EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr David Bickerton	AND	Royal Cornwall Hospitals NHS Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD IN CHAMBERS AT Plymouth **ON** 28 February 2019

EMPLOYMENT JUDGE N J Roper

Representation
For the Claimant: Written Representations
For the Respondent: Written Representations

JUDGMENT

The judgment of the tribunal is that the claimant succeeds in his claim for breach of contract. The respondent is ordered to pay the claimant two weeks' pay in sum of £1,338.46, which is to be paid net of the normal payroll and statutory deductions.

REASONS

1. In this case the claimant Mr David Bickerton brings a monetary claim for breach of contract against his ex-employer the Royal Cornwall Hospitals NHS Trust. The respondent denies the claims.
2. Following difficulties with the availability of witnesses, and the claimant's ill-health, the parties have consented to this matter being determined on the papers, and without an oral hearing in person. The parties have helpfully agreed a bundle of the relevant documents and have each provided detailed written submissions. The claimant has adduced a signed written witness statement of his evidence, and a signed written witness statement from Louise Dickinson in support of his claim. I have also received a signed witness statement from Stacey Davies on behalf of the respondent.
3. There was a limited degree of conflict on the evidence, although many of the facts were not in dispute. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both by way of the statements and the documentary evidence, and after considering in detail the factual and legal submissions made by and on behalf of the respective parties.
4. The claimant commenced employment with the respondent NHS Trust as a Band 7 Food Unit Operational Food Manager from 6 February 2017. On 14 September 2017 he was removed from this post when the respondent discovered that he did not possess the necessary qualifications. On 25 September 2017 the claimant presented a formal

grievance against this decision, and during the course of the grievance investigation the respondent identified a number of serious concerns in connection with the claimant's capability and conduct. These included: (i) lack of appropriate food hygiene knowledge and causing a health and safety risk; (ii) cancelling an equipment maintenance contract without authority; (iii) allegations of bullying behaviour towards colleagues; and (iv) failure to hold the required food safety standard qualifications.

5. Mr Weaver, the respondent's Director of Estates, had conduct of the grievance hearing which took place on 10 November 2017. Mr Weaver rejected the claimant's grievance. He also decided that the claimant's actions amounted to gross misconduct (for the reasons set out above) and dismissed the claimant summarily for this reason. He told the claimant of his decision at the meeting on 10 November 2017, and confirmed that decision in a detailed letter dated 14 November 2017. He stated in that letter: "Therefore, in light of the issues summarised in this letter, both relating to your conduct and ability to undertake your role, it is appropriate that I terminate your contract of employment with immediate effect on the grounds of gross misconduct."
6. The claimant appealed against that decision in short on the basis that it was a wrongful dismissal in the absence of any formal disciplinary process consistent with his contract of employment. The claimant also lodged an appeal against his original grievance on the basis that it had not been objectively investigated. At a grievance appeal hearing on 12 December 2017 the claimant's grievance appeal was dismissed and that decision does not form part of the complaint before me today.
7. The respondent convened an appeal panel to hear the claimant's appeal against his summary dismissal and this took place on 14 December 2017. The claimant was present and was accompanied by Louise Dickinson who, as noted above, has provided a statement in support of the claimant. Stacey Davies, who has provided a statement on behalf of the respondent, provided HR support to the appeal panel at that hearing. The claimant's appeal was heard by a panel consisting of Mrs S May, the respondent's Joint Chief Financial Officer, and Mr T Lafferty, the respondent's Director of Corporate Affairs.
8. The appeal panel upheld the claimant's appeal. It found that the respondent had not followed the correct procedure and concluded that: "the Trust did not follow the Disciplinary Procedure and you were summarily dismissed without an investigation, a Disciplinary Hearing or the opportunity to respond to the allegations made against you."
9. However, the appeal panel also decided that the employment relationship between the claimant and the respondent Trust had broken down irreparably and decided to confirm that the claimant's employment would be terminated for this reason in any event, rather than for gross misconduct.
10. One of the issues to be determined today is whether (and if so when) this second decision to communicate dismissal was made to the claimant. Part of the claimant's claim is that this second decision to dismiss him was not communicated until he received a letter dated 20 December 2017 from the respondent. However, I find that this second dismissal was communicated to the claimant at the appeal hearing on 14 December 2017. I make this finding for the following reasons. Ms Davies in paragraphs 9 and 13 of her statement on behalf of the respondent states that dismissal was clearly communicated to the claimant in person at the meeting on 14 December 2017. In addition, the detailed contemporaneous notes of the appeal hearing on 14 December 2017 (at page 116 of the agreed bundle) record that the claimant was informed: "The appeal is therefore upheld; however, as the relationship with the Trust is broken down and DB is not suitably qualified he cannot be re-employed in his former post so his contract would end from today." On the other hand, the statements of both the claimant and his supporting witness Louise Dickinson, who were at the appeal hearing, are both silent on whether or not dismissal was communicated at the appeal hearing. For these reasons I find on the balance of probabilities that dismissal was communicated (for the second time) to the claimant at that hearing on 14 December 2017.
11. The respondent also determined that given that dismissal for gross misconduct was not the appropriate sanction, the claimant would (i) be paid for the period from his original dismissal on 10 November 2017 to the date of the appeal hearing on 14 December 2017, and (ii) would receive two months' pay in lieu of his contractual notice. The claimant was

then paid eight weeks' pay in lieu of notice, rather than the correct (higher) amount of two months' pay, but the shortfall of £471.13 has since been paid by the respondent to the claimant to clear these arrears.

12. The respondent wrote to the claimant to try to confirm the position by letter dated 19 December 2017. Unfortunately, this letter was a draft which had not been finally approved by the respondent before it was sent to the claimant. There were two significant errors in that letter. The first was that the revised termination of employment date was incorrectly noted to be the date of receipt of that letter (19 December 2017). In addition, the original dismissal date was stated to have been 19 November 2017 when it was actually 10 November 2017. The claimant made an immediate enquiry as to the detail in the letter, and Ms Davies wrote a further explanatory letter to the claimant on 20 December 2017. That second letter made it clear that the claimant had not been reinstated and that the appeal panel had communicated to him at the hearing on 14 December 2017 that his employment had terminated at that time because of an irreparable breakdown in the working relationship. She confirmed that the claimant would be paid for the period from 10 November 2017 (his original dismissal) until 14 December 2017 (the second dismissal) and that the claimant would also be paid in lieu of his notice from 14 December 2017 in accordance with his contractual notice provisions. There was no further right of appeal, and the claimant issued these proceedings on 22 December 2017.
13. One further issue to be determined today is the extent to which the respondent's disciplinary procedure has contractual effect. The claimant asserts that the respondent was contractually bound to apply the procedure before dismissing him on the second occasion. The respondent accepts that the policy has been collectively agreed, but asserts that it does not have contractual effect because it has not been incorporated into the claimant's contract of employment.
14. The relevant policy is the respondent's Disciplinary Policy and Procedure. It was revised in 2010 and runs to 35 pages. On its front sheet there is a brief summary of contents as follows: "The Policy provides managers and staff with a robust framework for managing any conduct issues of concern that arise in a consistent manner across the Trust in line with current legislation and the ACAS Code of Practice". Under paragraph 3 headed "Scope", 3.1 provides: "The policy applies to all employees of the Trust including Kernowflex workers. Additional arrangements apply to medical and dental staff …" There is no provision within the 35 pages of this policy which I have seen, or which has been drawn to my attention, which suggests that the policy is non-contractual.
15. The claimant was issued with a statement of the principal terms and conditions of his employment which stated that the terms and conditions of his employment consisted of the terms of that document, and NHS National Terms and Conditions of Service. Paragraph 17 of the claimant's statement of terms and conditions of his employment headed "Disciplinary Procedures" merely provides: "The Trust's Disciplinary Policy and Procedure is designed to inform and encourage all employees to achieve and maintain high standards of conduct and provides a fair and consistent method of dealing with alleged failures to meet them." There are no other provisions relating to the Disciplinary Policy Procedure, and there is no provision to the effect that it is not intended to be incorporated by reference and/or to have contractual effect.
16. Finally, it is not in dispute between the parties that the respondent failed to apply the provisions of the Disability Policy and Procedure in respect of the claimant's second dismissal, because no formal disciplinary procedure was followed in accordance with that policy. The respondent asserts that there was no need to do so because there was no contractual requirement to do so, and in any event none was necessary because there had already been a very thorough and detailed investigation into the circumstances concerning the claimant's employment which had taken place during the original grievance investigation.
17. The claimant's claim for breach of contract is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the claim was outstanding on the termination of employment.

18. At a case management preliminary hearing on 21 March 2018 I recorded that the list of issues to be determined at this hearing were threefold as follows: (i) Was dismissal communicated to the claimant on 14 or 21 December 2017? If the latter date, then seven days net pay will be due to the claimant; and (ii) Was the claimant contractually entitled to a further disciplinary process before being dismissed on the second occasion? If so by what period would his employment have probably been extended? His loss will be net pay for that extended period; and (iii) In any event (whenever the pay in lieu of notice was to be paid) the claimant is due a further £471.13. As noted above the respondent has paid this further sum of £471.13, and so the third issue has already been determined. I deal with remaining two issues in turn.
19. The first issue is whether dismissal was communicated to the claimant on 14 or 21 December 2017. For the reasons set out in my findings of fact above I have found that dismissal was communicated on the second occasion to the claimant on 14 December 2017. His claim for a further seven days' pay in this respect is therefore dismissed.
20. The final issue to be determined is whether the claimant was contractually entitled to a further disciplinary process before being dismissed on the second occasion. The respondent has referred me to the following authorities in this respect: Wandsworth London Borough Council v D'Silva [1998] IRLR 193; Pendragon v Jackson (No 2) UKEAT 108/97/3006; and Alexander v Standard Telephones and Cables Limited (No 2) [1991] IRLR 286. I have considered these authorities.
21. Whether such a policy gives rise to contractually enforceable obligations is a matter of fact in each case. Helpful indications include whether the language is consistent with the provision of contractual right; whether there is an express statement in the policy that its provisions do not form part of the contract of employment; and whether the terms are apt for incorporation.
22. In my judgment the respondent is a large national employer with detailed terms, policies and procedures which have been collectively negotiated with a number of trade unions, not least as a result of the well-known Agenda for Change programme. The Disciplinary Policy and Procedure is a 35 page document which at no stage suggests that it lacks contractual effect. Similarly, the claimant's contract of employment which partly consists of his Statement of Terms and Conditions, does not suggest that the Disciplinary Policy Procedure does not have contractual effect. The language on the claimant's Statement of Terms and Conditions is consistent with the provision of contractual rights, and such terms are apt for incorporation. It was open to this employer the respondent to assert that the relevant Disability Policy Procedure did not have contractual effect, but it has not done so. For these reasons and in the context of this case I find that the Disciplinary Policy and Procedure was incorporated by reference into the claimant's contract of employment, and did therefore have contractual effect.
23. I also find that the respondent was in breach of this policy when it dismissed the claimant on the second occasion on 14 December 2017. This does not appear to be in dispute between the parties, not least because there was no second disciplinary hearing specifically listed to determine the extent to which there had been an irreparable breakdown in working relationships and whether the claimant might face dismissal for this reason. Rather, the decision was taken at a hearing listed to determine the claimant's appeal against his original dismissal for gross misconduct (which was successful). The claimant therefore succeeds in his claim for breach of contract in respect of the respondent's breach of the Disciplinary Policy and Procedure.
24. The respondent has relied upon the authority of Norman George Gunton v the Mayor Aldermen and Burgesses of the London Borough of Richmond-upon-Thames [1980] WL 149489 to the effect that where there is a contractual obligation to follow a disciplinary procedure and the employer fails to follow it, the employee may claim for the loss of wages for the period of time that the procedure would have taken had it been followed. The claimant asserts that the appropriate period is 10 weeks, because that is the period of time comparable to the time it took to investigate and conclude the claimant's grievance. The respondent makes two points in reply: (i) it asserts that an investigation and disciplinary hearing could easily have been arranged and concluded within a period of five weeks, even

bearing in mind the provisions of the Policy which require employees to be given seven days' notice to meet with the investigating officer and seven days' notice of the disciplinary hearing; and (ii) the claimant has already been compensated for a period of five weeks (the period between the two decisions to dismiss on 10 November 2017 until 14 December 2017) which accounts for the time in which it would have taken for the respondent to have completed the disciplinary process. It makes the point that the claimant's suggestion of 10 weeks is clearly excessive because the respondent had already undertaken a detailed investigation as to the circumstances surrounding the claimant's employment during his grievance process.

25. In my judgment the appropriate starting point for consideration is 14 December 2017. The claimant's appeal against his dismissal for gross misconduct was successful. He was then dismissed for another reason. That dismissal was in breach of contract. To the extent that the respondent suggests that the claimant should not be compensated for the time taken to arrange a further disciplinary hearing simply because it had decided to reinstate his lost salary between the five-week period of 10 November 2017 to 14 December 2017, in my judgment that argument is fallacious. The correct measure of damages for the claimant is his lost salary from 14 December 2017 when the respondent contemplated dismissing him through irreparable breakdown of working relationships, and failed to apply its Disciplinary Policy and Procedure.
26. However, I do agree with the respondent's submission that the necessary investigation had already effectively been concluded, and that no more time was required to complete any necessary investigations into the matters which had given rise to the claimant's dismissal. All that was required was the period of time which might have elapsed before the disciplinary panel could have been arranged, and for the claimant (and if necessary a representative or companion) to attend. The decision to dismiss the claimant would have been made in any event at that hearing, and the claimant's salary would have terminated on that date, even if he had subsequently appealed.
27. The Disciplinary Policy and Procedure indicates that the seven days' notice must be given to the employee in question. It would probably have taken the respondent about a week to arrange the availability of an appeal panel. I accept that it is not an exact science, but in my judgment I think it is reasonable to conclude that the respondent could have arranged a further disciplinary hearing within two weeks, at which the claimant would then have been dismissed.
28. For these reasons I assess the level of damages at two weeks' pay, and the respondent is ordered to pay the claimant the sum of two weeks' pay. The claimant's gross pay is set out in his originating application as £2,900 per month, which equates to £34,800 per annum, or £669.23 week, which is £1,338.46 for two weeks. The respondent is therefore ordered to pay the claimant the sum of £1,338.46. However, damages for breach of contract should reflect net loss, and so this sum should be subject to the normal payroll and statutory deductions, and the net equivalent of this sum paid to the claimant.
29. Finally, the claimant has also sought "a compensatory award for aggravated damages". That is a remedy which is only available for discrimination claims, and not the breach of contract claim currently before me, and that claim is therefore dismissed.

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Employment Judge N J Roper
Dated 28 February 2019