EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr. L. Marana	v	**University Hospitals Coventry & Warwickshire NHS Trust**

Heard at: **Birmingham via CVP** **On:** **6,7,8 & 9 September 2021**

In chambers :10 September 2021

Before: **Employment Judge Wedderspoon**

Members : **Mrs. Howard**

Mr. White

Representation:

Claimant: **Miss. T. Hand, Counsel**

Respondents: **Mr. T. Sheppard, Counsel**

JUDGMENT

1. The unanimous decision of the Tribunal is that :-
   1.1 the claimant's complaint of unfair dismissal is not well founded and is dismissed.
   1.2 The claim for wrongful dismissal is not well founded and is dismissed.
   1.3 The claim for direct race discrimination is not well founded and is dismissed.
   1.4 The claim for indirect race discrimination is not well founded and is dismissed.

REASONS

1. By claim form dated 20 March 2020 the claimant brought complaints of unfair dismissal, wrongful dismissal, holiday pay and direct and indirect race discriminatory dismissal. The claimant's holiday pay claim was dismissed on withdrawal on 25 May 2021. The claimant's national origin is Filipino.

2. The agreed issues to be determined by the Tribunal are set out in the case management order of Employment Judge Butler on 2 October 2020 and are as follows :-

   <u>Unfair dismissal</u>

   2.1 What was the reason or principal reason for dismissal ? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct;
   2.2 If the reason was misconduct did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide in particular whether :
   2.2.1 there was reasonable grounds for that belief;

2.2.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
2.2.3 the respondent otherwise acted in a procedurally fair manner;
2.2.4 dismissal was within the range of reasonable responses.

Remedy for unfair dismissal

2.3Does the claimant wish to be reinstated to their previous employment?
2.4 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?
2.5 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and if the claimant caused or contributed to dismissal, whether it would be just.
2.6Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and if the claimant caused or contributed to dismissal, whether it would
2.7 What should the terms of the re-engagement order be?
2.8 If there is compensatory award, how much should it be? The Tribunal will decide :
2.8.1 What financial losses has the dismissal caused the claimant?
2.8.2Has the claimant taken reasonable steps to replace their lost earnings for example by looking for another job?
2.8.3 If not for what period of loss should the claimant be compensated?
2.8.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed or for some other reason?
2.8.5 If so should the claimant's compensation be reduced/ By how much?
2.8.6 Did the ACAS code of Practice on Disciplinary and Grievance Procedures apply?
2.8.7Did the respondent or the claimant unreasonably fail to comply with it?
2.8.8If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion up to 25%
2.8.9If the claimant was unfairly dismissed did he cause or contribute to the dismissal by blameworthy conduct?
2.8.10 If so would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
2.8.11Does the statutory cap of fifty two weeks pay or £86,444 apply?
2.9 What basic award is payable to the claimant if any?
2.10 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so to what extent ?

3. Wrongful dismissal/Notice pay

3.1What was the claimant's notice period?
3.2 Was the claimant paid for that notice period?
3.3 If not was the claimant guilty of gross misconduct?

4. Direct race (national origin) discrimination (Equality Act 2010 section 13)

4.1 The claimant brings his race discrimination claim based on national origin. For the purposes of his national origin, the claimant describes himself as being of Filipino origin.
4.2 Did the respondent do the following things :
4.2.1 Dismiss the claimant?

4.3 Was that less favourable treatment?
The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The claimant had not named anyone in particular who he says was treated better than he was.

4.4 If so was it because of race (national origin)?

5. Indirect race (national origin) discrimination (Equality Act 2010 section 19)

5.1 A PCP is a provision, criterion or practice. Did the respondent have the following PCP :
5.1.1Requirement that individuals do not greet each other with physical contact?
5.2 Did the respondent apply the PCP to the claimant?
5.3 Did the respondent apply the PCP to those who are not of Filipino origin or would it have done so?
5.4Did the PCP put those of Filipino origin at a particular disadvantage when compared with those that are not of Filipino origin in that this has the consequence of dismissal ?
5.5Did the PCP put the claimant at that disadvantage ?
5.6 Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were :
5.6.1 To maintain a professional healthcare environment.
5.7 The Tribunal will decide in particular :
5.7.1was the PCP an appropriate and reasonably necessary way to achieve those aims;
5.7.2could something less discriminatory have been done instead;
5.7.3 how should the needs of the claimant and the respondent be balanced?

6. Remedy for discrimination/victimisation

6.1Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
6.2What financial losses has the discrimination caused the claimant?
6.3Has the claimant taken reasonable steps to replace lost earnings for example by looking for another job?
6.4If not for what period of loss should the claimant be compensated ?
6.5What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
6.6Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that ?
6.7Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?
6.8Did the ACAS Code of Practice on disciplinary and grievance procedures apply?
6.9Did the respondent or the claimant unreasonably fail to comply with it?
6.10If so is it just and equitable to increase or decrease any award payable to the claimant?
6.11By what proportion up to 25%
6.12 Should interest be awarded? How much?

HEARING

7.The Tribunal was provided with an agreed bundle of 342 pages. At the commencement of the hearing, the respondent applied to add documents p.143a to d. There was no objection by the claimant and the application was allowed. The claimant relied upon his own evidence. The respondent relied upon the evidence of Alexander Monahan, Group Director of Operations for Surgical Services, dismissing officer and Tracey Brigstock Deputy Chief Nursing Officer/Director of Nursing (Operations) and appeal officer.

FACTS

8. The claimant was employed as a staff nurse by the respondent from about 2003 until 31 December 2011. The claimant took a career break. He commenced employment with the respondent as a bank nurse from 15 July 2013. On 23 December 2013 the claimant commenced his role as a theatre practitioner in a bank role capacity. From 5 March 2014 the claimant became a permanent employee. He was an experienced and senior nurse at grade 6 and worked at the Hospital of St. Cross, Rugby.

Policies and Procedures

9. Pursuant to his contract of employment, the disciplinary procedure provided a right to the respondent to suspend at paragraph 6.7 (page 90). The right was a discretionary one permitting the respondent as an alternative to suspension, deployment of the employee to other suitable duties during the course of an investigation. Circumstances in which suspension may be deemed to appropriate will include where the alleged offence may constitute an act of gross misconduct. Pursuant to paragraph 6.10, an employee should be notified in writing a minimum of 14 calendar days in advance of a disciplinary hearing. A disciplinary outcome should be provided to an employee usually within 7 calendar days of the hearing (page 95). Gross misconduct is defined at page 98 as *"misconduct that is serious enough to irreparably damage the working relationship between the trust and the employee."* The non-exhaustive list of examples includes (a)serious breach of Trust policy; (k) serious acts of unlawful discrimination or harassment of a colleague, patient or member of the public in breach of the Dignity at Work policy; (n)any conduct considered likely to bring the Trust into disrepute (o)any conduct considered likely to bring the Trust into disrepute. A right of appeal to a disciplinary sanction is set out at paragraph 6.13. It is stated *"save in exceptional circumstances an appeal will not re-hear the disciplinary case but review the fairness of the disciplinary decision in conjunction with the employee's grounds of appeal."* The management is entitled to provide a response to the appeal (see page 101 and 106).

10. There was also a dignity of work policy which prohibited harassment in the workplace (page 107) which the claimant was aware of. Harassment is defined in this policy as including any physical contact which is unwanted and unwelcome remarks.

Claimant and the theatre team

11. The claimant was a well-liked, very competent and well-respected nursing professional as indicated by the number of personal and professional character references he obtained from nursing and medical professionals for the disciplinary hearing. Comments included *"a key member of the theatre staff"*; he displayed *"the utmost level of professionalism in all aspects of his work"; "well mannered man who is friendly, pleasant and open to everyone he comes into contact with*..".

12. The theatre staff were a tight knit close team. They enjoyed socialising in and outside work. The team consisted of a number of fillipino nurses. There was a culture amongst the theatre staff when greeting one another to hug and/or kiss colleagues. The culture of fillipinos was to hug and kiss cheek to cheek one another on greeting; this is known as beso beso.

13. The claimant enjoyed a friendly relationship with colleagues including Emelia Birtles ("EB"). She was an apprentice healthcare assistant, on a low level nursing grade, aged 20 years and had been employed with the Trust since September 2018. She was 20 years younger than the claimant.

14. On 19 May 2019 the claimant, two colleagues and EB arranged to meet at the Bikefest, Rugby (a bike festival). Two colleagues were unable to attend on the day, so the claimant attended but did not meet with EB. Once he returned home, he received a message from EB asking where he was and he explained that he had already attended and then left as he did not know whether EB was still attending to come. EB called the claimant a "*loser*" and stated "*you can't say I didn't try*." At this point of time the Tribunal finds this indicated the nature of the relationship enjoyed by the claimant and EB as friendly and jokey. The claimant on a previous occasion had informed EB to "*stop flirting*" and EB had replied "*flirting it's what I do best.*" Further, on 22 May 2019 some of the theatre team including the claimant and EB attended a dinner originally planned as a colleague maternity leave send off. The group hugged and kissed each other by way of greeting. This evidence of the claimant was unchallenged and therefore the Tribunal has made these findings. However, the Tribunal acknowledge that relationships and attitudes to others can change overtime.

15. On 19 July 2019 EB complained about the claimant to Rachel Barrett, Operating Department Practitioner. EB came out of the sluice area and looked very pale and stressed. EB started crying and stated *"I can't stand it anymore."* EB stated that the claimant had tried to kiss her on a number of occasions namely the disposable store cupboard and in the small waiting area where on both occasions she felt she was trapped. She stated that everyone loves the claimant and no one will believe her. Rachel advised the claimant it was a very serious matter and she must report it to management. Rachel Barrett accompanied EB to Alison Bolsover's office (Clinical Lead). EB was crying and visibly distressed. Rachel Barrett informed Ms. Bolsover about the incidents described to her by EB. EB also stated that this had happened before and when EB was alone. She described it started back in May when the claimant had walked her back to her car; he said he had forgotten some kit and requested a lift in her car. EB said she felt uncomfortable; so refused and got into the car and locked the door. The claimant remained outside the car, asking whether EB was serious. EB mentioned that he had on another occasion massaged her back as she had said it was sore but went lower than EB felt comfortable with. EB said she had discussed it with fellow health care apprentices. EB stated she felt very uncomfortable when the claimant was around. Ms. Bolsover contacted HR and Mr. Hammond, her manager.

16. On 22nd July 2019 (page 124) EB made a written statement about the incidents with the claimant including the car park incident, attempts to kiss her in the store-rooms, standing in the doorway so EB could not get out; the comment *"like the view"* referring to EB's behind as she pushed a trolley; on 15 July 2019 when the claimant massaged her back and took his hands down lower and massaged her bum. She described feeling on edge as to what is going on or done to her whilst around the claimant.

17. On 23 July 2019 the claimant was advised by Derrick Hammond his line manager that EB had made a complaint about him and he was shown her letter of grievance (page 124). He was informed that the respondent would be commencing an investigation into the allegation. Although the claimant was not provided with a copy, he was able to provide a written statement dealing with the allegations (dated 26 July 2019 page 125-128) and apologised for causing EB to feel on edge. His evidence was that he tended to greet colleagues with a hug and kiss on the cheek and described this as a cultural norm for him. His evidence is that all his conduct towards EB was in the context of a friendship with EB, was purely innocent and with no malice. He denied every trying to kiss EB on the lips or giggling (the car

park incident 1). He could not recall stating *"I like my view"* when EB was pushing a trolley but he said if he did so it was in a jokey way. He accepted that when EB said her back was hurting he offered a massage; he moved down her back towards the top of her buttock; she said that is my bum and he stopped immediately. He refuted that he put his hands on her bum. He described feeling disappointed that the claimant did not tell him that he was making her uncomfortable which was not his intention. He volunteered to meet with EB to offer his sincere apology.

18. The claimant became unwell and was absent from work due to anxiety and depression from 23 July 2019 to 15 August 2019.

19. The claimant was not suspended when the disciplinary investigation began. The Tribunal accepts that from the disciplinary procedure that it is not an automatic step to suspend an individual facing gross misconduct allegations. The respondent exercised its discretion under the disciplinary policy and ensured that the claimant and EB were scheduled in different theatres and on different shifts. Pursuant to the respondent's procedures (page 90) it was possible to deploy the claimant and EB in such a way that they did not work together. There was no evidence or complaint that Leonard Marana had acted in a sexually inappropriate way towards other staff or patients or that his presence at work would hinder the disciplinary investigation. In the circumstances the Tribunal reject the suggestion that simply on the basis that the respondent failed to suspend the claimant it did not consider the allegations to be serious. The claimant referenced on three occasions whilst the investigation was ongoing that he encountered EB but these were in shared areas and the respondent did try to keep the claimant and EB on different shifts and theatres.

20. Chris Seddon, Modern Matron was appointed as investigating officer. She interviewed EB on 14 August 2019 (page 129 to 132). EB described the team hugging and kissing each other as a greeting at work. The claimant was the only male member of staff to kiss and hug her. EB described the car park incident; the claimant had walked her to her car; as she normally did, she went to hug the claimant to say goodbye and the claimant tried to kiss her on the lips. EB said that she had to turn her head to the right to avoid the kiss and the claimant giggled; she believed the claimant was trying to laugh off the situation. EB described getting into her car and the claimant was asking for a lift and she refused and the claimant stood and watched her drive off. On another occasions, she described the claimant coming into the storeroom, standing in front of her and putting his arms around his waist and tried to kiss her. She stated she did not know how the claimant had not got the hint. The claimant was blocking the doorway. No one was in the vicinity and EB stated that these situations occur when no one else is around. She described a further occasion when in the warming cupboard, she turned around and the claimant was stood in the doorway and was watching her. He had his arm on the door and it made EB feel uncomfortable. On another occasion she met the claimant on the corridor. The claimant stopped in front of her, hugged her and put his hand on her lower back. When EB was pushing a trolley away, the claimant leaning on the zimmer boxes stated *"I like my view"* referring to the claimant's behind. She told him not to be a *"weirdo"*. On 15 July 2019 when EB complained about lower back pain the claimant asked if she wanted a massage and EB said *"it will be ok"*. The claimant started massaging really low on her back and then took his hands down lower and was massaging her bum. EB stated that's her bum. The claimant then stopped. EB said that the claimant may have misinterpreted what she meant by saying its ok; she meant just leave it.

21. In the course of her investigatory interview, EB was directly asked whether she had initiated any behaviour towards the claimant. She said she had not. She denied flirting with the claimant but said that they bantered and had a laugh but it was like

this with everyone in the department. She was asked whether she had given any indication to the claimant that his behaviour was acceptable. EB said she did not know if a simple hug was leading him on. EB said that the claimant was an adult and he is very aware that she *"is only a kid"*. EB said that she is 20 years old and the claimant is 40 years old.

22. By letter dated 6 August 2019 (page 146) the respondent invited the claimant to an investigatory meeting on 14 October to consider the allegation *"that you behaved in an inappropriate and unwanted manner towards a female colleague."* He was informed about his right to be accompanied.

23. On 14 August 2019 the claimant attended an investigatory meeting with Denise Crampsie, as representative, Chris Seddon, investigator and Jeff Upton, Workforce business partner (page 133- 136). He signed the interview record as an accurate copy. At the start of the interview the claimant confirmed he was currently off sick but was fit enough to attend the meeting and wished to proceed. He described his relationship with EB as colleagues who became friends. He stated it was commonplace and normal for a theatre environment to hug and kiss colleagues. He did not directly suggest that this was part of his fillipino culture. He described hugging and kissing younger female colleagues. Out of respect he did not hug older staff. He disputed that he attempted to kiss EB on the lips; he described as EB was tall that when they hugged they were face to face and their lips were not far from each other so EB may have perceived this as their heads were going left to right. He did not know what the giggling allegation concerned. In the storeroom he said that he recalled merely giving EB a kiss on the cheek. He did not recall standing in the doorway whilst EB was putting sheets away but he could have been leaning on the doorframe when he was talking to EB. The claimant could not recall the specifics of the comment *"like my view"* but if he did say it, it was banter. In respect of the massage on 15 July 2019, the claimant stated he offered a massage when EB complained about back pain and he did not wait for an answer before starting the massage. He accepted that he applied pressure low down and thinks he touched the top of her bum. When EB said "*thats my bum"* he stopped the massage; it lasted a few seconds. The claimant stated that some of his behaviours needed to change and he would not kiss and hug colleagues. He stated that EB had said on one occasion *"flirting it's what I do best*". However, the claimant when asked whether EB flirted with him, said "*it was just friendly banter and nothing else.*"

24. On 15 August 2019 the claimant returned to work.

25. As part of the investigation, Chris Seddon interviewed Sophie Hassell, Theatre Practitioner and friend of EB, on 20 August 2019 along with Jess Upton (page 138-140). She described a lot of hugging in the department and that the claimant had kissed her on the cheek but had not felt threatened by this. She described EB informing her that the claimant had tried to kiss EB on the lips. EB had not said anything to the claimant as she was taken aback. Sophie told the claimant that she probably misread the situation and EB said she probably had. She recalled EB telling her about three other occasions involving the claimant including an occasion when the claimant was stood in the doorway with his arm on the doorframe. Sophie felt EB should have told the claimant his conduct made her feel uncomfortable but thought EB felt uncomfortable saying this. Sophie said EB behaves as she does with everyone else; they have a laugh and banter. EB did not flirt with the claimant and the claimant did not flirt with EB.

26. A statement was obtained from Alison Bolsover, Clinical Lead on 22 August 2019. She described EB coming to see her with Rachel Barrett on 19 July. EB was crying and visibly distressed. EB was unable to verbalise her concerns so Rachel described what had occurred. EB stated in respect of the car park incident she got into her car and locked the door. She felt very uncomfortable when the claimant was around. Ms. Bolsover decided to reallocate EB's shifts so that she was not working with the claimant for the next couple of days. She contacted HR and her manager, Mr. Hammond. On 23 September 2019 a statement was provided by Rachel Barrett, operating Department Practitioner who described seeing EB very pale and stressed crying and stating *"I can't stand it anymore"* and described that the claimant had tried to kiss her on a number of occasions. She described feeling trapped in a room by the claimant. EB has said she didn't know what to do because everyone loves the claimant and no one will believe her. She described EB as looking petrified.

27. In October 2019 Chris Seddon completed the investigation (page 71-148). It was alleged that the claimant had acted inappropriately towards a colleague EB. The allegations related to a number of different incidents that occurred from May 2019 and concluded that the misconduct was so serious that it constituted gross misconduct and should be subject to a disciplinary hearing.

28. By letter dated 10 October 2019 Alex Monahan invited the claimant to attend a disciplinary hearing on 24 October 2019 (page 147-8). The allegation to be considered at the hearing was "*that you behaved in an inappropriate and unwanted manner towards a female colleague."* The claimant agreed under cross examination that he was aware of the allegation he faced as set out in the detail of the investigation report attached to the invite letter. The claimant was informed that if the allegations were upheld one possible outcome may be dismissal from the respondent. He was informed about his right to call witnesses and his right of accompaniment. The claimant did have representation from his investigation interview on 14 August 2019 and the Tribunal were not persuaded by the claimant's evidence that he was unaware he could call witnesses.

29. At no time did the claimant and/or his representative raise a concern that the claimant received the letter dated 10 October on 11th October so that he had 13 days notice of the hearing (as opposed to 14 days notice as set out in the disciplinary procedure) or seek an adjournment for further time. In fact the claimant prepared in a timely fashion and on 17 October 2019 the claimant emailed character references to the respondent (page 152-164) and forwarded a statement from Matron Carolyn Bradshaw on 23 October 2019 (page 165 to 166). The character references were from a consultant, nursing and healthcare staff and indicate that the claimant was a highly regarded nursing professional and had not made anyone feel uncomfortable at any time.

30. On 24 October 2019 the disciplinary hearing took place. The panel consisted of Mr. Monahan, Chair who was supported by Jagdeep Sidhu workforce business partner and Rose Blake, Modern Matron. Ms. Blake was a member of the panel as a senior clinical professional. The decision maker was Mr. Monahan. The claimant was represented at the disciplinary hearing by Mr. Scott, RCN Regional representative. The claimant confirmed he had all the relevant documents. Both the claimant and the management had an opportunity to present their cases and ask questions.

31. During the disciplinary hearing, the claimant stated he was very sorry. He thought he was just being friendly but it had been construed as something else. He

accepted his behaviour had overstepped the line. He stated his behaviour would now change. He stated that he now knew there were boundaries that cannot be crossed and this was inappropriate. In respect of the issue of EB not raising concerns with him he said he saw people as equals but he realised that he was a Band 6 and a senior colleague.

32. Mr. Monahan considered the specific complaints EB had made and noted there were 6 incidents in the space of some two months from 30 May 2019 where EB complained that the claimant had acted in a sexual way towards her which made her feel uncomfortable. He summarised these as incident 1 cromwell road (the car park incident); incident 2 the warming cabinet; incident 3 the corridor following theatre list; incident 4 the theatre trolley; incident 5 in the storeroom and incident 6 in theatre. During his consideration of the evidence before him, he noted that at the investigation meeting the claimant had recalled the incidents 1,5 and 6 but did not accept that he had acted in a sexually inappropriate way towards EB. He disputed that he had sought to kiss EB on the lips and whilst conducting the massage thought he touched the top of her bum but he was being friendly. In respect of incidents 2 and 4 the claimant could not recall these. In respect of incident 2 he noted that that the claimant had stated he could have been leaning on the doorway of the warming cupboard. In respect of incident 4 he took account of the fact that the claimant could not recall the comment *"I like my view"* but that the claimant said if stated it was banter. The incident number 3 was not put to him by Chris Seddon in the course of the investigation hearing; this was the allegation concerning standing infront of EB and putting his arms around her lower back. Reference was made to it in Chris Seddon's report and Mr. Monahan noted that the claimant had accepted all the facts presented in the investigation report but disputed the sexual motivation stating his action was in a friendly context.

33. Mr. Monahan made a judgement call on the evidence before him and determined that EB's account was accurate and truthful. He concluded on balance that the claimant had acted in a sexual way towards EB and that his conduct was unwelcome and caused distress.

34. Mr. Monahan took into account that there was a culture of colleagues greeting each other by hugging and kissing on the cheek (which both the claimant and EB happily participated in) but the claimant's conduct had gone way beyond what EB was comfortable with. His behaviour was unwelcome sexual behaviour. He considered all the allegations in the round and deemed they constituted gross misconduct. Furthermore, he found incidents 1, 5 and 6 (incidents where the claimant was alleged to have tried to kiss EB on the mouth and massaged her bottom) were clearly each and separately acts of gross misconduct. In considering the sanction he took into account the number of character witnesses that the claimant had provided and high regard they had for the claimant, nevertheless due to the nature and seriousness of his gross misconduct, a sanction of summary dismissal was appropriate in all the circumstances. During re-examination Mr. Monahan he also stated that he took account of the claimant's unblemished long service to the respondent before determining the sanction of dismissal. The Tribunal were not persuaded that this factor was considered by Mr. Monahan at the time because this does not appear in his reasoning contained in the dismissal letter or his witness statement to the Tribunal. The Tribunal determined having heard his evidence that Mr. Monahan considered there was a pattern of inappropriate and unwanted behaviour consisting of six incidents, three of which he deemed gross misconduct; he further took into account the fact that the claimant was 40 years of age and a senior band 6 professional whereas EB was an apprentice and aged 20 years. He determined that he really only had a choice of giving a final written warning or

summary dismissal and he determined that the conduct was so serious that summary dismissal was appropriate. The Tribunal concluded that the respondent held a genuine held belief that the claimant was guilty of misconduct. Mr. Monahan advised the claimant at the end of the disciplinary hearing he was to be summarily dismissed for gross misconduct. By letter dated 5 November 2019 (received by the claimant on 8 November 2019) the claimant's dismissal was confirmed. This letter was provided outside the timescale envisaged by the disciplinary policy of 7 days (page 95) but the Tribunal do not find this disadvantaged the claimant because he was informed on the day of the disciplinary hearing he was to be dismissed.

35. By letter dated 11 November 2019 (page 282) the claimant wrote to the respondent to state his intention to appeal. His appeal was dated 14 and 15 November 2019 (page 274/5). He set out five grounds in his appeal letter. He provided fuller details of these grounds in a letter at page 276 to 280. The claimant stated that the sanction was too harsh and not reasonable in the circumstances on the basis that he had not been suspended so he could not have been guilty of gross misconduct; he was still friends with EB on facebook messenger because she had not deleted him. He alleged that relevant witnesses were not interviewed as part of the process namely the character witnesses who supported him by way of references. He stated that affection greetings are common amongst the team. He also raised his medical conditions of anxiety, depression and hyperthyroidism were not properly taken into account. He disputed he had sexual intentions as he was a married man and he was only interested in friendship and his medication lowered his libido. He stated that cultural customs and traditions of the Philippines were not given proper consideration. He described the traditional greetings of beso beso and mano. He felt that the respondent trust had failed to take into account his ethnic origin. His fifth ground was that whether or not his actions amounted to gross misconduct the intent of his actions was not considered. The claimant stated he was a naturally friendly person and given the career ending implications this matter could have for me the Trust's investigation has been grossly inadequate. He also referenced additional issues including the referral to the Nursing and Midwifery Council and he was critical that the Trust had failed to wait until his appeal had been heard to make the referral. On this basis he believed that the appeal had already been pre-determined. He was also concerned that EB had not raised her concerns with him. He maintained he was just being friendly. He also provided a statement of reflection stating *"I now recognise that my actions or behaviour may be interpreted differently by different people. It was never my intention to offend or make one of my colleagues feel uncomfortable or upset a member of staff."*

36. By letter dated 2 December 2019 Tracey Brigstock wrote to the claimant inviting him to attend an appeal hearing on 16 December 2019 (page 184). On 4 December 2019 due to the unavailability of the claimant's trade union representative to attend on 16 December, at the claimant's trade union request the date of the appeal was re-arranged to 17 December 2019 (p.185-188). On 11 December 2019 (p.189) the claimant made a request to Jag Sidhu to attend the hearing with legal representation. Jag Sidhu suggested that the claimant request a postponement of the appeal hearing on the basis the appeal officer, Ms. Brigstock was on annual leave until 16 December 2019 and would need time to consider this application on her return to work. Subsequently the parties agreed that the appeal hearing be postponed. The appeal officer on return from holiday considered the claimant's request for legal representation and permitted the claimant to have, outside the disciplinary policy, a legal representative outside the hearing room. Following on from this, it was difficult due to the number of individuals and their availability to arrange a mutually convenient date. However, a date was arranged for 3 March 2020. Neither the claimant nor his trade union representative complained about this delay. The Tribunal finds that certainly in the beginning,

delays of arranging the appeal hearing were caused by the claimant's side not the respondent's side. Furthermore, there was no prejudice suffered by the claimant because he had fully articulated his grounds of appeal in a detailed document, he had both trade union and legal support and documents had been exchanged for the initial date on 16 December 2019 (page 264a).

37. In the dismissal letter the claimant was informed that a referral to the NMC would have to be considered. On 20 December 2019 (p.220-237) Nina Morgan referred the claimant to the NMC. The respondent is under an obligation to refer matters to the NMC of potential concern. It set out the allegation faced by the claimant at a disciplinary hearing (page 233). On 9 March 2020 the NMC wrote to Nina Morgan to advise that the threshold for commencing a full investigation into the claimant had been met. On 12 January 2020 the claimant was informed by the NMC that there would be a further investigation into his case. The allegation, *inappropriate sexual behaviour towards a junior female colleague,* contained in the letter dated 9 January 2020 is the allegation that the NMC have considered is appropriate to consider and the respondent had no involvement in the drafting of that charge.
38. Pursuant to the respondent's disciplinary policy management is permitted to provide a response to an employee's grounds of appeal. Management provided such a response in a document see page 265 to 269. On 10 February 2020 the claimant was invited to attend an appeal hearing on 3 March 2020 (page 264a). There are no appeal minutes. The claimant accepted that in his evidence that he had confirmed at the beginning of the hearing that he had no further documents and he was not calling any witnesses and that Ms. Brigstock was professional throughout the appeal hearing.

39. By letter dated 5 March 2020 Tracey Brigstock wrote to the claimant with the appeal outcome (page 288-289). The claimant accepted in his evidence that Ms. Brigstock considered all five grounds of the claimant's appeal. Her conclusions were that the sanction imposed was not too harsh and was not unreasonable in particular taking into account the duty of care bestowed on the Trust and its values as both an employer and a care provider; that the claimant's actions fell short of desired standards and there was some evidence that the claimant demonstrated a lack of insight to his actions. Ms. Brigstock dismissed the contention that relevant witnesses were not interviewed; she stated that it would be difficult for any witness other than the claimant to demonstrate his intent. As for the claimant's health conditions, this was the first time these had been raised and she concluded it was not clear what bearing the underlying health conditions would have had on the behavioural actions of the claimant. In respect of the cultural customs and traditions of the Philippines, Ms. Brigstock that appeared flawed; the claimant had not behaved like this with anyone else. In respect of the determination the conduct amounted to gross misconduct, it was concluded that the claimant had the opportunity to state his intentions. A key factor under consideration was the impact of the actions on the recipient and this was clear from the investigation report. Ms. Brigstock concluded the claimant had been working for the Trust since about 2003 so there was sufficient time for the claimant to adjust any behaviour. Ms. Brigstock dismissed his appeal.
40. The Tribunal was not satisfied that the outcome was pre-determined by reason of the date of February 2020 included in the second line. The date of the appeal hearing is set out at the top and we are satisfied from the evidence of Mrs. Brigstock and the claimant's own concession that she considered all his points.
41. On 27 May 2021 the NMC wrote to Nina Morgan to advise that the claimant has a case to answer in relation to the claimant and that the matter will be considered by a fitness to practice committee.

Claimant's Submissions

42. Ms. Hand on behalf of the claimant submitted a claim of direct race discriminatory dismissal was pursued. The claimant by reason of his Filipino heritage was a naturally tactile person and had been dismissed for this reason.
43. Further, the claimant continued to pursue the claim that his dismissal was an act of indirect race discrimination. Ms. Hand noted the claimant's evidence that he had accepted that there was no policy or prohibition on hugging and kissing in the workplace and made no further submissions.
44. In respect of the unfair dismissal claim, the claimant relied upon the failure to suspend him which it was submitted was evidence that the respondent was not too concerned about the allegations. There were significant delays; a two month delay between the conclusion of the investigation and the disciplinary hearing and a delay of three months between the disciplinary hearing and the appeal hearing. These delays made the dismissal procedurally unfair. There was a delay in referral; this was further evidence that the respondent was not that concerned about the allegations against the claimant. However, the timing of the referral to the regulatory body before the appeal hearing was indicative of a pre-determined decision.

45. It was submitted the investigation and decision making were flawed. Relying upon the guidance in **Salford Royal NHS Foundation Trust v Roldan (2010) EWCA Civ 522.** (paragraph 13 and the reference to **A v B (2003) IRLR 405)** it was held that the relevant circumstances include the gravity of the charge and their potential effect upon the employee. So it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where as on the facts of that case the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite. *"serious allegations of criminal misbehaviour at least where disputed must always be the subject of the most careful investigation always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious cases it is unrealistic and quite inappropriate to require the safeguards of a criminal trial but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the enquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him."*
46. It was submitted the investigation did not satisfy the care and consideration that should have been adopted where the claimant's career was under threat; there was a failure to investigate the nature of the relationship; (paragraph 27 page 136) it is stated that there was friendly banter and nothing else; between the claimant and EB should have been considered. The claimant stated that his actions had been misinterpreted by the claimant but the respondent did not check this with EB. Further the thought process of Mr. Monahan the dismissing officer was not apparent from his letter of dismissal. Referring to paragraph 60 of the Judgment in **Roldan** it was submitted that it was important that the respondent should have taken into account that the claimant had an unblemished long employment history with the respondent; it was not. The character references show that the claimant was well regarded and had never made others feel uncomfortable. It was submitted that the claimant was both unfairly and wrongfully submitted the decision to dismiss fell outside the band of reasonable responses. At appeal there was no consideration of the claimant being a tactile person as a reason for his behaviour; the management response merely justified its dismissal decision and Ms Brigstock undertook no independent investigation of her own and Ms. Brigstock misunderstood her role as appeal officer. There should be not contribution or Polkey because the claimant's culture and that of the department was to hug and kiss.

47. Mr. Sheppard on behalf of the respondent provided a written submission and supplemented it with oral submissions. He submitted the correct approach of the Tribunal applying the test in **Iceland Frozen Foods Limited v Jones (1983) ICR 17** was to consider the words of section 98 (4) themselves; the tribunal must consider the reasonableness of the employer's conduct; it must not substitute its decision as to what was the right course to adopt for that employer; there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another and the function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair. The range of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision is reached; **J Sainsbury plc v Hitt (2003) ICR 111.** The standard of investigation required is influenced by the gravity of the charges faced and their potential effect upon the employee; **A v B (2003) IRLR 405**. In cases of misconduct the employer has to show that it believed the claimant was guilty of misconduct; had in mind reasonable grounds upon which to sustain that belief and at the stage that belief was formed it had carried out as much investigation into the matter as was reasonable in all the circumstances **(BHS v Burchell (1980) ICR 303**). The Tribunal should look at the procedural fairness and thoroughness of the appeal stage and the open mindedness of the decision maker when deciding whether any prior procedural defiencies are cured (**Taylor v OCS Group) Limited (2006)**, Where an employee would have been dismissed at a later date if a fair procedure had been followed the amount of compensation due to the dismissed employee falls to be reduced accordingly. Where a dismissal was caused or contributed to by any action of the employee the tribunal shall reduce the compensatory award by such proportion as it considers just and equitable. In respect of a wrongful dismissal claim the Tribunal must be satisfied on the balance of probabilities that there was an actual repudiation of the contract by the employee.

48. The respondent submitted the indirect race discrimination claim was dead in the water, on the basis of the concessions made by the claimant under cross examination that there was no PCP that there was a requirement that individuals do not greet each other with physical contact; the evidence was overwhelming that employees in the department did greet each other with physical contact.

49. In respect of a section 13 claim, Mr. Sheppard submitted that the claimant's dismissal had nothing whatsoever to do with his race. The claimant had been working/living in the UK since 2003; he had accepted he was aware of the Trust values and in his contract he had agreed to abide by the respondent's policies which includes the disciplinary and dignity at work policies. The claimant's own evidence in the disciplinary hearing is that he had crossed the line. On the basis of the claimant's acceptance that he was dismissed because it was found his actions towards EB were sexually motivated his direct race claim was bound to fail.

50. He further submitted that pursuant to its own policy the respondent is not bound to suspend an employee for allegations of gross misconduct. It has a discretion. The claimant and EB were placed on different shifts so that they were separate; there were five theatres and in the period of time only met on three occasions in public places. There was no suggestion that the claimant was a threat to anyone else; no to dismiss in these circumstances in not inconsistent with ultimately finding allegations are serious and amount to gross misconduct. In respect of delay there was never a concern/complaint raised by the claimant or his representative and it

was likely because some delay in respect of the appeal was a result of the claimant's side requiring re-listing of the hearing and the claimant was no prejudiced. In fact, the claimant was offered 20 January 2020 for an appeal hearing but his representative could not attend. Thereafter both sides had difficulty with fixing a convenient date., There was no prejudice suffered by the claimant; on 12 December 2019 he had submitted detailed grounds of appeal. There was no unfairness.

51. Any reference to the referral to the NMC Fitness to Practice is a red herring. There was no challenge to the fact that the respondent is under an obligation to refer the claimant. The appeal officer did not prepare the referral.

52. Mr. Shepherd accepted the general principal set out in Roldan that where an employee's career is at risk there must be a heightened level of seniority. However, he distinguished the case of Roldan to the present case on the basis that in **A v B** there was a very significant delay; not the case here. There was further no criminal allegation or risk of deportation. Mr. Monahan's evidence was clear that he was aware that his decision may have an impact on the claimant's career.

53. It was also submitted that the dynamic of the relationship of EB and the claimant was considered and in fact EB was specifically asked in the course of her investigation interview whether she had initiated any behaviour towards the claimant. The best evidence is that of the claimant and complainant and witnesses who saw the distress the behaviour was having on EB. The claimant's conduct was not simply friendly or banter. The claimant was not getting the hint.

54. Mr. Sheppard stated that the decision making of Mr. Monahan should not be compared to the level of reasoning of a legal professional. Ultimately there was a fair investigation in the circumstances which formed a genuine belief in misconduct; in the light of the serious allegations the respondent was entitled to dismiss.

LAW

55. There was no dispute between the parties as to the law and the Tribunal takes into account the case law provided to it.

Unfair dismissal

56. The burden rests upon the respondent to establish the reason or principal reason for the dismissal. Misconduct is an admissible reason. If the respondent fails to persuade the tribunal that it had a genuine belief in the claimant's misconduct and that it dismissed him for that reason, the dismissal will be unfair. In conduct cases when considering the question of reasonableness the Tribunal is required to have regard to the test outlined in **British Home Stores v Burchell (1980) ICR 303.** The three elements of the test are :

(a)Did the employer have a genuine belief that the employee was guilty of misconduct?

(b)Did the employer have reasonable grounds for that belief?

(c)Did the employer carry out a reasonable investigation in all the circumstances?

57. The case of **Sainsbury's Supermarkets Limited v Hitt (2003) ICR 111** establishes that the band of reasonable responses applies to all three stages above and in considering sanction the Tribunal should focus on whether the sanction of dismissal fell within the band of reasonable responses. The Tribunal may not substitute its own view for that of the employer as made clear in the case of **London Ambulance Service NHS Trust v Small (2009) EWCA Civ 220.** The appropriate standard of proof for those at the employer who reached the decision

was whether on the balance of probabilities they believed that the misconduct was committed by the claimant. They did not need to determine or establish that the misconduct was committed beyond all reasonable doubt.

58. In considering the investigation undertaken the relevant question for the Tribunal is whether it was an investigation that fell within the range of reasonable responses that a reasonable employer might have adopted. Where the tribunal is considering fairness, it is important that it looks at the process followed as a whole including the appeal. The Tribunal is also required to have regard to the ACAS code of practice on disciplinary and grievance procedures.

59. The ACAS Guidance on disciplinary proceedings suggests the following factors may be relevant when determining what if any disciplinary penalty to impose; whether the employer's rules indicate the likely penalty; the employee's disciplinary record, work record, experience and length of service; whether there are special mitigating circumstances which might make it appropriate to adjust the severity of the penalty and whether the proposed penalty is reasonable in all the circumstances.

60. The issue of procedural irregularities was considered by the Court of Appeal in the case of **Taylor v OCS Group (2006) EWCA Civ 702** which involved a claimant who was dismissed for misconduct. The tribunal found that the disciplinary process was fundamentally flawed because during the disciplinary hearing the claimant had been unable to understand the proceedings (the claimant was profoundly and pre-lingually deaf). Whilst the principal point on appeal was that tribunals in considering whether an appeal process cured the earlier defects should not ask whether the appeal was a review or a re-hearing the Court of Appeal went on to explain that in cases where there are procedural irregularities procedural fairness should not be considered separately from other issues. The Tribunal should consider the procedural issues together with the reason for the dismissal as the two impact upon each other and the tribunal's task is to decide whether in all the circumstances the employer acted reasonably in treating the reason as sufficient reason to dismiss. The Court of Appeal explained that in cases where the misconduct that founds the reason for dismissal is serious a tribunal might decide (after considering equity and the substantial merits of the case) that notwithstanding some procedural imperfections the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct is of less serious nature so that the decision to dismiss was nearer to the borderline, a tribunal might well conclude that a procedural deficiency had such an impact that the employer did not act reasonably in dismissing paragraph 48. This approach was re-iterate in the case of **NHS 24 v Pillar UKEATS/005/16** in which it was explained that the danger of treating procedural unfairness separately is that it can result in a failure to assess the gravity of the procedural defect. If there is no real relationship between an unfair step in the procedure and the ultimate outcome the impact of that procedural defect may well be far less than where an absence of any proper procedure led to substantive unfairness.."

<u>Contributory Fault</u>

61. Pursuant to section 123 (6) of the Employment Rights Act 1996 the Employment Tribunal may reduce the compensatory award where it considers it to be just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action by the employer. The starting point is to consider whether the claimant had

been guilty of "blameworthy conduct" (**Nelson v BBC (No. 2)).** The next stage is to consider whether the blameworthy conduct contributed to or caused the dismissal. If so the Tribunal should consider to what extent the blameworthy conduct contributed to or caused the dismissal and apply the appropriate deduction to compensation.

Polkey

62. The Tribunal has a discretion to make a reduction to the compensatory award to reflect the percentage chance that the claimant would have been dismissed fairly in any event (**Polkey v AE Dayton Services Limited 1987 IRLR 50**). The deduction can take the form of a finding that the individual would have been dismissed fairly after a further period of employment (a period in which a fair procedure would have been completed). In the case of **Andrews v Software 2000 Limited 2007 IRLR 568** set out principles to be applied conducting this assessment. Having considered the evidence the Tribunal may determine that (i)if fair procedures had been complied with the employer has satisfied it, the onus being firmly on the employer, that on the balance of probabilities the dismissal would have occurred when it did in any event; (ii)that there was a chance of dismissal but less than 50% in which case compensation should be reduced accordingly (iii)the employment would have continued but only for a limited fixed period or (iv) employment would have continued indefinitely.

Wrongful dismissal

63. **British Heart Foundation v Roy UKEAT/49/15** the Employment Appeal Tribunal sets out the difference between the test in an unfair dismissal claim and the test for wrongful dismissal. That Judgment helpfully summarises what the Tribunal needs to decide when considering the wrongful dismissal claim and identifies why the questions to be asked are so different in respect of the two claims. It says :

"The law as to wrongful dismissal (in respect of which the appeal arises) needs to be set out. A member of the public might express some surprise if the law were to the effect that an employee whom the employer on reasonable grounds suspected of having been guilty of theft and in respect of whom a Judge concluded that indeed she probably was, had to be kept on at work until the expiry of her full notice period and could not be dismissed immediately. Whereas the focus in unfair dismissal is on the employer's reasons for that dismissal is on the employer's reasons for the dismissal and it does not matter what the Employment Tribunal thinks objectively probably occurred or whether in fact the misconduct actually happened, it is different when one turns to the question either of contributory fault for the purposes of compensation for unfair dismissal or for wrongful dismissal. There the question is indeed whether the misconduct actually occurred. In a claim for wrongful dismissal the legal question is whether the employer dismissed the claimant in breach of contract. Dismissal without notice will be such a breach unless the employer is entitled to dismiss summarily. An employer will only be in that position if the employee is herself in breach of contract and that breach is repudiatory.

Direct Race discrimination

64. Section 13 of the Equality Act 2010 states "A person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others.

65. Pursuant to section 23 (1) of the Act, on a comparison for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

66. Section 136 (2) and (3) of the Equality Act 2010 states
"(2)If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned the Court must hold that the contravention occurred; (3)But subsection (2) does not apply if A shows that A did not contravene the provision."

If the Claimant can prove a 'prima facie' case of discrimination, then the burden shifts to the Respondent to show that such discrimination did not in fact occur. In the recent Supreme Court case of **Royal Mail Group Limited v Efobi (2019) EWCA Civ 18** it was confirmed that the burden does not shift to the employer to explain the reasons for its treatment of the claimant unless the claimant is able to prove on the balance of probabilities those matters which he wishes the tribunal to find as facts from which in the absence of any other explanation an unlawful act of discrimination can be inferred.

67. To establish a prima facie case, the Claimant has to show that she was treated less favourably than others were or would have been treated, and in addition to this also needs to show 'something more' which indicates that discrimination may have occurred:
'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

(***Madarassy v Nomura International plc*** **[2007] ICR 867** at [56] *per* Mummery LJ)

Conclusions

68. The Tribunal will deal with the discrimination complaints first because by the time evidence and submissions were made, these claims were not the focus for the claimant or his counsel.

69. The claimant conceded in his evidence under cross examination that he was dismissed for the allegations of misconduct. He failed to establish a prima facie case of direct race discrimination. The allegation faced by the claimant was inappropriate conduct; this included allegations of attempting to kiss on two occasions a female colleague at work and touching her bottom; he was not dismissed because he was practising "beso beso" or being friendly. The allegations of misconduct extended far beyond that. Furthermore, the Tribunal finds that a hypothetical comparator who was found to have attempted to kiss on two occasions a young junior female and touch her bottom is more than likely to have also received the sanction of dismissal. The claim of direct race discrimination is without merit and is dismissed.

70. In respect of the claim of indirect race discrimination, the claimant accepted under cross-examination that the wealth of evidence pointed to friendliness in the department which included hugging and sometimes kissing on the cheek to greet individuals. EB, Rachel and the claimant had given evidence about this; it was a known and not a prohibited practice in the department. Although Mr. Monahan was not cross examined about his dismissal letter page 168 in respect of his bullet point that greeting people by hugging was not appropriate; the Tribunal finds, it is likely that this meant mid shift because there was no evidence before the Tribunal that hugging colleagues to greet at the beginning of a shift was prohibited by the

respondent. As previously stated, it was a known practise. In the circumstances the Tribunal rejects the claimant's case that there was a requirement that individuals do not greet each other with physical contact.

71. If the Tribunal is wrong about this and such a PCP did apply, the Tribunal is not satisfied that it placed the claimant of Filipino origin at a particular disadvantage. The claimant's case is that individuals of Filipino origin are affectionate and practice beso beso; kissing on the cheek. The claimant was not disciplined for practising beso beso but for attempting to kiss a young, junior female in the workplace and touching her bottom; accordingly, the alleged PCP did not put the claimant to any disadvantage.

72. The reason for dismissal -there was no dispute that the reason for the claimant's dismissal was the allegation concerning his misconduct. The claimant in fact conceded this under cross examination. In the circumstances the Tribunal finds that the reason for the claimant's dismissal was conduct, an admissible reason pursuant to section 98 (2)(b) of the Employment Rights Act 1996.

73. The Burchell test - The Tribunal considered this test in the context of **Roldan**. Potentially dismissal for misconduct has serious professional ramifications for the claimant as a nursing professional. The Tribunal notes that there are distinguishing features in the **Roldan** decision as compared to the present case; in particular in the case of **Roldan,** the claimant of fillipino origin lost her job, lost her work permit and right to remain the U.K and the case concerned criminal misbehaviour (this has not been suggested here). Nevertheless, the principle is good law so that there is a requirement that there should be careful and conscientious investigation of the facts by an employer and the employer should focus no less on any potential evidence which may exculpate or at least point towards the innocence of the employee as well as considering evidence directed towards proving the charges against the claimant.

74. The Tribunal concluded that the respondent had conducted a reasonable investigation in all of the circumstances and the Tribunal was satisfied that there was a careful and conscientious investigation of the facts. The claimant was aware about the nature of EB's allegations against him from the commencement of the investigation process. From the start on 23 July 2019 when he was made aware by his manager that EB had complained, he was permitted to read the statement of EB and from this he prepared a detailed response. Although the Tribunal finds it would have been best practice for the claimant to have been given a copy, it was not unreasonable for him to have the opportunity to read it and he was able to respond to it in a detailed statement and he was not disadvantaged by not having a copy.

75. Following the initial statement gathering both EB and the claimant were interviewed. The allegation was stated in the invitation letter that he had behaved in an inappropriate and unwanted manner towards a female colleague. He was aware from EB's initial statement the nature of those allegations. The context of the investigation is that there were no actual eye-witnesses to the incidents which occurred between the claimant and EB. The respondent interviewed the complainant, EB, the claimant, and the witnesses to the disclosure of the allegations made by the claimant; Rachel and Ms. Bolsove; who gave evidence about the distressed state of EB in July when she revealed her concerns about the claimant's behaviour. The Tribunal do not consider that a reasonable employer would have felt the need to interview the claimant's manager. He was not a witness to the events and there was an acceptance by both EB and the claimant that colleagues did greet each other with hugs and kisses and the team were close knit and friendly. It was open to the claimant or his representative to call witnesses at the disciplinary hearing but they chose not to. Furthermore, a reasonable employer would not be required to interview the character witnesses put forward by the

claimant. The respondent accepted that the claimant was a competent professional and the respondent could reasonably conclude that although he had not acted inappropriately towards others that is not necessarily conclusive evidence that he acted appropriately towards the claimant.

76. The claimant had the benefit of representation from just after the time he received notice of the claimant's formal complaint.

77. The disciplinary procedure states that an employee should be provided with 14 days notice of the hearing. The Tribunal accepts that the invitation to the disciplinary hearing dated 10 October 2019 (page 147) was only received by the claimant and read on 11 October 2019. However, the Tribunal rejects any suggestion by the claimant, he was disadvantaged by having 13 days notice as opposed to 14 days notice. The claimant had by 17 October 2019 obtained a number of character references to support him and at no time within the process including the appeal did he or his representative complain he was disadvantaged by being given 13 days notice (as opposed to 14) or seek an adjournment of the disciplinary hearing.

78. The invitation letter to the disciplinary hearing set out the same allegation contained in the invite to the investigatory interview and attached the investigation report and appendices and the management state of case. Although the invitation letter did not break down the allegation into the 6 incidents the claimant was aware from the documentation provided the nature of the allegations made against him. There was no suggestion by the claimant or his representative at any stage he was unaware of the case and he accepted he knew the allegations he faced in cross examination.

79. Further the Tribunal reject that any delays in this case could amount to a procedurally unfair dismissal. First the claimant and his representative did not complain at any stage about any delays. The delays in respect the appeal were caused initially by the claimant's side requiring the re-listing of the hearing due to trade union unavailability. In fact, the claimant was offered 20 January 2020 for an appeal hearing but his representative could not attend. Thereafter both sides had difficulty with fixing a convenient date. There was no prejudice suffered by the claimant because by 12 December 2019 the claimant had submitted very detailed grounds of appeal. There was no unfairness.

80. In addition, the Tribunal reject the suggestion that the respondent did not consider the allegations against the claimant as serious because he was not suspended. The policy is clear; there is a discretion to suspend. The claimant was no threat to patients and no complaint was made by other staff members; his work pattern could be worked around the complainant so that they were not in contact other than in occasional public places. A failure to suspend was not an acceptance that the claimant's alleged misconduct did not amount to potentially gross misconduct.

81. The respondent did carry out a careful and conscientious investigation of the facts. In particular, the respondent accepted that EB and the claimant had a friendly relationship. Mr. Monahan did consider the nature of the relationship of the claimant with EB. Both EB and the claimant were asked whether EB flirted with the claimant; both described banter between them and both denied that EB flirted with the claimant. The claimant's conduct towards EB was reasonably considered by the respondent to fall way beyond the friendly or simply banter.

82. The respondent had to make a judgment call on the evidence. Mr. Monahan was considering whether the claimant's conduct was inappropriate. He considered EB's version to be consistent and credible and rejected the claimant's version of events that he was simply behaving in a friendly manner. In particular, Mr. Monahan

having considered the evidence of EB, the contemporaneous evidence of Rachel and Ms. Bolsover testifying to the distress EB was in whilst reporting her concerns, reasonably took account of the significant difference in grades and age between EB; the claimant's acceptance at the disciplinary hearing that he had overstepped the mark so to conclude that that the claimant's conduct was inappropriate. The Tribunal concluded that this was a genuinely held belief on the part of the respondent to have reached on reasonable grounds following a reasonable investigation that the claimant behaved in an inappropriate and unwanted manner towards a female colleague.

83. The claimant was given an opportunity to appeal and he provided very detailed grounds. These, as conceded by the claimant in evidence, were considered in turn by the appeal officer but were rejected. He accepted he was given a fair hearing at the appeal stage.

84. The Tribunal is not satisfied that there was a pre-determined view of the appeal as indicated by the timing of the referral to the regulatory body. Such a suggestion is inconsistent with the claimant's own evidence that all his points were considered by the appeal officer. Neither the dismissing officer nor the appeal officer were involved in the decision to refer the claimant to his regulatory body; this was another person from the Trust. The respondent is under an obligation to report; whether it is taken any further is a matter for the regulator. Further it is the regulator who has decided to pursue proceedings against the claimant highlighting the difference in age and status of the complainant.

85. Sanction -The respondent was faced with a concession by the claimant that incidents had occurred as EB had stated but that he had been acting from no other than a friendly context. The claimant disputed that he had tried to kiss EB on the lips but instead he asserted that as he kissed her on the cheek their lips may have crossed. The claimant alleged he offered a massage and started to massage without allowing EB to consent. The claimant accepted that he may have touched the top of EB's bottom. Mr. Monahan was not persuaded by the claimant's evidence and the Tribunal has found that it was reasonable for the respondent to reject the claimant's version of events.

86. In reaching the decision on sanction, the dismissing officer took account of the character evidence of the claimant. He viewed allegations 1, 5 and 6 (attempted kissing and touching of bottom) as gross misconduct. The Tribunal finds it was reasonable on the evidence before Mr. Monahan to reach that opinion. His evidence to the Tribunal was that he considered a final written warning and dismissal but concluded because of the serious nature of the allegations summary dismissal was appropriate.

87. Although in re-examination Mr. Monahan stated he weighed the claimant's good service in the balance, the Tribunal were not satisfied that this matter was really considered by the respondent because it does not appear in his dismissal letter and it did not appear in his witness statement. However, the Tribunal take account of the Court of Appeal guidance in **Taylor**; it should consider the procedural issues together with the reason for the dismissal as the two impact upon each other and the tribunal's task is to decide whether in all the circumstances the employer acted reasonably in treating the reason as sufficient reason to dismiss. As set out above, the Court of Appeal explained that in cases where the misconduct that founds the reason for dismissal is serious a tribunal might decide (after considering equity and the substantial merits of the case) that notwithstanding some procedural imperfections the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee.

88. The Tribunal conclude that the allegations found proved by the respondent were serious; attempting to kiss on the lips on two occasions and touching of the bottom

of a young, junior female member of staff who was very distressed. The failure to actively consider the good service of the claimant does not make this particular dismissal unfair on the facts of this case taking into account the serious nature of the allegations. This was aggravated by a significant difference in grade (and power of the claimant) and youth of the complainant compounded by the claimant's failure to fully acknowledge full ownership of what he had done. He continues to date to dispute that there was any sexual motivation in what he did; the respondent found this incredible and the Tribunal conclude it was reasonable for them to do so.

89. In respect of considering a final written warning or dismissal as potential sanctions, the Tribunal finds that the respondent acted reasonably in looking at these two potential sanctions only. Mr. Monahan's approach was to look at the allegations in the round; reasonably formulated the view that the allegations were serious and reached the threshold of severe sanctions. Dismissal in these circumstances fell within the band of reasonable responses. In the circumstances the claimant was fairly dismissed.

90. Wrongful dismissal -The Tribunal conclude that the claimant was in repudiatory breach of contract so that the respondent was entitled to dismiss him summarily. The Tribunal is not persuaded that the claimant was acting in a merely friendly way or that there may have been an accidental lip touching when kissing on the cheek or accidental touching of the bottom whilst conducting a low back massage on EB. On the balance of probabilities, the Tribunal concludes that the claimant did attempt to kiss EB on the lips on two occasions; the Tribunal were not persuaded that there could have been an accidental kiss on the lips on two occasions. Furthermore, on the claimant's own case he offered a massage and started the massage on the "lower back" without waiting for EB to provide a response. The Tribunal finds that the claimant did touch EB's bottom and this was not an accident either. His conduct was inappropriate and it amounted to gross misconduct for which the respondent was entitled to dismiss him summarily.

91. In the circumstances all the claims are dismissed.

Employment Judge Wedderspoon

23/09/2021

Sent to the parties on:

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