EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102660/2019

Held on 4, 5, 6 AND 7 MAY 2021 BY CVP

Employment Judge B Campbell

Dr A Khan	**Claimant** **Represented by** **Mr E Stafford** **Solicitor**
NHS Highland	**Respondent** **Represented by** **Mr K McGuire,** **Counsel**

JUDGMENT

The judgment of the employment tribunal is that:

1. the claimant was not unfairly dismissed contrary to section 94 of the Employment Rights Act 1996, and

2. the claim is therefore dismissed.

REASONS

GENERAL

1. This claim arises out of the claimant's employment by the respondent which began on 1 December 2001 and ended on 19 September 2018 with his dismissal. The claimant asserts that he was unfairly dismissed.

2. Evidence was heard from, in order, Ms Tracy Ligema, Mr David Park and Mr David Garden of the respondent, and the claimant himself. The parties had helpfully prepared an indexed and paginated joint bundle of documents. Numbers in square brackets below are references to the page numbers of the bundle. The claimant also provided an updated schedule of loss which superseded the version in the joint bundle. Some of the key values within it were agreed by the parties.

3. All of the witnesses were found generally to be credible and reliable. The parties were not in direct conflict over much of the evidence and the case turned more on matters such as the severity of the sanction imposed and whether the respondent had treated the claimant reasonably in all of the circumstances throughout what ultimately became a lengthy process. The parties' representatives provided written submissions at the close of the hearing which were considered and where appropriate they are referred to below.

LEGAL ISSUES

4. The legal questions before the tribunal were as follows:

   4.1. It being agreed that the claimant was dismissed on 19 September 2018 for some other substantial reason under section 98(1)(b) of the Employment Rights Act 1996 ('**ERA**'), namely a breakdown in his working relationship with colleagues, did the respondent meet the requirements of section 98(4) ERA so that the dismissal was fair overall?

   4.2. If not, what remedy should be ordered?

APPLICABLE LAW

5. By virtue of Part X of ERA, an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on matters such as length of continuous service and the reason alleged for the

dismissal. Unless the reason is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) ERA. Should it be able to do so, a tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements set out in section 98(4), taking in the particular circumstances which existed, such as the employer's size and administrative resources, as well as equity and the substantial merits of the case. The onus of proof is neutral in that consideration.

6. ERA recognises that as well as common types of dismissal specifically listed, an employer may dismiss an employee fairly for a different reason, provided by way of section 98(1)(b) that it is 'substantial'. As developed in case law authorities, that term denotes that the reason must be relevant and important, and cannot be minor or trivial. It would be all too easy for employers to evade the purpose of this part of the Act otherwise. Just as with a dismissal on grounds of conduct, an employer's decision to terminate the employment of an individual for some other substantial reason must fall within the band of reasonable responses open to an employer.

FINDINGS OF FACT

7. The following findings of fact were made as they are relevant to the issues in the claim.

8. **Background**

9. The claimant is a qualified medical doctor and has a specialism in sexual health and the treatment of sexually transmitted diseases. The respondent is a part of the Scottish NHS responsible for delivering public sector care in the Highlands of Scotland.

10. The claimant was an employee of the respondent from 1 December 2001 until 19 September 2018. The respondent considered that his start date may have been around two weeks later but was unsure, and it was recognised in any event that this would have made no difference to his claimable losses.

11. The claimant was employed as an Associate Specialist by the respondent. He was based at the Raigmore Hospital in Inverness. He worked within a service named Highland Sexual Health, which was made up of two parts, namely Genitourinary Medicine and HIV (GUM/HIV) and Sexual Reproductive Health (SRH). The claimant worked in GUM/HIV. He worked part time under a semi-flexible hours pattern. This permitted him to hold a similar position at the same time with the Chelsea and Westminster Hospital in London. The arrangement he agreed with the respondent broadly involved working alternate weeks in each role, but every Friday for the respondent at Raigmore. The details are set out in a note of his job plan which he discussed with his practice lead, Dr Hame Lata, in April 2018 [243-246]. He lived in Inverness with his family and would travel to London as required by train and stay there until he next needed to return to Inverness to perform work for the respondent.

12. The claimant's Consultant and Clinical Lead within GUM/HIV was a Dr Gordon McKenna up until June 2018 when Dr McKenna retired. The Consultant and Clinical Lead for SRH, and also on an interim basis for the whole Highland Sexual Health service, was Dr Lata. Effectively therefore the claimant worked under Dr McKenna, and ultimately Dr Lata up until June 2018, and then (albeit more in principle than practice given events) more directly Dr Lata after that.

Suspension and investigation

13. The claimant arrived at work on the morning of Friday 18 May 2018, ready to begin his clinic. He was suspended from his duties by Dr Katharine Jones, Associate Medical Director because of allegations of bullying and harassment of colleagues, and dishonesty. He went home. A letter dated 21 May 2018 [87-90] confirmed the terms of the suspension. He was told that an investigation into his conduct would be undertaken by Ian Thomson, Lead Social Work Officer, under the respondent's 'Management of Employee Conduct' policy. The policy was produced within the bundle [99-131]. He was paid while the suspension was in effect.

14. Mr Thomson's investigation was completed on 12 July 2018 and he produced a report dated 20 July 2018. The report was included in the bundle [60-84] together

with a number of appendices [85-375]. The report is in sections, covering an introduction to the background and allegations made, a description of the investigation process itself, a set of findings making up the majority of the report, and conclusions and recommendations.

15. The claimant's suspension had been prompted by a complaint made by a colleague, Shirlie Geddes, a Health Care Assistant on 16 April 2018 to Dr Lata by email [92]. She alleged a number of examples of the claimant behaving in an uncivil way towards her. A meeting took place involving Dr Lata, Ms Geddes and her line manager on 24 April 2018 and a note was prepared by Dr Lata [93-94]. A Health Advisor named Sandra Marquis was a witness to one of the instances complained about, which involved a patient, and gave an account which was also noted [95]. Ms Geddes sent a further email to Dr Lata on 4 May 2018 in relation to an additional interaction with the claimant that day which she considered was similarly problematic [96].

16. In parallel to the above matters, Dr Lata as the Clinical Lead for the service had met with him on 23 April 2018 to discuss his job plan, and following that had reported to the respondent's HR team that she had concerns over whether the claimant was fulfilling his contractual hours and being fully honest about the work he was doing.

17. Dr Lata herself provided a statement and supporting documentation to Mr Thomson's investigation. She prepared a written statement on 28 May 2018 [301-306] and provided a set of emails with colleagues in the team and other documents [307-354]. These included the items in the paragraphs immediately above and additional evidence in support of the allegations against the claimant.

18. Mr Thomson interviewed 13 people in his investigation, all employees of the respondent with the exception of the patient who allegedly witnessed the claimant behaving unprofessionally towards Ms Geddes. The interviews took place between 25 May and 19 July 2018 and were noted. A list of the interviews is at section 2.2 of the report and copies of the notes were included as appendices.

19. The claimant was one of the individuals interviewed. He met with Mr Thomson on 15 June 2018 and the discussion was noted by Brigitte Johnstone, an HR Manager. The claimant was provided with a typed note and permitted to make comments on it, which were incorporated as part of the investigation materials [214-235]. He signed the note on 20 July 2018.

20. Section 3 of Mr Thomson's reports contains his findings in relation to the allegations he investigated. There were two main allegations, described as:

> ***'Allegation 1: Bullying and harassment in the workplace towards work colleagues'****;* and
>
> ***'Allegation 2: Dishonesty'****.*

21. **Allegation 1** was further divided into categories of behaviour relating to (i) questioning colleagues' competence, including in front of patients, and in the process undermining them, (ii) intimidating or undermining colleagues by bypassing, challenging or ignoring them, and (iii) verbally intimidating and abusing colleagues. Evidence gathered in support of each is summarised and cross-referenced to supporting documents such as the statements.

22. **Allegation 2** was broken down into the claimant being dishonest about (i) the hours he worked and for which he was paid and (ii) time taken off in lieu (TOIL). Again, the evidence gathered in support of the allegations was summarised and supporting documents included as appendices.

23. In relation to each aspect of each allegation with the exception of the TOIL concern, Mr Thomson found there to be *'clear evidence'* of conduct which was inappropriate. He concluded his report by recommending that the issues be addressed via a formal disciplinary hearing.

24. Dr Jones wrote further to the claimant on 29 June 2018 to confirm that the investigation was still being carried out at that point, and his suspension was continuing.

Disciplinary hearing and dismissal

25. On the basis of the contents of the investigation report and its recommendations, Tracy Ligema, then Deputy Director of Operations for North and West, was appointed to chair a disciplinary hearing.

26. Ms Ligema wrote to the claimant on 1 August 2018, inviting him to a disciplinary hearing on 31 August 2018 [376-378]. The letter specified the two central allegations which had been investigated and provided further details of each by way of bullet points which she had drafted by summarising the investigation report's more detailed findings. At the hearing she was to be assisted by Kathy Black from HR and Dr Boyd Peters, Associate Medical Director. The respondent's standard practice in disciplinary procedures is that clinical support will be provided in a disciplinary hearing involving a clinical member of staff.

27. Also, part of the respondent's disciplinary procedure was that the 'management case' - i.e. the case in support of a finding that there had been a breach of conduct standards – would be presented by Mr Thomson the investigator, assisted by Ms Johnstone who had helped him in that exercise. The claimant would then be able to present his own 'staff case'.

28. The claimant was given the right to be accompanied and also to call witnesses, by liaising with Ms Black as necessary.

29. Along with the letter, the claimant was sent the investigation report including appendices.

30. The claimant submitted documents of his own the day before the hearing [379-449].

31. The claimant attended the disciplinary hearing on the given date. He brought along a friend named Alistair Fraser to assist him. Mr Fraser was not an employee of the respondent.

32. As part of the management case, Mr Thomson called Dr Lata, Hayley Shepherd (ANP HIV), Mairi Pearson (Receptionist), Sandra Marquis and Shirlie Geddes to the hearing. Each was questioned by Ms Ligema and the claimant had the opportunity to question them also.

33. The hearing was recorded and digitally transcribed to produce a written account [450-558].

34. Part way through, the hearing was adjourned to 7 September 2018 when it continued and concluded. Ms Ligema took the decision to do that based on how the hearing was progressing. In particular, she was concerned that the claimant had not adequately prepared to answer the allegations and wished to allow him more time to do so.

35. The adjournment also allowed a further witness, Kimberley MacInnes, to be called to answer questions at the claimant's request.

36. Ms Ligema reached her decision by 19 September 2018 when she issued her outcome by letter [559-563]. Although she described the arrangement for hearing the matter as a panel and used the pronoun 'we' when discussing the process, the decision in the outcome letter was hers, albeit that it was supported by Dr Peters.

37. The outcome letter stated the conclusions reached in relation to each part of the two main allegations under consideration. Those are summarised below as follows:

    37.1. **Allegation 1** – Bullying and Harassment in the workplace towards colleagues – the allegations of inappropriately questioning colleagues' competence, including in front of patients, and undermining them (**Detail 1**) and seeking to intimidate and/or undermine colleagues by bypassing and/or ignoring them completely (**Detail 2**) were upheld; the allegation of verbally intimidating and abusing colleagues (**Detail 3**) was partly upheld;

    37.2. **Allegation 2** – Dishonesty – the allegation of dishonesty about hours worked for which he was paid (**Detail 1**) was upheld; the allegation of dishonesty about time off in lieu (TOIL) (**Detail 2**) was not upheld.

38. In conclusion Ms Ligema stated that examples of gross misconduct had been found under both allegations. She decided that she would therefore dismiss the claimant immediately. She stated that the panel had considered issuing a

warning and redeploying the claimant with a supported improvement plan, but listed her reasons why that was not considered appropriate. Those reasons were:

- ***'the nature of the upheld allegations which are corroborated with powerful witness testimony about this which put into question your ability to moderate your behaviour in the future;***
- ***that you did not show any insight into the impact of your behaviour on others, denying that your behaviour could be perceived as inappropriate, intimidating or undermining. And in fact that you advised that your values were misunderstood;***
- ***the specialist nature of the service which would meant [sic] that redeployment opportunities would not be available;***
- ***the impact of you returning to a small team within which it is clear that relationships with colleagues had irretrievably broken down by virtue of the testimony heard from witnesses;***
- ***that your admission of dishonesty amounts to a fundamental loss of trust and confidence in you as an employee.'***

39. The claimant was given the right to appeal against the decision within 10 days of receipt of the letter. He was paid up to 19 September 2018 and was due no accrued annual leave.

Appeal

40. The claimant appealed against his dismissal within the permitted time by way of an undated document headed 'Gaye boyde appeal' [568-579].

41. At some point an appeal hearing was scheduled for 26 July 2019. There had been as many as three attempts to fix a date before that, but for various reasons those needing to attend could not do so on the proposed date. At one point it was fixed for 14 December 2018, and later for 31 May 2019. The reasons included a delay in obtaining the transcript of the initial disciplinary hearing late in 2018 and the claimant undergoing a back operation which prevented him attending around January to March 2019, and the rehabilitation of the claimant's union representative after an injury. There was no fault on either side albeit that ideally the appeal would have taken place sooner.

42. Before the appeal hearing the claimant submitted further material, principally in the way of emails [580-596].

43. The appeal hearing finally proceeded on 26 July 2019. It was chaired by David Park, the Chief Officer of the North Highland Health & Social Care Partnership. He was assisted in relation to clinical matters by Dr Stewart Macpherson and given HR support by Gaye Boyd and Kathy Black. The claimant was accompanied this time by Gavin Smith, an officer with the GMB union.

44. At this hearing Ms Ligema presented the management case in favour of the original decision to dismiss. Her position was captured in a note [597-598]. The claimant was able to question her and make his on submissions. No witnesses were called to this hearing.

45. Again, the hearing was recorded and digitally transcribed at a later date [599-644].

46. After the hearing Mr Park asked Dr Lata to provide a statement. The precise terms of the request are not captured in the bundle but he was seeking her experience of the impact of the claimant's conduct on his working relationships with colleagues and her view on the potential effect of his return to work, as is evident from the statement which she provided dated 6 August 2018 [651-652].

47. In her statement Dr Lata describes how she initially raised concerns about the claimant to HR, her understanding of the experiences of others over a number of years, the effect this has had on the mental health and morale of some team members, the experience of staff since his suspension, and feeling within the team about the prospect of his return.

48. In her covering email to Mr Park she states that the two key members of staff involved had been:

> ***'distraught and in tears'***, and were
>
> ***'upset that they would be forced to leave their jobs in order to protect their own health whilst Dr Khan is reinstated. Although I have not mentioned this in my statement, I think you need to be aware that they***

have independently stated that they would bring an action against the health board.'

49. Mr Park gave consideration to Dr Lata's statement and emailed her on 9 August 2019 with a further set of questions about the impact on the team, and designed to explore whether there was a way for the claimant to return to some form of working which would minimise contact with those who had concerns. Dr Lata relied later that day [647-649]. She stated that the prospect of the claimant returning was:

'deeply concerning', and that

'We are a very small team and loss of any members of staff will decimate the service'.

She pointed out what she saw as logistical challenges to him performing another role in the service, such as a lack of training, the inability to drive and issues around his availability connected to his role in London.

50. In response to Mr Park's question about whether any staff had resigned because of the claimant, she said that some staff had amended their working pattern to avoid him, and four had held off on any decision to resign pending the completion of the disciplinary process.

51. When asked to confirm that she had explained to staff that the respondent would help mediate in any return to work the claimant may make, Dr Lata responded that they:

'do not have faith in the process due to Dr K's lack of integrity and lack of accountability of his actions. Being asked to mediate will cause significant distress. I have the impression that staff would resign rather than be in a room with him even with a mediator.'

52. In the same email Dr Lata discussed the impact of the claimant on herself. She stated that she considered it inappropriate to continue holding the role of Lead for Gender Based Violence when at the same time she considered conduct akin to that was taking place within her own team. She said:

'The cost to me personally has been immense. I have not resigned solely for the reason that this is my service and I have a duty of care to my patients and staff and I am the only SRH Consultant in Highland.'

53. She concluded her email by saying:

> ***'If Dr Khan were to return to work in HSH, I will not be able to continue. I cannot put myself (and my family) through any further additional trauma. Whilst it will break my heart to walk away from this service that I care so much about, it will be the last straw.'***

54. Mr Park issued his outcome to the appeal by letter dated 15 August 2019 [653-657]. He upheld the finding of dishonesty in relation to the time the claimant was spending on work for the respondent as against his contracted hours. He also upheld the finding of bullying and harassment of colleagues.

55. However, on considering the findings made against the claimant and the sanction previously imposed, he concluded that a 'First and Final' warning would be appropriate rather than dismissal. He therefore substituted the decision of Ms Ligema with his own to that effect.

56. Mr Park then went on to say in his letter that having considered all of the circumstances, it would not be possible to reintegrate the claimant into the service as would normally have happened. He gave his reasons, which he said were based on information presented at the appeal hearing and in subsequent discussions with Dr Lata. In essence:

    56.1. The team was small, numbering 18 individuals;

    56.2. Five of those individuals (named in the letter) had expressed serious concerns about the claimant;

    56.3. Dr Lata had stated that she would resign in the event of the claimant's return, causing significant impact to the service;

    56.4. Four other staff had said they would resign also;

    56.5. There was a lack of faith in the claimant's ability to modify his behaviour and an unwillingness even to enter into mediation; and

    56.6. The claimant had given an indication that he would find it difficult to trust Dr Lata.

57. Mr Park acknowledged that the claimant had said he was willing to engage in mediation and to change his behaviour, having had such serious accusations made against him and a disciplinary sanction imposed. However, he also considered that the claimant hadn't fully recognised the extent and nature of his unacceptable conduct, and that there was a material risk of repetition of the events which had prompted complaints about him. He thought the claimant's relationships with those colleagues referred to had broken down to such a significant degree that it was *'irretrievable'* and *'would cause severe disruption and distress'* were he to return.

58. The letter went on to state that Mr Park had explored whether there were any other viable roles or ways of working for the claimant within the respondent, but had been unable to identify any.

59. Mr Park therefore explained that although the claimant's personal conduct did not warrant dismissal, the fact of his dismissal would remain but the reason for it would now be changed from misconduct to an irretrievable breakdown in relationships with no opportunity for deployment.

60. As a result of Mr Park's decision, the claimant was paid his entitlement to 12 weeks' notice.

61. Mr Park concluded by acknowledging that the claimant had not been told that an outcome of the appeal might be the decision he took, and that the claimant would be able to appeal against it within 10 working days.

Second appeal

62. The claimant appealed against Mr Park's decision. David Garden, Director of Finance for NHS Highland, was identified to hear the appeal.

63. An appeal hearing took place on 7 February 2020. Mr Garden was assisted by Dr Emma Watson in a clinical capacity and Claire Blackburn from HR. The claimant was again accompanied by Gavin Smith of the GMB union.

64. At the hearing the management case was presented by Mr Park, assisted by Gaye Boyd. Dr Lata was called to answer questions. Mr Smith had been informed in advance that she would be called.

65. The hearing was recorded and then transcribed [678-703].

66. Mr Smith submitted at the hearing that the respondent had departed from its normal process in changing the reason for dismissal and allowing for a second appeal. He considered that aspects of the process followed by Mr Park were not sufficiently comprehensive or transparent. He questioned whether or how suitable alternative roles were properly explored. In particular, it was submitted that the claimant's capacity to provide training had not been fully considered and in general outdated information about the claimant had been relied on.

67. There was discussion of whether a working relationship, such as that between the claimant and Dr Lata, could irretrievably break down if one party reached that view, or whether it required both. Similarly, the viability of mediation was discussed when one party saw no prospect of it resolving issues between the parties.

68. Mr Park explained to the hearing the process he had followed and the reasoning for his ultimate decision. He explained that he thought it would be an *'impossible situation'* were mediation to be ordered and that returning the claimant to his department would have been *'irresponsible'*. He explained the steps taken and individuals consulted as part of his redeployment efforts.

69. Mr Garden asked the claimant for his view on whether he could successfully return to his department. He believed he could and mentioned that at least one member of the team had said they wished to have him back.

70. Dr Lata gave evidence at some length and related some of the discussions she had had with team members about the prospect of the claimant returning. She also spoke about her personal perspective on the claimant. She expanded on the concerns and experiences she had articulated to Mr Park at the first appeal stage in more detail. She also answered questions about her understanding of the claimant's skills and the opportunities to utilise them which existed within the

respondent. She confirmed that her views had not changed since being consulted by Mr Park, and that subsequent events reinforced them. This included, she said, the claimant and his wife visibly observing team members going to and from work, and at times approaching them. Dr Lata also answered questions put by Mr Smith. Among other things it was put to her that the claimant apparently only caused issues with four colleagues out of a team of 18 in total.

71. After a short adjournment, Mr Smith and Mr Park were allowed to sum up their respective cases.

72. Following the hearing Mr Garden decided to speak to the claimant's colleagues who had originally complained about him. He had asked Dr Lata in the hearing whether she was content for him to do so and she had said yes. He managed to speak to Shirlie Geddes and Hayley Shepherd, in the presence of Dr Watson.

73. Mr Garden reached his decision by 14 February 2020 when he issued his outcome letter [706-709].

74. In the letter Mr Garden set out that on the evidence he concluded that:

> ***'It was absolutely clear to both Emma and myself, how your behaviours have affected those individuals [that were spoken to] and we could visibly see the distress this has caused, even after a period of time. Following these discussions, I can confirm that there has obviously been a clear and substantial breakdown in relationships with colleagues. I also conclude that you provided no insight into the impact your behaviour has had on these individuals and, even though you were issued with a First and Final warning for your bullying behaviour, there seemed to be no acceptance nor remorse shown at the appeal hearing.'***

75. Mr Garden went on to give his reasons why he believed sufficient redeployment efforts had been made. This included a further review by Dr Watson.

76. The culmination of the above was that the claimant's appeal against Mr Park's decision was not upheld. Mr Garden confirmed that this was the end of the process the respondent was following and the claimant's dismissal on the terms of Mr Park's outcome letter would stand.

77. Since the claimant's dismissal he has not found other work to replace the role with the respondent he lost. He continued to work in his role with Chelsea and

Westminster Hospital, and from March 2020 until recently worked from home as he was in a vulnerable self-isolation category and because in any event was prevented from travelling to and from London. The claimant would have been significantly restricted in securing an alternative role and performing it in that time. There was also some delay in his being provided with a reference by the respondent.

78. The claimant did apply for a teaching role. The hours would have been flexible such that he could have performed it whilst retaining his London role. He was unsuccessful in securing that post.

79. Throughout the disciplinary and appeal process, and at the time of the hearing of his claim, the claimant considered that relationships with his colleagues could be repaired to the extent required for him to return to his role and perform it effectively without further issues. He indicated that he had reflected on his conduct and was willing to change his way of behaving towards colleagues. If he could not be reinstated to his old role, he would have preferred to be re-engaged in a different role with the respondent. Pure compensation was his third choice.

80. The respondent had consciously not filled the claimant's role with a permanent replacement pending the outcome of this claim. At least some of his duties were being covered by existing members of the service. There was no obstacle to his return in that sense.

The parties' submissions

81. The parties helpfully provided written notes of submissions which were considered as part of their respective cases. In particular, the authorities referred to in the submissions were considered.

DISCUSSION AND CONCLUSIONS

The statutory reason for dismissal – section 98(1)(b) ERA

82. Mr Stafford on behalf of the claimant accepted that the reason for the claimant's dismissal was, ultimately, the reason given by Mr Park in his letter of 15 August 2019, and that this constituted some other substantial reason within the scope of

section 98(1)(b) ERA. He therefore agreed that the respondent discharged that burden. This is a finding the tribunal would have made on the evidence in any event.

General reasonableness of the respondent's process – section 98(4) ERA

83. The majority of the discussion in a statutory sense was therefore around whether the requirements of section 98(4) had been met. This involved a number of distinct issues relating to the respondent's process, considered below.

84. The claimant argued that the respondent departed from its own policy designed to deal with conduct issues when it became unsustainable to do so, by way of Mr Park substituting the reason for dismissal on appeal. It was argued that the policy did not permit that to happen. The claimant's position was that he should have stopped at the point of downgrading the claimant's dismissal to a warning and passed the matter back to the respondent's HR department to consider any further steps or processes to follow.

85. It is correct that the policy did not expressly state that at the appeal stage a manager could change the reason for dismissal from conduct to another reason. However, as recognised by the claimant there was nothing in the policy to say that this could or should never happen. There is no statutory or other general authority preventing an employer from deciding, on the same facts, that its reason for dismissal should be described differently at an appeal stage. On one interpretation of the facts, what happened was that the policy was exhausted at the point Mr Park substituted the claimant's dismissal for misconduct for a warning, and that his next step, namely to confirm that the dismissal would stand but for other reasons, was effectively a new process outside of that policy. Thus, he acted completely within the policy until the point that his remit under it was fulfilled. In any event it follows that this was an option at least potentially open to him.

86. Nevertheless, it is important to consider whether the requirements of section 98(4) itself were met. A dismissal which is for some other substantial reason still requires to be implemented reasonably in accordance with the employer's size

and administrative resources. The dismissal must fall within the band of reasonable responses open to an employer in the scenario in question.

87. Furthermore, the fundamental aspects of a dismissal decision or process cannot be cynically revisited by an employer when an individual challenges it, so as to simply achieve the same effect in a less risky way with the benefit of hindsight. As cautioned by the EAT in ***Ezsias v North Glamorgan NHS Trust [2011] IRLR 550***, an employment tribunal should be on the lookout for an employer seeking to use the 'some other substantial reason' option as a pretext to conceal the real reason for a dismissal or, for that matter, because it does not have an adequate reason at all.

88. On consideration of the evidence in this case it is found that Mr Park did genuinely reach the view that, whilst the claimant's misconduct was not serious in itself to warrant dismissal without regard to other factors, there was no viable way for the claimant to return to work for the respondent. It is also found that the process he followed was reasonable so as to meet the requirements of section 98(4). The decision did fall within the band of reasonable responses.

89. In reaching this decision consideration was given to all of the evidence, including the claimant's own position regarding having learned from the experience and being willing to adapt his working manner and behaviours. However, there was a substantial quantity of evidence before Mr Park which he was entitled to treat as credible and significant to the effect that some of the claimant's colleagues would be caused serious stress by the prospect of his return, that they had no faith in his ability to recognise the issues his behaviour had caused or to change, that they would not even participate in a mediation process and that they may leave the respondent's service and/or raise legal claims.

90. The claimant raised that only four of his colleagues (excluding Dr Lata) had made complaints or expressed concerns with his conduct towards them. This was a minority of the team. However, that number was sufficient, particularly when considering the evidence of the effect of the claimant's behaviour on them, to allow the respondent to decide that it was not feasible simply to let him to return.

91. The evidence of Dr Lata herself was relevant. She spoke not only of the effect of the claimant on his colleagues but also herself as the lead for the service. The essence of what she said was that there was a real risk of the service losing a number of staff, some highly specialised and difficult to replace, as well as the respondent potentially having to defend claims.

92. Whilst therefore it is found that the claimant was sincere in saying that he did not see his working relationships as irrevocably damaged, that he was willing to change, and would make efforts to do so given the chance, the respondent was nevertheless entitled to consider the possibility of a harmonious return to be very low. Faced with the potential consequences spelled out so starkly, the respondent was entitled to opt not to take that risk.

93. It should be stressed therefore that the claimant was not wrong to hold the view that he could reconcile with his colleagues and go back to working as an Associate Specialist, but simply that the respondent, considering both sides of the issue, was entitled to decide that his colleagues equally legitimately considered themselves unable to work with him again.

94. Procedurally it was reasonable for Mr Park, on reaching the conclusion that the claimant's misconduct did not warrant his dismissal, to consider the consequences of that decision. The issue of the claimant's damaged relationships with colleagues was already in the foreground, having been identified by Ms Ligema and evident in the fact that the claimant was still deemed to have breached the conduct policy through his behaviour towards other team members, to the extent of deserving a warning. Mr Park was entitled to explore the viability of allowing the claimant to return to his role and also to consider whether any adaptations should be made, including a change to the role itself. Those questions followed naturally from his decision. Even had he decided to hand matters back to HR, it would be unrealistic for the claimant to expect simply to return to work in the meantime and realistically a similar process to that followed by Mr Park would likely have had to be pursued, only by someone else. Therefore, whilst that was an option, it was not required in order for the respondent's process to be reasonable.

95. It is found that Mr Park made adequate efforts to identify whether an appropriate alternative role could be identified for the claimant which matched his skills, limitations and availability, and avoided him coming into contact with his colleagues who had raised concerns. Given the nature of Dr Lata's evidence any such role would have to have been outside the Highland Sexual Health service which she led. There was no evidence of a suitable role existing. At no point did he identify one himself. Whilst it would have been preferable to involve the claimant in a discussion about the scope of the search, that could not be said to be a step on which the fairness of the whole process depended. There is no evidence that this would have made any difference, and the matter was revisited in the course of Mr Garden's appeal in any event. Although the claimant had a concern that any influence Dr Lata had in the consideration of alternative roles would go against him, it could equally be the case that she would be motivated to identify a potential role for him outside of her service as a means of preventing him returning to her area.

96. Whilst the claimant submitted that an employee should have a reasonable expectation that the reason for their dismissal should not be changed as a consequence of appealing, there must be room for circumstances where a fresh pair of eyes considering the relevant facts results in a legitimate recategorization of the reason or reasons for dismissal. This is particularly so given that the effect for the claimant was to have a dismissal for gross misconduct erased from his employment record - in itself a positive step. Whilst it may be one thing for an employer to seek to rewrite a conduct dismissal as, say, redundancy, the space occupied by conduct issues and relationship differences can overlap and this is such a case. It should not be forgotten that the original disciplinary findings were upheld and merely the sanction changed. They were not abandoned altogether. In fact, save for the severity of the sanction imposed, the conclusions of Ms Ligema and Mr Park are substantially the same. Therefore, although the claimant submitted that Mr Park's decision involved entirely new facts and new evidence which was not put to the claimant, that is not the case to any relevant extent. It was based on substantially the same evidence as the original disciplinary decision, with some additional input in relation to the irretrievable breakdown and redeployment questions which flowed from the decision not to dismiss for

misconduct. Admittedly the claimant did not get to respond in relation to those matters in that specific context until the appeal before Mr Garden, but by the end of the process he had been given his say.

97. Although it was found that the claimant's dismissal was found to be fair by the point at which Mr Park issued his outcome letter, it should also be said that the effect of the appeal from that decision reinforced that outcome.

98. There was no absolute requirement upon the respondent to offer a right of appeal against Mr Park's decision, but in doing so the claimant was given the opportunity to respond to the change to his reason for dismissal and his conclusion that redeployment was not feasible.

99. As a result of Mr Park's appeal outcome, the two key issues became whether the claimant's relationship with colleagues had irretrievably broken down to the point where he should not be allowed to return to his role, and whether there was an alternative way of engaging him which would have averted his dismissal. Both were considered thoroughly by M Garden, assisted by Dr Watson.

100. By this point the claimant was fully aware of the nature and extent of the issues raised by his colleagues about his potential return, and Mr Park's attempts to identify an alternative role. The claimant was able to hear from Dr Lata in person why she and others opposed his return, and ask her questions. As well as hearing from Dr Lata directly in this way, Mr Garden also spoke to two of the other complainers and in the process was able to gain a fuller appreciation of the strength of feeling within the team. The claimant was also able to make submissions in relation to whether there might be an alternative role for him to perform.

101. The claimant suggested that certain aspects of the investigation, and Mr Thomson's subsequent input at the disciplinary hearing, indicated bias against the claimant. Whilst it appears to be the case that Mr Thomson had asked leading questions of some of the complainers, this was identified by Ms Ligema and addressed by way of both her and the claimant's questions of those individuals. In any event, with the shift from a conduct-based dismissal to one for a different

reason centred on the state of working relationships, this became less of an issue.

102. The claimant also took issue with the fact that he was suspended whilst Mr Thomson's investigation was carried out. It is found that there was adequate reason for doing so, given the nature and seriousness of the allegations against him. Ms Ligema referred to a perceived need to reassure the staff who had spoken up, and concern that there could be further complaints whilst the process was being followed and this was accepted as genuine and relevant.

103. Mr Stafford quite properly stressed that although a working relationship breakdown could qualify as 'some other substantial reason', it had to be of sufficient seriousness before dismissal could be justified. However, there was adequate evidence available to Mr Park (and also Mr Garden) to allow him to conclude that the situation was critical enough to render the claimant's return to his role inappropriate, triggering his dismissal remaining effective. The material before him as described above was clear and comprehensive. He took what Dr Lata said in good faith as he was entitled to do. There was no evidence of any note against what she reported. The claimant's response was effectively that he viewed the events differently, not so much factually but in terms of their seriousness, and believed he could change so as to cause no further upset.

104. Mr Stafford cited the cases of ***Perkin v St George's Health Care NHS Trust [2005] EWCA Civ 1174, [2005] IRLR 934*** and ***Phoenix House Ltd v Stockman [2016] IRLR 848.*** In ***Perkin*** the Court of Appeal recognised the proximity of and potential overlap between circumstances which could amount to conduct and some other substantial reason. A critical finding made by the Court in support of the original tribunal's decision to dismiss a claim of unfair dismissal was that there was material on which to make a finding that the claimant could not work harmoniously with his colleagues. Such evidence existed and was relied on in the current claim. The Court also recognised that something as potentially nebulous as 'personality' could not in itself found a fair decision to dismiss an employee. What mattered was how the consequences of personality played out in a work context by way of the individual's actions. The Court also recognised

that the case turned on its own 'unusual facts' which were effectively determinative of the outcome. The Court did not confine the circumstances where some other substantial reason could be relied upon in the case of a personality issue to those where there was an actual or potential breakdown in the functioning of the employer's operations (or where a senior executive group could no longer work together as a team). Those were simply the events relied upon by the respondent employer in that case. Even if those were the only occasions when an SOSR dismissal for personality conflict was permissible, the terms of the second were close enough to the circumstances of the present claim.

105. In ***Phoenix House*** an employee's dismissal was found unfair by the tribunal and that judgment could not be overturned by the employer on appeal to the EAT. One of the criticisms made of the employer's process in dismissing an employee, whose relationship with a colleague deteriorated after missing out on a promotion, was that she was not given the chance to show that the relationship had not in fact broken down. An irretrievable breakdown had been assumed by the employer, who had put the onus on the claimant to prove otherwise. The EAT considered that the tribunal was entitled to find the employer's approach to be unfair on the facts of that case. It did not at the same time set a precedent to the effect that any employee whose working relationship with a colleague was thought to have broken down must be given a second chance by way of returning to work in order that the conclusion could become formal. It would be inconsistent with an employer's duties to other employees to be bound in such a way. Clearly there will be a spectrum of situations involving relationship issues, from minor irritation over personal foibles to serious concern over one's physical or mental wellbeing. The circumstances of the current claim were more serious than those in ***Phoenix House*** in terms of the potential ramifications of a return to work, and the respondent in the current claim did not put the onus on the claimant to disprove that there had been a relationship breakdown. In ***Phoenix House***, it was unclear whether the employee could have realistically returned to work or not. The lengths the respondent in the current claim went to in order to understand the extent of the damage to relationships, the resultant stress, the aversion of those complaining to even embrace a mediation process and the

threats of resignation were sufficient in terms of allowing a sustainable conclusion to be reached without putting that to the test by permitting the claimant to return to his role and see what happened.

106. The EAT judgment in ***St John of God (Care Services) Ltd v Brooks [1992] IRLR 546*** to which the claimant also referred does not particularly help his claim. That case involved assessment of the fairness of an employer dismissing employees who refused to accept alternative terms offered to them. Whilst the EAT did indicate that the relevant date on which to evaluate an employer's decision was the date of dismissal, in the context the alternative argument was to judge the employer at an *earlier* date, when the new terms were offered. The current claim differs from that in terms of the background and the reason stated for dismissal. There is case law authority, for example ***West Midlands Co-operative Society Limited v Tipton [1986] IRLR 112*** to the effect that where an appeal process follows a dismissal, the whole process should be reviewed in determining whether the employer acted fairly. This recognises the possibility of the situation which arose in the current claim, namely that the reason for dismissal may change. That could be the precise set of factual findings on which dismissal is said to be justified, or the weight given to each, or the way that the original findings were characterised or described. It was therefore permissible for Mr Park to reach the decision that he did with the consequence that the original dismissal would stand, but for a differently described reason.

Conclusions

107. As a consequence of the above findings it is not necessary to consider questions of remedy. The respondent was found to have dismissed the claimant for a potentially fair statutory reason, and have met the requirements of section 98(4) as to reasonableness, including taking a decision which fell within the band of reasonable responses. Therefore, the claim must be refused as a result.

Employment Judge	**B Campbell**
Dated	**17 May 2021**
Date sent to parties	**18 May 2021**