EMPLOYMENT TRIBUNALS

Claimant: Mr U Hayat

Respondent: Care Quality Commission

Heard at: Leeds Employment Tribunal (via CVP)
On: 6 and 7 July 2021

Before: Employment Judge K Armstrong

Representation
Claimant: Mr J McHugh (counsel)
Respondent: Mr S Lewis (counsel)

RESERVED JUDGMENT

1. The Claimant was fairly dismissed. The claim for unfair dismissal is dismissed.

2. The Claimant was not wrongfully dismissed. The claim for wrongful dismissal is dismissed.

REASONS

Claims

1. In his claim form dated 19 June 2020, the Mr Hayat brings claims for unfair dismissal and wrongful dismissal (notice pay).

Conduct of the hearing

2. The claimant was represented by Mr J McHugh (counsel). The respondent was represented by Mr S Lewis (counsel). The hearing took place over two days via CVP. The hearing was listed remotely in line with current practice due to COVID-19 restrictions. All parties confirmed that they were able to see, hear and engage with the proceedings throughout. The claimant lost connection a small number of times in the course of the hearing. The

hearing was paused and he confirmed through counsel that he had not missed any of the proceedings.

Issues for the tribunal to decide

3. The following issues were identified and agreed at the start of the hearing. The parties agreed to deal with liability first, then remedy at a separate hearing following this judgment, if required.

4. Unfair dismissal:
   4.1. What was the reason for dismissal? The Claimant accepts that the reason for dismissal was conduct, however the central issue in the case is whether it should have been characterised as capability. The claimant put the issue as one of the reasonableness of the belief in conduct, because it should have been dealt with as capability. The respondent says if I am not satisfied that the reason was conduct, it would be open to me to find that it was some other substantial reason, but not capability. I will need to make a finding on this point.
   4.2. If the reason for the dismissal was conduct, did the respondent have a genuine belief that the claimant had committed the conduct alleged?
   4.3. Was that belief reasonably held?
   4.4. Did the respondent carry out a reasonable investigation?
   4.5. Was the sanction of dismissal within the band of responses open to a reasonable employer?
   4.6. Did the respondent follow a fair procedure in dismissing the claimant? The claimant says that the respondent should have applied their capability procedure.
   4.7. If the dismissal was procedurally unfair what are the chances the claimant would have been dismissed had a fair procedure been followed?
   4.8. Was the Claimant's conduct a contributory factor in relation to the dismissal?

5. Wrongful dismissal:
   5.1. Has the respondent established that the claimant did commit gross misconduct sufficient to justify summary dismissal?

Evidence

6. I was provided with a bundle comprising 803 pages. Page references in (**bold**) refer to this bundle. I also considered witness statements from the claimant, and Carolyn Jenkinson and Deborah Westhead on behalf of the respondent. Each of these witnesses gave sworn evidence at the hearing and were cross-examined. I have considered all of the evidence in the bundle, witness statements and the oral evidence, even if I do not expressly refer to it within this judgment.

Findings of fact

Background

7. The claimant commenced employment with the Care Quality Commission (CQC) on 14 August 2014. The claimant was initially employed as a senior project manager. On 1 September 2017 he was appointed to the role of inspector. The claimant was summarily dismissed for gross misconduct on 5 February 2020, after he failed to deal with a number of notifications of concern received during the period 21-24 October 2019, including two notifications which raised safeguarding concerns.

8. In the claimant's witness statement he says that previous employment with the civil service from 2009 counted towards his continuous service. The respondent's counsel was unable to confirm whether this was agreed but in any event it was accepted that the claimant had sufficient service to bring a claim for unfair dismissal.

9. There are two key elements to the role of inspector. Firstly, carrying out inspections of services regulated by the CQC, and secondly maintaining and monitoring a '*portfolio*' of services. This includes ensuring *'issues and risks'* are escalated as appropriate, and taking enforcement action (**56-7**). In practical terms, this means responding to notifications of concern from other agencies and / or members of the public, and dealing with them appropriately or escalating more complex cases. In carrying out the role, the claimant was expected to '*Maintain an understanding and awareness of CQC policies and procedures and ensure these are reflected in everyday practices'* (**57**).

10. The claimant's role was subject to the respondent's capability procedure. Within that procedure, capability is defined as follows (**62**):

    'The procedure is applicable when an employee's performance or level of capability falls below expected standards due to a lack of skill, ability, knowledge or an understanding of what is required…Where poor performance is willful, in that it is due to carelessness, a failure to observe working practices that are generally accepted to be safe, lack of application or motivation, inattention to work matters or any other reason related to the employee's conduct, then it should be dealt with under the Disciplinary procedure.'

11. Whether or not the claimant's poor performance was *'willful'* formed a central part of his case before me.

12. The capability procedure sets out a process for dealing with capability issues, including informal action, formal action, and opportunities for improvement and review.

13. The claimant's role was also subject to the respondent's disciplinary procedure (**230-245**), which sets out a procedure for investigation, disciplinary meeting, sanctions up to and including summary dismissal, and appeal. It sets out that an act of gross misconduct will usually lead to summary dismissal. Gross misconduct is defined at **233:**

    'Gross misconduct – which covers any deliberate or negligent act which is, or has the potential to be severely detrimental to the CQC, or harmful to the employee, other employees or stakeholders or which constitutes a serious breach of our rules and/or the contract of employment. An act of gross

misconduct will, if found to have occurred, usually lead to dismissal without notice or pay in lieu of notice.'

14. Examples of gross misconduct include (**244**):

'Any act or omission which risks, or has the potential to risk, harm to service users and/or other vulnerable people.'

15. On commencing his role, the claimant attended online training regarding safeguarding (**625-702**). This included training on the respondent's safeguarding handbook (**344-403**). Amongst other information, the handbook sets out what inspectors should consider on receipt of information about safeguarding, including (**357-8**):

'Urgency – how serious is the issue?...
Judgement – use your professional judgement in deciding action to take and how best to respond to the information received [refer to framework of KPIs and mandatory actions];
Support – if you are not sure about a specific course of action, or want to check your thinking about a safeguarding issue, ask your manager or buddy for assistance;
Taking action – this needs to be done within the framework of the new KPIs for safeguarding alerts and concerns.'

16. The relevant KPIs (Key Performance Indicators) are set out at **359-60**. Alerts and concerns which are allocated as a 'safeguarding record' should be referred to the Local Authority within 0-1 days of receipt by the inspector (i.e. by close of the following working day).

17. The claimant also completed numerous other training courses, the list of which covers seven pages of the bundle (**408-414**).

Claimant's work prior to the events of 21-23 October 2019

18. The claimant attended an end of year review with his line manager sometime shortly after 31 March 2018, when he had been in the post of inspector for some seven months. He raised some concerns that he felt he should have had more training before leading on an inspection, but his manager felt that his outcomes had been *'achieved' (***100-101**).

19. On 19 September 2018 a risk assessment for stress was undertaken with the claimant by his manager, Berry Rose (**104-110**). The notes record: '*Umar has some development needs around risk assessing enquiries so that he can confidently prioritise them.'* It was also noted that the claimant did not feel clear about what the inspections part of his role involved. It was agreed that weekly buddy support would continue, as well as a separate coaching / mentor relationship and line manager support.

20. Following this assessment, the claimant was referred for an occupational health (OH) report regarding *'perceived work-related stres*s'. The report, dated 26 October 2018, recommends that the claimant is fit to work with continued support. The author suggests support for inspections, and a referral to counselling (**116-7 / 324-5**).

21. The claimant was referred for counselling and an appointment was made. It appears that this was missed due to a miscommunication. The claimant was expecting the counselling to take place by telephone, but then received a call on the day of the appointment asking where he was as he was expected to attend in person. As a consequence, the claimant says he lost faith in the service and sought support instead through his GP.

22. In response to the OH recommendations, on 22 November 2018, the claimant was 'taken off' inspections for the next two quarters, so that he could have *'the time and space to focus on the basics of the role.'* (**138**).

23. During January 2019 the claimant was offered various training and development opportunities, as well as undertaking a 1:1 meeting with his manager, Wendy Dixon (**140-146**).

24. On 4 February 2019, the claimant commenced a 'development plan' (**148-54**). This set out various expectations, actions and timescales to support the claimant to develop in his role. The plan was intended to be completed by April 2019. In fact it remained in place until his dismissal in February 2020. The claimant was provided with regular support as part of the plan, and I have seen various emails to that effect (e.g. **155-160**).

25. In a 1:1 'education and development conversation' with his manager Wendy Dixon in April 2019, the claimant reported feeling '*fine*' and that he had a good work-life balance, although he was concerned that this would change again when he commenced writing his next inspection report. His manager was satisfied with his progress (**161-5**).

26. In his 1:1 meeting in August 2019 the claimant raised that he was apprehensive about a forthcoming inspection. The inspection was discussed with his manager and it was agreed that he would keep in touch with her as it proceeded and would discuss with her if he was feeling under pressure or needed support (**171-5**).

27. At the next 1:1 meeting in September 2019, the claimant reported feeling under pressure and stressed due to undertaking two ongoing inspections. His manager recorded that the claimant's workload was '*quite heavy*', and that she had requested for one of the inspections to be moved, and noted that the claimant needs to be aware of not working excessive hours and should flag this if it is an issue (**176-180**).

28. During September / October the claimant undertook a 6-week coping with stress course via his GP practice (**172, 181**).

29. On 13 September 2019 the claimant was 'signed off' on the development plan in so far as it related to portfolio management (**192**)**.** It was agreed that the development plan would continue with regards to inspections, and a further expectation was added. Weekly 1:1 meetings would continue. Ordinarily these plans would run for six weeks (**192, 187**).

30. By this stage, the claimant had dealt with a number of notifications, including two safeguarding notifications. The claimant repeatedly emphasized in his oral evidence that he considered that two safeguarding notifications was not enough for him to be competent to deal with them in

future. The respondent's case is that it was more than sufficient – he might not have been expert, but it was reasonable for the respondent to consider him competent.

31. By October 2019 the claimant had accrued around 60 hours of Time Off In Lieu (TOIL) (**338**). The claimant maintains that this is because he had an excessive workload, and that the consequence of this was a level of stress and anxiety which ultimately led to his failure appropriately to deal with the safeguarding notifications on 21 October 2019. Mr McHugh points to the comments of Nicola Kemp in the September 2019 1:1 meeting in support of this submission.

32. The respondent says that the claimant's workload was not excessive, and that in fact he had a lighter workload than others within his team. Comments from other colleagues suggest that this is the case (**291**, **292**), and the claimant accepted he may have had a lighter workload than others in his oral evidence, although he maintained that it was still high. In her oral evidence Carolyn Jenkinson did not accept that the claimant's TOIL was a result of excessive workload, but rather put it down to how he managed his workload and his competence in the role.

33. I am satisfied on balance that the claimant's workload was not excessive. There is evidence that his workload was comparable to that of his colleagues, if not lighter. The claimant himself accepts that he found his work challenging and that he had difficulties prioritising and completing work. Nicola Kemp's comment is that the claimant's workload was *'quite high'* as a result of one inspection, which was re-arranged, not that it was excessive or more than he could reasonably be expected to manage.

The events of 21 - 24 October 2019

34. The events of 21-24 October 2019 are not disputed, and are set out within the witness statements, investigation report, and the claimant's statement to the investigation.

35. A colleague, Helen Moment, was on leave that week. The claimant agreed to cover a number of matters on her behalf. A team skype meeting took place on Monday 21 October 2019, which Helen Moment attended although she was on leave. During that meeting eight notifications relating to cases in Helen Moment's portfolio, including two safeguarding enquiries, were brought to the claimant's attention and he agreed to deal with them. They were forwarded on to him by email during the meeting.

36. The enquiries included an enquiry regarding Beverley Ambulance Service which had conveyed a 4-year-old child under blue light to hospital despite being currently suspended. The enquiry identified that they were due to convey the child back from the hospital on Friday 25 October. The two safeguarding enquiries related to a patient who had sustained extensive unexplained bruising whilst in hospital and a patient who had been fed toast and crisps when on a soft food only diet.

37. No specific reference was made in the meeting to the requirement to deal with safeguarding enquiries within 24 hours. The evidence of the respondent's witnesses is that this timescale was so fundamental to the role

that it should have been apparent to any inspector. It was set out within the training which the claimant had attended. In cross-examination the claimant conceded that these enquiries were *'urgent'*.

38. The claimant looked at the enquiries on CRM, the case management system, but took no action on Monday 21 October 2019.

39. The claimant attended the Leeds office on Tuesday 22 October 2019. He was re-writing an inspection report which had been rejected by senior management. Nicola Kemp was also in the office and they spoke briefly, but the claimant did not raise the outstanding notifications or request support or assistance. The claimant says that he did not revisit the enquiries due to his significant workload and the fact he was suffering from *'mental health conditions which meant that [he] could not prioritise between these enquiries and the inspection report'* (Claimant's witness statement, para 18).

40. On Tuesday 22 October 2019 at 4.56pm a colleague, Donna Winter, emailed the claimant bringing five of the open enquiries to his attention again (**328**). The claimant had already left the Leeds office by this time and he did not pick the email up until the following day.

41. On Wednesday 23 October the claimant was working from home. He saw the email from Donna Winter in the morning at 9.55am. He took no action on it that morning. About 12.30pm that day his father returned home from hospital and it transpired he had been diagnosed with a medical problem which was likely to be cancer. Mr Hayat attempted to keep working that afternoon but was so distracted that he signed off at about 4.00pm. He was on pre-booked annual leave Thursday 24 and Friday 25 October.

42. On 24 October 2019, Donna Winter emailed Nicola Kemp to bring the open enquiries to her attention (**183**).

43. On 28 October 2019, the claimant was due to have a 1:1 meeting with Nicola Kemp but this was cancelled. The claimant did not take any action to contact another manager to deal with his queries about the notifications (**308**).

44. On 30 October 2019, the claimant spoke with his line manager Nicola Kemp regarding the enquiries (**187-8**). Regarding the suspended ambulance service, Ms Kemp records that: '*You confirmed that you did see the enquiry relating to Beverley ambulance service but did not act on it. You felt that you would return to it later in the day but did not return to them. This then was left as an open enquiry. You felt the reason you didn't return to the enquiry was because you were busy.'*

45. With regards to the safeguarding enquiries, Ms Kemp records that '*You were not clear whether a referral had already been made to the local authority for either patient. You told me that you had wanted to ask my advise [sic] on these, which you had planned to do at your 1:1 on 28/10/2019. We discussed the KPI for safeguarding enquiries being that we need to action these within 24 hours. We discussed safeguarding training and you confirmed you were up to date with this.'* The claimant maintains that this was the first time that he was aware of the 24-hour deadline (**309**).

46. Ms Kemp confirmed to the claimant that she would be discussing the matter further with HR with a view to considering disciplinary procedures. She also agreed to complete a stress risk assessment at his next 1:1.

47. As a consequence of the claimant's failure to action the notifications regarding Beverley Ambulance Service within 24 hours, the CQC was unable to take action under s.30 Health and Social Care Act for urgent cancellation of the provider's registration on the basis that serious risk to life, health, or wellbeing had been identified. (**217**)

48. In the claimant's ET1 and witness statement (para 34) he claimed part of the unfairness was that the respondent said his actions could have resulted in serious harm and this was speculative. This point was not pursued before me, and in his oral evidence the claimant accepted that it was clear his failure to act was placing others at potential risk of harm.

49. On 5 November 2019, another stress risk assessment was carried out. It was agreed that 1:1 support would continue, and a further referral to OH would be made (**329-333**). On 12 November 2019, the claimant's development plan was extended for a further 8 weeks, until 7 January 2020 (**192**). The claimant continued to attend 1:1 meetings during this period and to receive support from his line manager (e.g. **203**).

Investigation

50. On 15 November 2019 the claimant was invited to an investigation meeting to take place on 22 November 2019. The allegations to be investigated were identified as: '*1. Not dealing with a total of 8 open enquiries whilst covering for a colleague's annual leave, 2 of which were of significant concern. 2. Not dealing with safeguarding alerts within the required time scales, meaning patient safety could have been put at risk*.' (**201**).

51. The claimant attended an investigation meeting with Beverley Boal on 22 November 2019. The agreed minutes are at **293-301.** The claimant also submitted a personal statement (**302-313**). He confirmed that he had demonstrated that he could deal with portfolio management as part of his role, which was why he was signed off as competent in this respect on 13 September. He maintained that he was unaware of the 24-hour requirement to deal with safeguarding enquiries.

52. He told Ms Boal that once he was aware of the enquiries: '*he assessed them and felt he needed some line manager advice, so wrote them down, so he could get some advice. BB enquired if UH thought he needed to get this advice urgently, and UH responded by saying no one had told him to deal with them straight away, he said he was under pressure to do the Doncaster report and the Durham & Darlington report, and his focus was on those reports*.

BB asked if UH accepts that a delay in taking action in relation to safeguarding concerns can present a risk to patient safety, and UH said on reflection and in hindsight he should have stopped the report writing and contacted NK.'

53. The claimant told Beverley Boal that following the email from Donna Winter on Tuesday 22 October 2019, he read the enquiries and looked to contact Nicola Kemp but she was busy so he thought he would check with her later. Then his father came home from the hospital and he logged off at 4.00pm, before commencing his 2 days pre-booked annual leave.

54. The claimant raised that he felt he may have a mild learning disability, or a form of autism or Asperger's. He had spoken to his GP who had said there was a lengthy waiting list and he was considering a private assessment (**299**). He also set out concerns about high workload across the team (**300-301**).

55. Beverley Boal also spoke to: Nicola Kemp (**281-283**), who repeated the account set out above; Sarah Dronsfield (**284-6**), who was responsible for dealing with Beverley Ambulance service following the claimant's involvement; Helen Moment (**289**), whose work the claimant was covering; Donna Winter (**290-1**), who noticed the open enquiries; and Lisa Cook (**292**) who was another member of the team and who was asked about workload.

56. The OH report was completed on 4 December 2019. The OH nurse recorded that the claimant felt there was some learning disability, as well as perceived work-related stress. She advised that the claimant was fit to work with adjustments in place, and made the following recommendations: a stress risk assessment be carried out; regular reviews with his line manager for support purposes, to be able to step away from work to change what he is doing if required, time to be scheduled to attend counselling sessions, support to perform tasks, consideration to being the second inspector in the interim while awaiting counselling, information to be 'relayed' to ensure he is clear what has been asked of him; and she advised the claimant to see his GP regarding having a learning disability (**334-5**).

57. On 6 January 2020 the investigation report was completed. It recommended disciplinary action (**210**).

58. In January 2020, the respondent again attempted to arrange counselling for the claimant. Ultimately the referral was closed in April 2020 as the counselling service were unable to contact Mr Hayat (**724-729**).

<u>Disciplinary process and dismissal</u>

59. On 9 January 2020 the claimant was invited to a disciplinary hearing (**419-20**). The letter sets out the following charges and that they could be considered gross misconduct and may result in summary dismissal:

    'your conduct and behaviour had fallen below the standards expected of a CQC employee. This was because you:

    Failed to deal with a total of eight open enquiries (four of which were of significant concern and related to a provider operating whilst suspended) and two safeguarding alerts within the required timescales whilst covering for a colleague on annual leave. This meant that patient safety could have been compromised and patients put at risk of harm.

    Furthermore, you [sic] failure to act in relation to the four enquiries which were of significant concern impacted on the CQC's ability to take relevant and timely enforcement action against the provider concerned and may have led to reputational damage and a lack of confidence in the CQC.'

60. The claimant attended a disciplinary hearing chaired by Carolyn Jenkinson (head of inspection) on 23 January 2020 (**432-438**). The claimant was accompanied by a union representative. He essentially set out his case on the same basis as in the investigatory meeting. He was asked again about the safeguarding training and stated, '*I remember it being mentioned that Safeguarding is everyone's business but cannot remember they should be dealt with within 24 hours*.' Towards the end of the meeting, the claimant's union representative raised that the claimant had a *'potential condition'* of autism or mild learning difficulties, but no diagnosis. He was waiting for an appointment with the GP. Ms Jenkinson gave her decision at the end of the hearing, which was subsequently confirmed by letter.

61. The claimant was dismissed by letter dated 5 February 2020 (**428-431**). Carolyn Jenkinson set out that she found the allegations proven. She states, *'You did not provide the panel with any mitigation regarding your actions.'* The claimant relies on this sentence to found a submission that the respondent failed to consider the mitigation he put forward. I am satisfied that although this sentence is infelicitously worded, Ms Jenkinson did in fact consider the claimant's mitigation. She explicitly sets out in the following paragraph that she has considered the length of time that the claimant had been employed by CQC, and his personal circumstances.

62. She found that the failure to deal with the notifications was in breach of the required standards set out in the safeguarding training which the claimant had received. She was satisfied that the upsetting news regarding the claimant's father's health did not impact on his failure to act on Monday 21 or Tuesday 22 October. She found it *'difficult to comprehend'* that the claimant was not aware of the 24-hour requirement. She referred to the

capability and conduct procedures as set out above and was satisfied that the failure to prioritise these notifications was a conduct issue. The claimant was informed of his right to appeal her decision.

63. Ms Jenkinson confirmed the reasoning for her decision in her witness evidence. In her statement she states that it was '*unacceptable*' that the claimant would have waited seven days before dealing with the safeguarding notifications. In her oral evidence she stated that she found it very difficult to believe that the claimant would not be aware of the urgency. She gave evidence that she did not take any further action in relation to the claimant's potential learning difficulties because it was raised towards the end of the hearing, the information was *'flimsy'* and *'vague'*, and '*there was nothing presented to me about why a potential diagnosis of autism would mean that he didn't look at those enquiries and escalate for support with them.'*

64. Ms Jenkinson considered a disciplinary warning or demotion but because of the risk of the claimant repeating his actions, and the subsequent risk of harm to service users, she did not feel that this was appropriate, and was satisfied that summary dismissal was the only appropriate sanction.

Appeal

65. The claimant appealed the decision by email dated 18 February 2020 (**439-443**). He stated that he had now been assessed for autism and this report was a new piece of evidence (although the report does not diagnose autism). He also stated that he continued to come into work despite mental health issues because mental health is a 'taboo' subject amongst south Asian communities and therefore he did not want to admit that there was a problem. He alleged that he was never provided with counselling as recommended, and that the disciplinary hearing ought to have been suspended to further investigate his mental health problems, autism and/or learning disability. He provided a letter from his GP dated 17 February 2020 confirming that they were in the process of referring the claimant for investigations into learning difficulties (**513**). The appeal was allocated to Deborah Westhead (deputy chief inspector, north region).

66. On receipt of the claimant's appeal documentation, the respondent arranged for an Autism Spectrum Disorder (ASD) assessment of the claimant by Dr Becky Hull, clinical psychologist (report dated 15 April 2020) (**764-775**). It was Dr Hull's opinion that Mr Hayat did not meet the diagnostic criteria for ASD. She recorded that the claimant was experiencing mental health challenges consistent with an anxiety disorder and recommended cognitive behavioural therapy (CBT). She reported that her observations of the claimant's language skills, together with his academic achievements, would place him outside the range for a global learning disability. Because Mr Hayat reported difficulty with notetaking, organizing his work, following spoken instructions, and concentration, she recommended a formal dyslexia assessment.

67. During the assessment the claimant told Dr Hull that he was anxious about the inspection report he was writing, and was anxious to avoid any further criticism of his work. He also stated, *'that he was aware that these were safeguarding issues but as it had been over two years since he had*

attended safeguarding training he had forgotten that there was a 24 hour deadline for actions…Mr Hayat stated that his intention was to discuss the cases with his supervisor later in the week but this was further delayed by his father taking ill and Mr Hayat needing time off work to care for him.'

68. Before the appeal hearing, Deborah Westhead made enquiries with some of the claimant's former colleagues. A number of occasions were brought to her attention on which colleagues had raised concerns about the claimant's work, including when he had previously failed to deal with enquiries. She was also provided with evidence of extensive support, advice and training provided to the claimant (**560-624**).

69. The appeal hearing took place on 7 May 2020 (**776-785**). Discussions centred on the claimant's mental health and potential learning difficulties. The claimant said he had first had concerns that he may have autism in May 2018, but had not raised this until December 2019 because *'it took a lot of courage to speak out*'. Specifically in relation to the incidents of 21-24 October 2019, Deborah Westhead records: '*You were aware safeguarding notifications came through as enquiries and you recalled the conversation that signed you off as competent for portfolio management and escalating risk. You agreed this was correct but explained when your stress levels were high you could not think correctly. However, you did not think your stress levels were high in September 2019*.' The claimant was informed in the hearing that his appeal was dismissed, which was subsequently confirmed in writing.

70. I am satisfied that Deborah Westhead gave careful consideration to each of the claimant's grounds of appeal, as set out within her witness statement. The appeal outcome letter was sent to the claimant on 26 May 2020 (**789-790**). The appeal was a review of the decision to dismiss rather than a re-hearing. Deborah Westhead dismissed the appeal for the following reasons:

'I believe you made a judgement and chose to ignore the safeguarding enquiries. It is clear to me you were aware of them, you were aware what safeguarding meant and yet you made the decision to not escalate to your buddy or manager. You were also signed off as being competent to deal with enquiries just five weeks before the incidents occurred. I cannot excuse this failure and to do so would be unreasonable given our regulatory duty to protect the vulnerable.

It is also my opinion that CQC has acted appropriately and your managers were concerned about your overall wellbeing. Professional advice was sought, regular support calls were carried out and counselling was afforded but you chose not to access it.

I also believe that once you formally raised your concerns around your stress and mental health issues in 2018 your line managers did everything, they possibly could to help you to manage; not only your stress levels but also the basics of the job.'

71. In her oral evidence, Deborah Westhead confirmed that she considered that there was no link between increased workload, difficulty to stay on task, and the claimant's failure to deal with enquiries raised on 21 October

2019. This was because the claimant recognised the risk, realised that the notifications were serious, but made a deliberate decision to ignore them and prioritise report writing. She described dealing with notifications as *'bread and butter'* for an inspector.

72. She summarized the rationale in her oral evidence as follows:

'He'd been down the capability route before. This time was a fundamental failure. He chose to ignore them when he could have raised it with his manager or asked for some support. It was serious incident that put vulnerable people at risk of harm to health and welfare. In particular a child.'

Relevant law

73. Section 98 Employment Rights Act 1996 (ERA 1996), where relevant, provides:

'(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b)relates to the conduct of the employee,
...
(3) In subsection (2)(a)—
(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, ….
(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.'

74. The following reported cases were brought to my attention, all of which I have considered: *James v. Waltham Holy Cross Urban District Council [1973] ICR 398* (NIRC); *Sutton and Gates (Luton) Ltd v Boxall [1978] IRLR 486* (EAT);_*A v B [2003] IRLR 405* (EAT); *Adesokan v Sainsbury's Supermarkets Ltd [2017] EWCA Civ 22* (CA); *Philander v Leonard Cheshire Disability UKEAT/0275/17/DA* (EAT); *Burdis v Dorset CC UKEAT/0084/18/JOJ* (EAT).

75. In *Sutton and Gates* the EAT held that '*cases where a person has not come up to standard through his own carelessness, negligence, or maybe idleness are much more appropriately dealt with as cases of conduct or misconduct rather than of capability… [The Tribunal should] clearly distinguish in their own minds how far it is a question of sheer incapability due to an inherent incapacity to function, compared with a failure to exercise to the full such talent as is possessed.*' (488).

76. In *A v B,* a case where a social worker was accused of the most serious criminal conduct against a 14-year-old girl in his care, the EAT considered the reasonableness of the investigation and held '*Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, …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*.' (409).

77. *Adesokan* relates to wrongful dismissal. The Court of Appeal held that gross negligence can be misconduct, and the question for the ET is whether the negligence is so grave and weighty as to justify summary dismissal. It will not often be fair to dismiss for an omission but in some cases it can be - including in that case (paras 23-25).

78. *Philander* is the most analogous to this case. Mr Philander was the manager of care homes regulated by the CQC, and was dismissed after the care homes he managed failed inspections due to omissions on his part. At para 30 the ET found that his dismissal was for a reason related to conduct (and was fair) because the claimant had failed to carry out his role properly despite the training received and access to support if required – this was upheld by the EAT. At Para 51 the EAT held that the ET were entitled to find the claimant's lack of comprehension and his failures, given the personal responsibility of his role, were gross misconduct and the dismissal fair.

79. At Para 52 H.H. Judge Stacey sets out the following principles: *'The dividing line between conduct and capability can be paper thin and even porous. Some behaviours or acts or omissions which fall within the definition of extreme negligence can be considered as either capability matters or conduct matters and can properly be described as either. The Respondent in this case was entitled to consider the Claimant's behaviour as conduct. It could also have concluded it was capability. Even if it had plumped for a capability label it would, on the facts, have been entitled to dismiss, given the extensive recent training on the matters identified in the CQC report and the seriousness of the failings*.'

80. In relation to the claim for wrongful dismissal, the EAT held (para 62):

'We are mindful that Ms Hopkins' investigation found that the Claimant did not seem to comprehend the range of responsibilities required of him, and accept Mr Milsom's submission that this was not a case of deliberate wrong-doing by the Claimant. But the Tribunal was entitled to conclude from the evidence before it that the Claimant's shortcomings were serious enough to constitute gross negligence, amounting to repudiatory conduct, such as to entitle the Respondent to dismiss without notice.'

81. In *Burdis v Dorset CC* the EAT again found serious neglect, omission or carelessness can be a reason related to conduct (para 45). The ET were entitled to conclude that the claimant's prioiritisation of service delivery over ensuring appropriate checks and balances were in place amounted to gross misconduct (para 49).

82. I remind myself that when identifying whether the reason for dismissal relates to conduct or capability, I should first make findings as to the employer's own reasons for dismissal, and then assess how those reasons should be characterised in terms of the statute. A tribunal is not bound by the label the employer puts on its reasons, but it is seeking to characterise the employer's reasons rather than make findings of its own about the employee's conduct or capability (*UPS Ltd v Harrison EAT 0038/11*).

Conclusions

What was the reason for dismissal?

83. This was not substantially contested by the claimant, his case being rather that it was unreasonable for the respondent to conclude that he had committed the alleged conduct. I note the guidance in *Philander* that the line between conduct and capability can be porous. I am satisfied, and it is not disputed by the claimant, that the respondent's reason for the dismissal was conduct. The reason for the claimant's dismissal was due to a failure to act in breach of the standards expected of him, and despite training and support. I am therefore satisfied, considering the case law set out above, that conduct is the correct characterization of the respondent's reason for dismissal under s.98 ERA 1996.

Did the respondent have a genuine belief, reasonably held, that the claimant had committed the conduct alleged?

84. It is accepted that the events of 21-24 October happened. The issue is whether or not this was a 'willful' act which could reasonably be approached by the respondent as conduct. In the respondent's capability procedure, 'willful' is broadly defined. It includes unsafe practices, and not following procedures (**62**). This is consistent with the respondent's definition of gross misconduct at **233**, which includes any negligent act which has the potential to be severely detrimental to the CQC or stakeholders, or which constitutes a serious breach of rules. His negligent act was, I find, potentially severely detrimental to the CQC because of the potential consequences (serious harm to service users), and actual consequences (inability to take urgent action against a suspended ambulance service).

85. I am satisfied and I accept the respondent's evidence that dealing with these enquiries was '*bread and butter*' for an inspector. It was set out within the claimant's job description, within the training received by the claimant, and within the respondent's policies and procedures. It would be apparent to an unqualified bystander that dealing with these enquiries was a matter of some urgency. The claimant himself accepted on several occasions throughout the disciplinary process and before me that he was aware they were urgent. He was in fact capable of dealing with them – he had done it twice before. I am satisfied that it was reasonable for the respondent to conclude that this was a failure to exercise to the full such talent as he

possessed. It was reasonable for the respondent to conclude that the claimant had no 'inherent incapacity to function' which prevented him from being able to deal with the notifications, but rather that he made a judgement call and it was the wrong one.

86. The surrounding factors (the claimant's work-related stress and anxiety, difficulties managing his workload, and as yet unassessed potential dyslexia) put the claimant's negligence into some context. His failures did not come entirely out of the blue and he had raised his stress and workload on numerous previous occasions. However, the respondent had provided support and training in this regard, and therefore had substantial evidence to reasonably conclude that ultimately it came down to his own negligence and failure properly to prioritise his workload. I am satisfied that it was therefore reasonable for the respondent to treat the claimant's inaction on 21-24 October 2019 as a conduct rather than a capability issue. This was a genuine, reasonably held, belief.

Did the respondent carry out a reasonable investigation?

87. I do not consider that *A v B* helps the claimant. Firstly, he was not facing serious criminal allegations. Secondly, the facts of the claimant's conduct were not disputed. The issue was whether these should have been interpreted as conduct or capability. There was no more investigation that could reasonably be carried out. The claimant does not point to any more investigation that could be done into the facts. He submits that there should have been further investigation into his potential psychological issues.

88. I am satisfied that the OH assessments which had been carried out prior to the disciplinary hearing were all that was required of a reasonable employer. The OH nurse found that the claimant was fit to work, with support. She recommended further investigation into the claimant's self-reported learning difficulties, but did not consider that these rendered him unfit for work. The recommended support was put in place and indeed had been in place for some considerable time before the claimant's dismissal. By the appeal stage, when the respondent commissioned a private ASD assessment, the respondent had in my view gone above and beyond what was required of a reasonable employer in investigating potential underlying capability issues. In so far as there may have been any deficiencies in this respect at the disciplinary stage (which I do not find), these were cured on appeal (*Taylor v OCS [2006] IRLR 613*).

Was the sanction of dismissal within the band of responses open to a reasonable employer?

89. I am satisfied on the evidence set out above that dealing with safeguarding notifications was such a serious and fundamental part of the claimant's role that it was reasonable for the respondent to dismiss him for his omissions. I am satisfied that the rationale of the appeal officer reflects the rationale of the respondent, and that it is reasonable. The claimant had received a really significant amount of training and support before the dismissal, and in light of this it was reasonable for the respondent to impose the sanction of dismissal rather than some lesser sanction. As submitted by the respondent's counsel, there comes a point where a professional in a role

with responsibility has to be able to get on and do the job without continuous support and oversight.

90. The claimant says that the dismissing officer did not properly consider the mitigation he put forward (his father's illness, his workload, and his potential psychological / mental health difficulties). As set out above, taking the dismissal letter as a whole I am satisfied that she did consider each of these factors. They were exhaustively investigated on appeal and therefore if (which I do not find) there was a deficiency at the first instance, this was cured on appeal.

Did the respondent follow a fair procedure in dismissing the claimant?

91. The claimant says that the respondent should have followed the capability procedure instead of the conduct procedure. Because I am satisfied that it was reasonable to approach this as an issue relating to the claimant's conduct, it follows that it was not unfair to apply the conduct procedure rather than the capability procedure.

92. In any event, the claimant was put on a further development plan for another 8 weeks after the incidents. The claimant had already had a development plan for a year by the time he was dismissed, whereas these should normally last for no more than six weeks. In the circumstances, it is difficult to see what the claimant or respondent could have gained from any further capability procedure.

93. It follows from my decision above that I do not need to consider *Polkey* or contributory conduct.

Wrongful dismissal - Has the respondent established that the claimant did commit gross misconduct sufficient to justify summary dismissal?

94. The facts of the claimant's actions are not disputed. I am satisfied and find that once he had looked at the enquiries on 21 October 2019, the claimant was or should have been aware that they needed to be dealt with within 24 hours, or at the least urgently and certainly less than the seven days which was his proposed timescale. It would have been apparent to an untrained bystander that they were significant and urgent, and had the potential to place vulnerable people at risk if not dealt with.

95. For the reasons that I have set out above, I am satisfied that those actions do amount to gross misconduct. Similar to *Adesokan,* the requirement to deal with these notifications was so fundamental to the claimant's role that it was a serious dereliction of his duty not to act. I am therefore satisfied that the claimant had committed gross misconduct sufficient to justify summary dismissal.

96. Therefore, the claimant's claims for unfair dismissal and wrongful dismissal are dismissed.

Employment Judge **K Armstrong**

2 August 2021