant. In particular, the suggestion that he had some form of interest because he had to achieve costs savings in the department which employed the claimant, which may have influenced his decision is, in the tribunal's view a reasonable basis for his removal from the procedure. The requirement is to act reasonably, not to create a totally sanitised process which can only be conducted by managers with no conceivable interest in the subject matter, or even the remotest connection with the workplace of the employee. Ordinarily, as Chris Sleight suggests, the senior manager is indeed usually the appropriate person to conduct a disciplinary in his own Directorate. The common incidences of senior management such as overall budgetary imperatives, authorisation of suspension and the like, even if thereby a manager has some early awareness and, possible minor involvement in the process, should not ordinarily require a senior manager to recuse himself, and the tribunal would not find his refusal to do so in these circumstances alone to be unreasonable. Chris Sleight's prior involvement in the grievance process involving three of the main protagonists whose evidence he would have to assess in the ensuing disciplinary hearing , and compare with the claimant's, however, puts the situation into a wholly different league, and on any objective view this fell outside the range of reasonable responses.

(b)The role of Cath Hignett.

65. That brings the tribunal to another aspect of this case which is hard to ignore, and that is the extent to which Cath Hignett was involved as, on the face of it, an HR adviser supporting Chris Sleight. The tribunal has already commented upon her likely involvement in Chris Sleight's refusal to recuse himself. The tribunal notes, however, that for the ensuing appeal Cath Hignett's involvement increased. It is appreciated that by then, of course, Chris Sleight had ceased to be the decision maker, but was now presenting the management case, in defence of his decision to dismiss. Cath Hignett supported him in this role in a number of ways, but most significantly in drafting questions for him to put to

the claimant during the appeal hearing. Initially she drafted 17 (pages 2342 to 2346 of the Bundle), but then Chris Sleight increased this number to 62 (pages 2348 to 2354 of the Bundle) which he sent to her, one can only assume, for her approval.

66. The tribunal accepts that it is not the role of an HR advisor to be impartial, and act as some form of judicial officer. He or she is entitled support management , and is not obliged to act on behalf of the employee. Their role is to advise upon the relevant processes and procedures. Decisions should be taken by managers. In relation to the issue of legal representation, however, this does appear to have been (albeit on advice) Cath Hignett's decision, for she it was who wrote to the claimant (or rather, her solicitor) on 7 June 2012 saying that legal representation would not be permitted. Her e-mail to Chris Sleight of 28 May 2012 (page 2322 of the Bundle) is interesting, as in it she suggests that the claimant may be afforded that right on appeal. She never, however, communicated that to the claimant, or the appeal Panel. There are two possibilities. The first is that this was not correct, there was never any chance that the claimant would allowed this , even on appeal, and Chris Sleight was being told this to get him "onside" as it were on this issue. The second is that it was in fact true, in which case neither the claimant nor the appeal Panel were informed that this was a possibility, when the claimant had been asking Michelle Waite for this in the run up to the appeal hearing. Cath Hignett said in the hearing that she had not requested legal representation (page 2478 of the Bundle), when she clearly had, and had done so before the appeal Neither reflects well upon her, or the respondent, and whether the claimant was or was not, strictly speaking, entitled to legal representation, this contradictory stance on the part of the respondent is a further instance of unfairness.

(c)Legal representation.

67. Whilst still on that subject , as a procedural issue , a major issue has been whether the claimant should, in fact, have been afforded the right to legal representation in the disciplinary hearing, and subsequent appeal. The caselaw is discussed above. Whilst the claimant sought to have such representation before the disciplinary hearing, and indeed raised it as one of his grievances at the outset, at the appeal, other than in the e-mail exchange with Michelle Waite, she did not pursue it further when the appeal started. She did then raise it on day three of the appeal.

68. Having reviewed the caselaw, and applying it to the facts of this case, the tribunal finds that Article 6 was not engaged. Whilst the claimant, as a pharmacist was subject to the professional superintendence of the General Pharmaceutical Council, the evidence was that her dismissal, even for fraud, would not of itself be likely to result in her being disciplined by that body , or losing her right to practise. Further, the evidence was that before any such action was taken, an investigation and hearing would be held. Indeed, she has practised as a locum since her dismissal. The tribunal considers that in these circumstances, on the authorities, Article 6 would not be engaged at the disciplinary stage, and the claimant had no right to be legally represented.

69. That said, the tribunal does take into account the observations of Langstaff P. in ***Ministry of Justice v Parry UKEAT/0068/12/ZT*** at paras. 34 to 37 of his judgment that there may be circumstances where even if there is a breach of the employee's Article 6 rights, the dismissal may not be unfair. He accepted that these would be rare cases, but it is clearly possible.

70. Ultimately, however, the tribunal accordingly finds that Article 6 was not engaged, and hence the right to legal representation did not arise. There was no unfairness in not allowing the claimant to be represented at the disciplinary or the appeal hearings. How the issue was dealt with on appeal, however, as an issue raised by the claimant as one of her grounds of appeal , is a matter for further consideration.

(d)The suspensions.

71. Much has been made of the initial suspension and subsequent extensions thereof. The tribunal accepts that the extensions were not, on several occasions, carried out in strict adherence to the respondent's own procedures. Whilst noting that this may be a breach of the implied term of trust and confidence, the tribunal does not find that this , of itself, renders the dismissal unfair, or even contributes to any unfairness. Whilst Mr Mahmood understandably seeks to rely upon it as evidence of the respondent's attitude towards the claimant (and it is relied upon as a detriment for having whilstleblown), the tribunal does not see it as having any real bearing on the fairness or otherwise of the dismissal. Doubtless shortcuts were taken, and the procedure was breached on occasion, but the tribunal considers such instances to be more likely to operational and procedural deficiencies in administration rather than any deliberate act, or evidence of any pre – determination of the disciplinary outcome.

(e)The appeal.

72. Finally, the tribunal has to consider the effect of the appeal. As Ms Samuel submits, it is established law that an appeal is capable of rectifying any deficiencies in the original disciplinary hearing. The tribunal takes that to be a reference to cases such as ***Taylor v OCS Group Ltd [2006] ICR 1602*** in which the EAT recognised the potential for appeals to rectify prior unfairness, but counselled tribunals against over – fixating upon whether the appeal was a review or a re-hearing. The tribunal's task is always to examine the appeal, in all the circumstances, and applying the statutory test to the dismissal as a whole , 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.

73. The tribunal has applied that test to the appeal. It was, in substance and in form, the tribunal is satisfied, a re-hearing. It took four days, and the witnesses were heard. Some 25 grounds of appeal were considered. The panel was very active in its questioning, and gave due consideration to the appeal. To the extent that there was any unfairness from Chris Sleight's involvement as the decision maker in original decision to dismiss was inappropriate, the fresh and independent appeal panel certainly could have cured that. He did, however, take a role in the appeal that is unusual in the combined experience of the tribunal. A re – hearing, one would expect, would take the form of the same management case presenting the same material to the appeal panel. Doubtless the decision under appeal would be considered, and the decision maker may well put material before the appeal panel as to the rationale for his decision, or be questioned as to his or her decision. The Conduct and Disciplinary procedure at section 12 deals with appeals, and provides that the dismissing manager will submit a written case to the clerk to the appeal, but nothing is said as to their role in the appeal hearing. In this case , however, (and the

tribunal does not know if this standard practice) Chris Sleight became the presenter of the management case. He went from, in effect, judge to prosecutor. Obviously it is was his decision that was under appeal, and he was entitled to defend it, but the tribunal was struck how in the appeal his role went much further, and he then presented the management case, and cross – examined the claimant. Whilst not, of itself , unfair, the tribunal notes that this another instance of what could be called "replication" in this case – there were two investigations, Sue Smith's and Dawn Robinson's, (three if one counts Mark Livingstone's) and , in the appeal, two presentations of the management case, firstly by Dawn Robinson who had presented it to Chris Sleight, then by Chris Sleight who became a further proponent of the management case. These features are not, of themselves, grounds for holding that the dismissal was unfair, but are relevant to whether the tribunal can find that the appeal cured all defects, and rendered the dismissal fair.

74. The question that remains then is whether the appeal was sufficiently thorough and open – minded to cure the matters identified in this judgment as being elements of unfairness. The problem for the respondent is that the appeal comes at the end of a process that , from an early stage, was flawed. As identified above, the tribunal does not consider that the investigation was a reasonable one, in that the carrying out of a second investigation for disciplinary purposes, when the investigators were in possession of the claimant's interview notes from the counter – fraud interview she had had , when she herself was not, was not reasonable, and put her at a disadvantage. Further, that the investigation repeatedly failed, nay refused, to widen its scope , to take into account the level of use by the claimant's colleagues , which , despite her frequent pleas to do so, remained the case.

75. The appeal panel could do nothing about the first element, that was water under the bridge , and throughout the appeal the claimant and her representative were shut down when they tried to go down this avenue, and widen the scope of the enquiry. At one point , John Wilkes was recorded as saying that one of the claimant's colleagues was not there to defend themselves, when in fact they had been, and could have been asked further questions. It was a theme of the investigation, the disciplinary and the appeal that the claimant's defence that the conduct of others in the department should be examined as well, to show how culpable, or otherwise, her own conduct was to be regarded, was constantly shut down, or ignored.

76. Thus, whilst the appeal did indeed have the potential to rescue the dismissal from a finding of unfairness, in respect of the first matter it was too late to do so, and in respect of the second, it declined the opportunity to make the enquiries that the claimant had been asking for since the matter was first raised with her. The tribunal was struck, however, by the fact that the respondent did, shortly after the appeal, carry out the very enquiries that the claimant had been asking it to. It did not, however, see fit to delay the outcome of the appeal whilst it did so, indeed, it did the opposite, rather reinforcing the impression held by the claimant that the respondent was not interested in looking into the matters she was seeking to raise as part of her defence , but wanted to proceed to focus solely on her case, to the exclusion of other issues she was raising. The tribunal finds it also not without significance that, when those enquires were made, albeit very late in the day, and with the handicap of the absence of any internet records as they had long been deleted, one other employee was found to have had excessive use, for which she received no formal action, only a "reminder" of the Trust's policies on such matters.

77. The appeal, whilst superficially thorough, also failed to address all elements of the claimant's grounds of appeal. It is appreciated that she advanced extensive grounds , some 25 in number, in her written appeal document (pages 2231 to 2234 of the Bundle), but those are 25 sub-paragraphs under para. 3.1, and she continued, at paras. 3.2 to 3.8 to set out other matters, the last of which was a complaint that she had been denied legal representation. This omission is all the more surprising when it is remembered that in addition to the original "Reasons for Appeal" document the claimant then submitted an Addendum to Appeal Statement of Case (pages 2276 to 2337 of the Bundle) , following her Freedom of Information Act, or Subject Access, Request , in which she enclosed, as Appendix 13, Cath Highnett's e-mail of 28 May 2012 to Chris Sleight , in which she discussed the request that the claimant had made, and made reference to the appeal being an opportunity to consider whether to allow legal representation at appeal. She raised the issue of legal representation in the appeal, and Cath Hignett's recorded responses do not accord with the facts. Additionally, the claimant referred again to this issue in her Appeal Summary document (pages 2528 to 2543 of the Bundle) , twice, and even said that this would a focus point for the tribunal claim, which she , by then, issued. Further, the appeal panel were unaware of her last request for legal representation at the appeal, although the claimant and her representative did not repeat that request in the hearing. Be that as it may, it was one of the claimant's grounds of appeal, and an important one, against the decision to dismiss her that she had been denied legal representation in the disciplinary hearing.

78. The appeal outcome letter wholly fails to address this issue. This is despite the letter making express reference (page 2547 of the Bundle) to the additional information submitted by the claimant, following her subject access request . Whilst the outcome letter (pages 2546 to 2552 of the Bundle) goes through sub-paras. (i) to (xxv) of the claimant's grounds of appeal, as set out under para. 3.1 of her first "Reasons" document, it does not go on to address any other issues in the "Reasons" document, nor any of the material included in the further "Addendum" document. To be clear, sub – paras. (i) to (xxv) do not mention the denial of legal representation. Nowhere in the appeal outcome letter is the issue addressed. Whether the claimant should or should not have been afforded legal representation in the disciplinary hearing or the appeal is not the issue. She was entitled to have that ground of appeal considered as well, and , indeed, probably some investigation carried out into it. Neither happened, and in this regard also the appeal did not sufficiently redress the unfairness that hitherto affected the decision to dismiss.

79. Another feature of the appeal is that , whilst Chris Sleight's dismissal was expressly based upon the four identified days of 20 October 2011, and 17, 21 and 23 November 2013, and those only, the Appeal Panel's decision is not so specific. Indeed it is hard to discern from the Appeal Panel's decision, which was a re-hearing, just what it found in specific terms. The implication is that the appeal finding was of more widespread abuse, extending beyond the four specified dates. That the Appeal Panel also considered the other two allegations , one of which had been dismissed by Chris Sleight, and the other had been only found to be general misconduct, not meriting dismissal , and not the subject of any appeal , further demonstrates the lack of fairness in the appeal process as well.

80 In short, whilst clearly having the potential to do so, the appeal was itself also too flawed to be able to remedy the unfairness of the dismissal that preceded it.

(f)Other factors.

80. Before leaving this topic, the tribunal considers it important to keep in mind the express reasons given by Chris Sleight for the claimant's dismissal. They are set out in his dismissal letter at page 1978 of the Bundle, where he says:

" I have, therefore, concluded that on the 4 identified days of 20 October 2011 and 17, 21 and 23 November 2011 , your use of Trust facilities was excessive and unreasonable. Your usage was undertaken throughout the whole of the identified days and during times when you would have been expected to be fulfilling your contractual duties."

He says in para. 57 of his witness statement that the "focus" was upon these days , and he goes on to refer to evidence in front of him relating to the whole period of the investigation, which he says he took into consideration when reaching his decision. This is a further unsatisfactory aspect of this case. On the one hand the respondent , in the person of the investigators, Chris Sleight and the appeals panel, have sought to confine the issues to these four specific days, and have prevented the claimant from widening the scope of any further enquiry, but on the other, whilst not proceeding with specific allegations or finding that she had been guilty of such conduct over the whole of this period, reference has continually been made to other evidence about other days, and a more "general" impression of the claimant's conduct over a longer period of time. Without drawing too heavily on any analogy with criminal proceedings, the respondent did not put forward, or find the claimant guilty of, what may be regarded as "specimen charges", she was found to have committed these specific acts of misconduct on these specific days, and it was for these that she was dismissed. The references to other instances, and, indeed, the additional allegation in the dismissal letter of abusing her position by instructing junior staff to breach Information Governance rules (which did not relate to activity on any of the four days) is a further instance of unfairness pervading the process. This is given particular focus, given that, when the respondent did eventually carry out an investigation into the level of usage by the claimant's colleagues, only six random days were selected, and their conduct over a sustained period of weeks or months was not so scrutinised.

Unfair Dismissal – contribution and Polkey.

81. Having found that the claimant was unfairly dismissed, the tribunal must now address two further issues which, although they relate to remedy, the parties agree should be dealt with at this stage as they are issues of principle which the tribunal could and should determine on the basis of all the evidence it has heard on liability. Those issues are, of course, whether there should be any reduction in any compensatory award pursuant to ***Polkey*** , and whether there should be any reduction for contributory fault. In terms of the order in which these issues should be considered, the guidance in ***Rao v Civil Aviation Authority [1994] ICR 495*** is that the former should be considered before the latter, and the tribunal will accordingly adopt that approach.

82. Whilst there was some issue as to whether the tribunal should go on to deal with these issues, Miss Samuel did address them. They were indeed included in the claimant's opening submissions provided to the respondent and the tribunal at the commencement of the hearing. The tribunal considers that it has sufficient material before it to enable it to decide whether to make any reduction on either basis. The potential basis for any reduction to the compensatory award, in the event that the claimant is successful in ordinary unfair dismissal, is so inextricably linked to the facts relating to the whole process,

and the evidence of what the claimant had actually done, which are before the tribunal. To the extent that the respondent may have been concerned that, in order to establish contribution, it may have needed to call more witnesses as to the claimant's actual activities (in addition to Joanne Bramall and Mark Livingstone who were called) it need not be, as the tribunal has been able to determine , on a balance of probabilities, largely on the claimant's own evidence, and the documentary evidence assembled in the investigations, disciplinary and appeal hearings , what, as a matter of fact, the claimant had actually done.

83. For the respondent Ms Samuel submits that whatever the failings of the procedure adopted by the respondent, the tribunal can safely conclude that no amount of fair procedure would have made any difference , and the claimant would still have been dismissed. Any deficiencies in the procedure were minor, and the overwhelming likelihood was that the claimant would have been fairly dismissed in any event. Whilst this elides, somewhat, into her submissions on contributory fault, the tribunal has to consider whether this is right, and if so, whether any, and if what, reduction should be made to the compensatory award. For the claimant, not surprisingly, Mr Mamood submits that there should be no, or alternatively, only a modest, reduction.

84. As found above, to some extent the unfairness of the claimant's dismissal from a procedural point of view, was capable of remedy on appeal. The involvement of Chris Sleight , one of the claimant's main issues, for example, could have been remedied by a complete re-hearing, as was , in a fashion, carried out by the appeal panel. That said, his involvement then as presenter of the management case, which he had, of course, upheld, is a feature which undermined the potential for the appeal to be a sufficient safeguard which could rectify any prior unfairness.

85. In terms of whether a fair procedure, and a more extensive investigation would have made any difference, the respondent can also point to the results of the investigation into the claimant's three colleagues that was eventually carried out. Only one was found to have used the respondent's facilities at all excessively, and she was only given an informal warning. Her usage by comparison to the claimant's was minimal. The respondent argues that this shows what would have happened had a fair procedure, and a more thorough investigation been carried out. The claimant's usage was far more serious, and she was a senior employee. The result would have been the same.

86. The tribunal does not so find. The problem with the respondent's reliance upon the subsequent investigation into the usage by her three colleagues, when it was eventually carried out, is that it was too little too late. Crucially, no internet usage could then be monitored because it had been deleted after 12 months. Phone usage was not investigated further, the respondent simply accepting that some of the calls may have been to NHS mobiles, but no further analysis was undertaken. Instead of an entire period being analysed , as happened with the claimant, five random days were selected within the period that had been investigated with the claimant. Even then, one of the colleagues was found to have excessive use, but she was dealt with informally. This did not prompt any further enquiry into the rest of the period to see if this excessive usage on this one day was indicative of other instances of excessive usage. All this rather suggests that there may well have been more to discover if a timely investigation had been undertaken.

87. Additionally, it is of note that none of the three colleagues were subjected to a counter – fraud investigation, and even the one whose usage was found to be excessive was not made subject to such an investigation, nor even a disciplinary investigation. It is of further note that the letters to these employees after Cath Hignettt's enquiries was from Chris Sleight. It is hard to see how, given what he says in para. 57 of his witness statement to the effect that it was irrelevant whether the claimant had used Trust equipment, facilities and time in relation to her own interests on one day or twenty days, he appears to have applied a different standard to this one employee's usage. All of this rather reinforces how it is far from clear that, had a reasonable investigation been carried out, and the true extent of the claimant's usage considered in the context of that of her colleagues , dismissal would have been inevitable.

88. Secondly, none of this has any bearing on the unfairness of the dual investigations and the failure to provide the claimant with her interview notes from the first , when the investigators in the second had them in their possession when they questioned the claimant.

89. Even if satisfied that a fair procedure, including a fair investigation, would have made no difference, of which the tribunal is not persuaded, whether to make any reduction on the grounds of ***Polkey*** is still a matter for the tribunal's discretion. Given that there were other unsatisfactory elements of the respondent's handling of this process, and the fact that the investigation which was carried out was one that the claimant had been asking for throughout, was not carried out until after her appeal had been determined (indeed after her tribunal claim was lodged in October 2012) , and was then seriously compromised by the passage of time, the tribunal would not consider it just and equitable to allow the respondent to argue for any reduction in the compensatory award on the grounds of ***Polkey***.

90. Finally, in any event, there was an additional element of unfairness in the level of sanction applied, when there was no basis for the respondent thinking that the claimant, who was a senior employee, with an unblemished record , would not have responded to a warning, even a final written warning, by desisting from the conduct which she had been revealed to been engaged in. No thought appears to have been given to the doubtless unnerving experience of being interviewed by anti-fraud officers, and the likelihood of this alone being a salutary experience. This aspect is not one to which the ***Polkey*** principle has any application, as no amount of fair procedure or a more thorough investigation was likely to alter the position that to dismiss for such conduct in these circumstances was outside the range of reasonable responses. The tribunal accordingly makes no reduction on the basis of ***Polkey*** .

Contribution.

91. The tribunal therefore turns , finally, to contributory fault. In this regard Ms Samuel invites the tribunal to find that the claimant had indeed abused her position, and had used her employer's time and facilities extensively to promote and conduct her own personal and business affairs. Even if unfairly dismissed, she contributed to that dismissal by 100%, is the primary submission, or, if not totally, to a substantial degree. Ms Samuel accordingly seeks a reduction on that basis. Mr Mahmood resists, on the basis that the claimant had done nothing wrong, or that she knew was wrong, and it would not be just and equitable to reduce her compensatory award.

92. The tribunal has considered this aspect of the case extensively. In order to make such a finding, of course, the tribunal has to make findings of fact as to the claimant's actual conduct, not merely what the respondent may have believed it to have been. In this regard the only witnesses who were called who could potentially give such evidence upon which such findings could be based were Mark Livingstone and Joanne Bramall. The former, of course, did not witness much himself first hand, but received reports from other members of staff. Of those, only Joanne Bramall gave evidence. Joanna Appleton, and Charlotte Ollerenshaw - Ward , for instance, did not. The respondent, however, relies as much, if not more, upon the documentation, and the claimant's own account, particularly in cross – examination and under questioning from the tribunal.

93. The tribunal does indeed recall the impression, unfortunately a poor one, that the claimant left with the tribunal at the conclusion of her evidence, upon which she was not re-examined , doubtless for perfectly sound reasons. It is true that the tribunal was most struck by the apparently high amount of usage of the respondent's facilities, and to some extent , its time (though the two are not necessarily co-terminous, as we accept that many of the claimant's activities would, in themselves, only be likely to take a few seconds at a time). It was clear to us that the claimant, for the reason she herself stated, that it was not possible to do otherwise, given the office hours of those she was dealing with, was running her own property business, and attending to other personal affairs, whilst at work for the respondent, and used the respondent's facilities and time to do so. The tribunal does not accept for one moment that the claimant was not running a business. Whilst she has sought repeatedly to say that she does not (or did not at the time) "buy and sell houses", or "trade in properties", that may be strictly true, in the sense that it is not from purchase and sale that the claimant primarily seeks to derive income, but all the hallmarks of the communications in which she was engaged are of a person renting out property, both here and probably in Spain. That the limited company , Propertwise UK Limited, of which the claimant is a Director appears dormant is irrelevant, as the claimant may well choose not to operate her business through it. The tribunal agrees that the claimant's attempts to persuade her employers and the tribunal that she did not run some form of property business were disingenuous. She appears to have thought, or wanted others to think, that renting out properties that she formerly lived in was not a commercial activity. In any event, given that some of the claimant's property interests were in the North East, where she had not lived (she has worked for the respondent or its predecessors since 1981) , and she was clearly looking to acquire new investment properties , this explanation too holds no water.

94. The tribunal therefore accepts that the claimant did make extensive use of the respondent's equipment, facilities and time on the four occasions identified, for her own, largely business related , purposes. In summary, these have been calculated by the respondent to amount to the following, in a combination of internet, e-mail and telephone usage:

20 October 2011 – 2 hours 49 minutes

17 November 2011 – 1 hour 12 minutes

21 November 2011 – 1 hour 50 minutes

23 November 2011 – 1 hour 40 minutes

Of these, her activities on 20 October 2011 are by far the most serious, as the analysis shows she spent at least 2 hours 49 minutes that day on a combination of the internet, e-mail, and telephone. That said, in terms of time, the most serious aspect of any misuse in the tribunal's view, the claimant was entitled to 60 minutes lunch break, and two 15 minute breaks, meaning that dependent upon whether and when she actually took any of these, not all of this time was necessarily time when she should have been working for the respondent. The tribunal, however, notes the evidence of Joanne Bramall and Joanne Appleton before the disciplinary hearing that the claimant did in fact take a lunch break on 23 November 2011 , and thus it is likely that most of this non – work activity did not all take place during the claimant's "own time", and that a substantial amount did take place during work time. This too was a significant day, as the claimant was clearly completing a property purchase that day, as her colleagues were only too aware, and gave evidence about the effect this had. The claimant subsequently agreed that, in hindsight, she should have taken this day off.

95. The parameters of permitted departmental telephone usage, however, we consider, were rather ill – defined, and whilst the degree to which the claimant was using her employer's time and facilities grew to an extent that it prompted her colleagues to report her to management, the position was always that she had never been warned, or given clear instructions as to what was, and what was not, acceptable use, and to some extent had been allowed, if by default, to increase the level of her activities to what had become an unacceptable level. There was, we consider, rather highlighted by the evidence of Joanne Bramall and her colleagues, who had to threaten him in order for him to take some action, rather weak management of the claimant on the part of Mark Livingstone, under which the claimant's excesses were permitted to flourish.

96. Whilst all this is some mitigation, and there were clearly some blurred lines, we do not, it will be appreciated, consider that the claimant was blameless in all this, and she showed, at the very least, a lack of insight into her own behaviour, and its impact on her subordinates, and allowed herself on occasion to put her business and personal interests above those of her employer, and, indeed, her colleagues. Given that she herself was one who complained about waste of public resources in relation to the drugs issues, and she was herself quick to upbraid subordinates for their shortcomings, there was, we can well see, an element of hypocrisy about the claimant's own conduct, which doubtless, and understandably, rankled with her subordinates . She was, the tribunal is quite satisfied , on the four days in question (and it is for those, and only those, that she was dismissed) using the respondent's facilities, and to some extent, though this is less clear cut, its time to look after and to promote her business activities as a landlord, and property owner. Her attempts to suggest that this was not a business, and to play down the level of her activities, were, frankly, unconvincing and implausible. The witness accounts given by her colleagues in both investigations, and both the hearings, clearly show that they were finding her behaviour unacceptable, and disruptive of their own work , although this is a more general complaint over the period, and not necessarily confined to the four days in question. The claimant's level of activity on 23 November 2011, however, was plainly seriously disruptive, and even she accepted that she probably should have taken that day off. The tribunal does not consider it likely that these witnesses have colluded, or that their accounts were not genuine, although they do seem to have taken every opportunity to report on her activities in October and November 2011, in an attempt to get Mark

Livingstone to do something. On that basis, there are grounds, the tribunal finds, for the tribunal to make some reduction for contributory fault, and the tribunal has therefore seriously considered doing so.

97. The provisions as to reduction for contributory conduct under s..123(6) of the ERA require a tribunal to approach the matter in two stages. The first is making findings as to the conduct of the employee which amount to contributory conduct, and secondly, to consider whether to exercise its discretion to make any reduction, and if so, to what extent. That involves weighing various factors for and against the making of any reduction. In favour of making a reduction, of course, is the finding as to the claimant's conduct, which was, the tribunal has found serious and, of such a nature as to entitle the tribunal consider a reduction. She was herself a senior manager, again a relevant factor. Further, in approaching this issue, the tribunal may only have regard to the conduct of the claimant, not that of the respondent (see ***Live Nation (Venues) v Hussain UKEAT/0234/08*** for example). Thus the defective nature of the investigations, which prevented the respondent, and now prevents the tribunal, from ascertaining how serious the claimant's conduct was when compared with that of her colleagues cannot be taken into account. Nor can the other defects in the procedure which the tribunal has found be relevant for these purposes, as it is only the claimant's conduct that can be considered in this regard.

98. The respondent seeks a 100% reduction. The claimant's conduct was clearly unacceptable. The tribunal does not doubt that the conduct in question, which, it should be recalled was expressly found to have occurred on four days only , in October and November 2011, would probably have been stopped in its tracks by a warning. We note that Chris Sleight states (para. 57 of his witness statement) that it did not matter to him whether the claimant had done this on one day or twenty days. The question was whether she had used Trust equipment , facilities and time in relation to her own interests. That said there would clearly be a difference in how a serial abuser of such time and facilities should be treated, as compared with someone who committed a one – off transgression. As ever, it would be a matter of degree, and the appropriate sanction should reflect the seriousness of the conduct, and whether it was likely to be repeated. That one of the claimant's colleagues , Joanne Appleton , when finally investigated after the claimant's dismissal and appeal was found to have committed some level of misuse, but no formal action at all was taken against her by Chris Sleight, who issued her with the letter of 24 January 2014, rather demonstrates how grey the area of degree of seriousness of such conduct could be. Whilst a "zero – tolerance" policy would be understandable, and if consistently applied, potentially fair to all who were treated the same way under it, this difference in treatment , even after the limited investigation that was eventually undertaken, inclines the tribunal not to exercise its discretion to make a 100% reduction on this basis.

99. The tribunal is satisfied that the claimant's conduct on the four days in question (and the tribunal is only considering those , as they were the express basis for Chris Sleight's decisions to dismiss, and any wider finding on appeal was unfair, and will not be considered by the tribunal for these purposes) was of such a nature as to fall within s.123(6) , and did contribute to her dismissal.

100. Putting all the factors into the balance , the tribunal considers that to hold that in these circumstances the claimant was totally responsible for her own dismissal would be putting it too highly. She clearly substantially was, however. By a majority the tribunal

finds that the just and equitable proportion by which to reduce the compensatory award is 50% . The minority non – legal member whilst concurring in the findings that the claimant was indeed guilty of the contributory conduct found above as would entitle the tribunal to make such a reduction, was nonetheless not persuaded that, given the serious and significant instances of unfairness in the dismissal and the appeal processes on the part of the respondent, any reduction should be made on this basis.

101. Whilst not expressly advanced in either Counsel's submissions, the tribunal considers that it must also consider whether to make the same reduction in relation to the basic award, under s.122(2) of the ERA. Having made the findings it just has, the tribunal considers that it cannot differentiate between the compensatory and the basic award for these purposes, following ***RSPCA v Cruden 1986 ICR 205*** , and that the same reduction should be made unless there are exceptional circumstances. The tribunal therefore makes a 50% reduction in the basic award, again, by majority, for the same reasons.

102. Further, in the event that that the tribunal may not have been right not to make any ***Polkey*** reduction, had it done so, it would then have taken that into account in determining whether, and if so, to what extent, also to make a reduction for contribution. That such an approach is permissible is endorsed in ***Grantchester Construction (Eastern) Ltd. v Attrill UKEAT/0327/12*** , where, having made a reduction under the former to make the same, or any, reduction under the latter would lead to an injustice of an excessive and disproportionate reduction. The tribunal considers that to have applied both ***Polkey*** and contribution reductions in full in this case would have had that effect, and that one reduction to the compensatory award of 50% meets the justice of the situation.

Other issues as to fairness.

103. For completeness , and so that the tribunal's findings in relation to ***Polkey*** and contribution are set in the context of the reasons why the dismissal was unfair, the tribunal will briefly deal with those elements of alleged unfairness advanced on behalf of the claimant which the tribunal has not found sustained. They are:

a)The suspensions.

Mr Mahmood's submissions refer to it being "trite law" that breach of the suspension process could amount to a breach of the implied term of trust and confidence. That may be so, but it does not have any direct bearing on the fairness of the dismissal. True it is, as he points out that Mark Livingstone argued strongly for the claimant's suspension. That was , the tribunal finds no doubt because of his genuinely held fears about what may have happened if she was not suspended. Her suspension , and its extensions , may have been "unfair", but the claimant cannot complain of "unfair suspension". Mr Mahmood prays all this in aid of the claimant's case that the respondent as a whole displayed an indifference to a fair and proper approach to her case. The tribunal accepts that there were breaches of the respondent's procedures, strictly speaking, and that some of the reviews were somewhat perfunctory. That does not , however, in the tribunal's view render the dismissal unfair, or even contribute to its unfairness. No prejudice to the claimant's case in the process has been identified as having been caused by the suspensions, and at the end of the day the dismissal was carried out by Chris Sleight, not Mark Livingstone.

b)Dishonesty

Mr Mahmood makes much of the definition of "dishonesty", and the legal test thereof, citing ***John Lewis plc v Coyne [2001] IRLR 139*** and ***R. v Ghosh*** in this regard. He contends that the respondent did not adequately investigate the question of her dishonesty. The tribunal cannot agree. The respondent's investigations did touch upon the training she had received, and her senior position in general. Chris Sleight made it clear that he believed that she knew what she was doing was wrong. He may have been right, or wrong, but he was entitled to that view. That the claimant was fairly blatant was a relevant factor, but there was evidence too that her activities increased when Mark Livingstone was not in the office, and Joanne Appleton's evidence supplied to Mark Livingstone about the events of 21 November 2011 did indeed relate to a day when he was on annual leave. In short, whether "dishonesty" in the legal sense of the word, the respondent was entitled to conclude that the claimant knew that what she was doing went beyond the boundaries of reasonable use..

c)The management side and appeal panel remaining in the same room.

This is a minor point, and factually correct, in that there was a brief period of time when the management side were present in the room with the appeal panel after the claimant had left, but this , the tribunal is satisfied that nothing untoward occurred, and this had no effect on the outcome. It is not mentioned in Mr Mahmood's closing submissions.

d)Delay.

The claimant in submission complains of delay in the determination of the appeal. This is contended to be a breach of the respondent's own procedure, under which appeals are to be dealt with within 1 month of receipt. The appeal was lodged on 24 July 2012, and not disposed of until January 2013. The tribunal appreciates this, but considers that given the volume and complexity of the issues (requiring 4 days of appeal hearings) this is understandable. No contemporaneous complaint about delay was made. Whilst delay can in some instances render a dismissal unfair (see for example ***RSPCA v. Cruden [1986] ICR 205***) this is usually in the context of delay in taking action between the alleged misconduct and the subsequent disciplinary action. The tribunal knows of no authority (and none has been cited) where delay in determining an appeal occasions, or even substantially contributes to , the unfairness of a dismissal.

e)Consistency of treatment – non – colleagues.

Apart from the issue of usage by colleagues, and the lack of any investigation into it until after the claimant's appeal, the claimant has also sought to argue unfairness on the basis that other employees who have committed as, or more, serious acts of misconduct have not been dismissed. The claimant has cited at paras. 316 to 334 various examples , obtained on disclosure from the respondent, of cases where either employees have not been dismissed, for conduct which the claimant argues was worse than hers, or where they have been , for conduct which was clearly worse. She seeks to draw from these alleged comparators, or non – comparators, arguments that her own treatment was unfair in comparison, or to sustain her thesis that the respondent operated a witch – hunt against her.

The tribunal does not find that the latter is sustained. Whatever its deficiencies, the tribunal finds that the process to which the claimant was subjected was a genuine one, and that any singling out of the claimant was occasioned by a genuine belief amongst her colleagues, and her line manager that she was , in effect , taking liberties. In relation to the former, the tribunal takes Ms Samuel's point that consistency arguments must be considered in accordance with the authorities of ***Hadjioannou v Coral Casinos Ltd [1981] IRLR 352*** and ***Securicor Ltd v Smith [1989] IRLR 356*** . The emphasis must be on the individual case, and only when other cases can be considered truly parallel , in terms of facts and mitigation in each case, can a tribunal begin to consider whether lack of consistency has any bearing upon the fairness of the dismissal. The claimant does not say, as is mentioned in the first limb of the tests for potential relevance in ***Hadjioannou*** that lenient treatment of others misled her into believing that certain conduct would not lead to dismissal. The tribunal finds that it can draw no conclusions from all the other cases cited by the claimant, and does not find the dismissal unfair on this basis.

104. The tribunal's conclusion therefore is that the claimant was unfairly dismissed for the reasons set out above, but not those set out in para. 103 . Before going on to consider the consequences of that finding, the tribunal considers that it should next address her other claims.

The breach of contract and unlawful deductions from wages claims.

105. These have been resolved between the parties, and are withdrawn.

Age discrimination.

106. We now address the claimant's contention that her dismissal was an act of indirect age discrimination. The basis for this claim is that she was initially temporarily, and then permanently, replaced by Charlotte Ollerenshaw - Ward, a younger person. It is, in the tribunal's view, significant that there is no other basis advanced for this claim other than those facts. The claimant contends that the respondent had for some time preferred to appoint a younger person to her post, and planned to do this all along. In short, her suspension and dismissal were golden opportunities to further this desire. This is not, however, put as direct age discrimination, but as indirect, the PCP relied upon being to replace the claimant with someone in a lower grade or on lower pay than the claimant. In support of this , the claimant points to the fact that whilst she was, at the time of her dismissal on Band 8b, Charlotte Ollerenshaw – Ward was on Band 8a.

107. The claimant, however, other than the inherent unfairness of her dismissal, as she sees it, has adduced no additional evidence in support of this contention. She relies solely on the fact of the appointment of a younger person as her replacement. There is not a scintilla of evidence to support this conclusion. It is, of course, appreciated that in discrimination claims there will not always be overt evidence betraying the discriminatory motives of the discriminator.

108. As cases such as ***Madarassay*** have long established, for a claimant to succeed in reversing the burden of proof, there has to be "something more" that the possession of the protected characteristic, and a difference in treatment. That, however, is all the claimant has here, when one analyses the evidence. There is not a single remark, or reference to

the claimant's age, or the age of her replacement from which the tribunal could be invited to infer that , absent an explanation, her treatment was on the grounds of her age.

109. If, however, the tribunal was wrong on that, and the claimant did succeed in reversing the burden of proof , there is ample evidence from which the respondent would be able to satisfy the tribunal that the reason for her treatment was not her age, or indeed, the lower age of her replacement. As is clear from our findings above, we are quite satisfied that the reason for the claimant's dismissal was the respondent's belief that she had been guilty of serious misconduct. That may not have been fair, but it was, in our view, genuine. That she should be replaced by someone who was , as it were, coming up through the ranks behind her is hardly surprising. That this person was, almost by definition, likely to be junior to, and younger than, the claimant is also highly understandable. That does not mean that the respondent , absent any conduct issues with the claimant, wanted to, or would have sought to dismiss her to make way for Charlotte Ollerenshaw – Ward , who happened to be younger than the claimant.

110. This is not, however, we remind ourselves, a direct discrimination claim, it is an indirect one. Consequently, the first element the claimant must establish is the relevant PCP. It is contended that this was "the requirement to replace the claimant with someone in a lower grade". The respondent in fact did so, that is true, but what is the evidence that this was a "provision, criterion, or practice" ? As Ms Samuel submits (para. 28 of her submissions) all that the claimant relies upon is the fact that the Pharmacy Department, in common with most other public sector operations, was required to make financial savings, and the claimant's successor was paid a lower wage. In support of the argument that there was no such PCP, the respondent points to the facts that the claimant recruited Charlotte Ollerenshaw – Ward . she acted up in accordance with her job description , the claimant's role remained within departmental budgets, and she was the only person to apply for the interim aseptic services manager. She had applied for the new role of Head of Technical Services (a Band 8c post) , but was not suitable. Further, her appointment as permanent replacement was by external assessors.

111. The tribunal also notes that Mark Livingstone, the alleged author of the plan to remove the claimant himself argued vigorously against any cuts to the department, including to the claimant's post.

112.. In short the tribunal agrees with the respondent's submissions that the claimant has failed to demonstrate any PCP at all, and hence must fall at this hurdle. The tribunal accordingly dismisses the claimant's claims of age discrimination.

Summary and postscript.

113. The claimant thus succeeds on one claim, that of unfair dismissal. As the length and complexity of this case demonstrates, it is hard not to observe that both sides appear to have taken what could have been a relatively simple and manageable employment problem, and escalated it to almost nuclear proportions. On the respondent's side, this started with Mark Livingstone's failure to take prompt action to nip the claimant's activities in the bud, which resulted in her colleagues then forcing him to take some action. That action was not to speak to the claimant, or try warning her , but to set about gathering covert evidence, and encouraging, at the very least, her colleagues to gather evidence too, evidence which they did not confine to matters which directly affected them , but

included , for example, checking up on whether the claimant had booked leave when she had left a course early. That then led to a counter – fraud investigation, conducted in the manner of a criminal investigation. That doubtless was a considerable shock to the claimant, as it would be to many employees, who may not immediately see how taking some liberties with their employer's facilities and time would be equated with fraud, however legitimate that view may well be on the part of the employer. The investigation that then ensued covered a wide period, with some of the allegations made by some interviewees going back some years. The respondent not content with that process, then carried it out all over again with a second investigation.

114. For her part, the claimant raised a grievance, which was seen, again understandably, as a form of retaliation , or pre-emptive defence , to the allegations. Her own allegations, particularly against mark Livingstone, then ranged far and wide, and she introduced a whistleblowing element into the proceedings. The respondent's response was less than satisfactory to her, and involved Chris Sleight who then was to go on and hear the disciplinary. She was taken through a second investigation , and more evidence was assembled against her. Faced with all this the claimant sought to add to her armoury by seeking legal representation for her disciplinary hearing. This was another escalation, and a further source of contention.

115. In her defence to the initial disciplinary allegations, and her subsequent pursuit of the appeal, the claimant raised many matters, and prepared, doubtless with assistance, what can only be regarded as a "fully pleaded" case, covering many issues , some highly technical and procedural, containing legalistic terminology and even references to caselaw. Seldom has the tribunal , in its combined experience, seen a case quite like this one. That the claimant should take such measures is , of course, quite understandable, and an obvious reaction to the threat to her employment of some 27 years, without any prior blemish. The respondent too, however, seemed determined to mine every seam of allegation against her, gathering wide ranging evidence from colleagues, but , ultimately choosing to dismiss for only four days of misconduct, at least as far as Chris Sleight was concerned.

116. The whole process from the respondent's side gave rein to Mark Livingstone's, and to some lesser extent, the claimant's colleagues' long held, but unactioned, suspicions about the claimant's activities, and her honesty. Nothing had ever been said to her previously, but this investigation unleashed a plethora of evidence, some of it quite stale, that was not confined to the charges for which she was eventually dismissed. It is thus hardly surprising that the claimant sought to defend herself by every means possible. Those means , however, have unfortunately included allegations that the dismissal was motivated by whistleblowing, age discrimination or an allied desire to make costs savings, none of which the tribunal has found well - founded.

117. Both sides, therefore, rather escalated the stakes, and issues have had to be considered which a more focussed and measured approach by each side might have avoided. That said, the tribunal appreciates that it takes two to create such a situation, and can fully appreciate each side's position. What the case perhaps highlights is the value of a focussed and simple approach to employment matters, without, with all due respect to the claimant and her advisors, the involvement of lawyers, which, however, can hardly be complained of by an employer whose reaction to such issues was to instigate a quasi – criminal investigation. Whatever the merits of each side's position, the tribunal has to

observe that is highly regrettable that so much public time and resources have been expended on these matters. That is not, however, to denigrate the assistance and assiduity of both counsel, for whose assistance the tribunal is very grateful.

Remedy.

118. The claimant succeeds therefore only in respect of unfair dismissal. She is entitled to a remedy, which will comprise of a basic award , which ought to be capable of agreement, and a compensatory award. Her dismissal being on 4 July 2012, the relevant limit on a week's pay for the basic award is £430, and the maximum compensatory award is £72,300.00, the dismissal pre – dating the alternative limit of 52 week' pay introduced from 29 July 2013.

119. The claimant is seeking compensation for her loss of earnings since the date of her dismissal, to include pension loss. She was aged 53 at the time of her dismissal. Her annual gross salary was £55,945.00, and the Schedule of Loss suggests that this would have been increased, rising to £57,070 per annum from April 2014. Additionally she claims loss of pension rights. She has mitigated with locum work, but has not found (or had not, as at the date of the first hearing in January 2015) permanent work.

120. Whilst there has been suggestion that the claimant had told colleagues that she would retire well before reaching her normal retirement age of 60, or 66, which the claimant contends she would have worked until, this is disputed. It may have been a bit of bravado, and is in any event a speculative issue. Doubtless details of how the claimant has in fact supported herself over the last 5 years since her dismissal will cast some light on this issue, and the one benefit of the passage of time is that it will remove a degree of speculation from the process. In the claimant's Schedule of Loss, she seeks loss of earnings from the date of her dismissal at the net rate of around £40,000 per annum, plus loss of pension rights. Her losses, after mitigation, to January 2015 were put at just over £80,000. Given that, plus pension loss, even allowing for mitigation and a 50% reduction, it may well be that she will be entitled to a maximum award in any event. There may, of course, be other issues on remedy. The parties will doubtless need time to consider this judgment and the likely award. Once that is done, however, they are to notify the tribunal by the date set out above as to whether any remedy hearing is required, and if, so, shall specify the issues to be determined, the estimated length of hearing, and any dates to avoid.

Employment Judge Holmes

Dated: 17 August 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
23 August 2017

FOR THE TRIBUNAL OFFICE

ANNEX

The relevant statutory provisions

1.Unfair Dismissal.

s. 98 of the Employment Rights Act 1996:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show–

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it–

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) [N/a]

(4) In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(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.

122 Basic award: reductions

(1) [N/a]

(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such

that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

s.123 Compensatory award

(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

and, in particular:

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

2.Protected Disclosure – detriment and dismissal.

Employment Rights Act 1996.

43B Disclosures qualifying for protection

(1) In this Part a "qualifying disclosure" means 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--

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

47B Protected disclosures

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

103A Protected disclosure

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

3.Age Discrimination

Equality Act 2010:

19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—

age;

[N/a]
