EMPLOYMENT TRIBUNALS

Claimant: **Mr T Reuser**

Respondent: **University Hospitals Birmingham NHS Foundation Trust**

Heard at: **Birmingham** **On: 30 July to 3 August 2018 and 7 September (in chambers)**

Before: **Employment Judge Broughton**

Representation
Claimant: **Mr B Collins QC**
Respondent: **Ms N Motraghi, counsel**

JUDGMENT

The claimant was unfairly dismissed. The awards are reduced by 50 per cent because of the claimant's conduct. The claimant was dismissed in breach of contract. The dismissal was not automatically unfair.

REASONS

1 The claimant, a Consultant Ophthalmic Surgeon, brought claims of unfair dismissal, automatic unfair dismissal for having made a protected disclosure and wrongful dismissal.

2 The claimant was previously employed by the Heart of England NHS Foundation Trust (HEFT). That Trust got into significant difficulties and was put into special measures. A new management team was put in place which included senior secondees from University Hospitals Birmingham. Earlier this year, the two Trusts merged meaning the correct respondent in these proceedings is set out in the heading of this judgment.

3 The claimant was dismissed following an incident in May 2016 when he permitted a non-clinical member of staff to assist him in the Operating Theatre. The bare facts of that incident were not in dispute, albeit there were potentially significant disagreements between the parties in relation to the details of the

surrounding circumstances and their relevance or otherwise to the context and mitigation.

4 There was a second incident in September 2016 when it was alleged that the claimant allowed a senior trainee to perform certain cataract operations on his list whilst unsupervised. The respondent initially contended that this was also an act of gross misconduct but that assertion was not pursued before me. As a result, this incident was only potentially relevant as an exacerbation of the respondent's concerns in relation to the first incident and also, perhaps, to contribution.

5 Following the second incident, the claimant was excluded from practice for around 2 months. That exclusion was lifted in December 2016 and he continued to practice without restrictions until his dismissal in June 2017.

6 The claimant's protected disclosure was made in conjunction with another consultant in January 2017. It related to an alleged practice of nurses in Solihull who were said to be inconsistent with regard to the operations in which they would assist surgeons in circumstances where, it was alleged, they were fully competent to provide such assistance.

7 The respondent admitted that this amounted to a protected disclosure. The extent to which that disclosure was relevant to the factual matrix of the first incident was disputed between the parties. It was not, however, in dispute that the members of the disciplinary panel were aware of the protected disclosure.

8 Immediately after his dismissal the claimant was referred to the GMC. They ultimately took no action against him. It was not in dispute that, prior to the events leading to this case, the claimant was an experienced, long serving and highly regarded surgeon with a clean record. He produced numerous testimonials to confirm this.

9 The claimant relied upon a number of matters as demonstrating, on his case, the unfairness of his dismissal. He also relied on a number of other matters from which he said I could infer that his protected disclosure was the sole or principal reason for his dismissal.

10 It was agreed that remedy would not be dealt with at this hearing although I did hear submissions on contribution, Polkey and ACAS Code adjustments.

11 The Facts

11.1 The claimant commenced working with the respondent on 1 February 1998.

11.2 On 27 May 2016, the first incident relevant to these proceedings occurred.

11.3 In short, the claimant had an unremarkable list that day. There was the usual team briefing at the start of the day at which support staff were allocated and agreed to assist in relation to the various operations in the schedule.

11.4 One of the operations on the list related to a gentleman who had deteriorating vision in his left eye. He was seen by the claimant in clinic on 21 April 2016 and was listed for decompression surgery.

11.5 I heard evidence that, ordinarily, such surgery should take place within 4 weeks but, as it happened, this patient had to wait 5 weeks.

11.6 The claimant's evidence was that the patient needed to be operated on that day as any further delay of days or weeks could have resulted in a loss of vision. Before me the respondent acknowledged that the operation was as urgent as claimed.

11.7 However, just prior to the operation on this gentleman, the nurse who had agreed to assist the claimant during the operation refused to do so.

11.8 This nurse, and others, had, apparently, previously assisted with such operations. That said, I heard evidence that nurses in Solihull would, on occasion, refuse to assist. This had, seemingly, been an issue going back a few years. A number of consultants had concerns about this practice and it had been raised previously to no avail.

11.9 This put the claimant in a difficult position. He contacted Sarah Watson, the General Support Manager, to arrange alternative support to carry out the operation. Mrs Watson advised the claimant that there was nobody else available.

11.10 The claimant seemingly took this at face value and took no steps to check that information or, indeed, to look for assistance elsewhere or escalate the matter. In the absence of those considerations his evidence was that Ms Watson offered to assist. Whilst she had apparently been in theatre before she had never scrubbed up and had no qualifications or experience in assisting in theatre procedures.

11.11 Having accepted Ms Watson's response the claimant felt he was faced with a stark choice. He could either proceed with an unqualified and untrained assistant or he would have to cancel the operation of the patient with the very significant risk that he may lose his sight.

11.12 The claimant decided to proceed with Ms Watson assisting and he closely monitored her scrubbing up. The role which he needed her to perform was to hold the patient's eye lid down using a device called a retractor. The claimant apparently put this in place and then asked Ms Watson to hold it still.

11.13 The operation proceeded smoothly and successfully.

11.14 It was the respondent's case that the claimant's actions were totally inappropriate and, specifically, that they increased avoidable risk. The specific risks identified were in relation to the increased infection risk when utilizing an untrained assistant who had never scrubbed up before, the risks of the individual

not being able to hold steady, or even fainting or, indeed, not being able to react appropriately should anything have gone wrong.

11.15 The claimant acknowledged these risks before me although I note that he continued to challenge, to some degree, the level of increased risk in his witness statement.

11.16 The incident occurred on the Friday before a Bank Holiday and on Tuesday 31 May an incident report was completed.

11.17 As a result, on 2 June 2016, Dr Steyn, a divisional director, spoke to the claimant.

11.18 Notwithstanding the seriousness with which the respondent claimed to have viewed this incident and, particularly, the increased avoidable risk to patients' safety and the claimants alleged lack of contrition and insight, they did not see fit to exclude the claimant from practice or, indeed, place any restrictions upon him at that stage.

11.19 It appears that nothing then happened for a little over 2 months and the respondent could offer no explanation for that delay.

11.20 On Thursday 11 August 2016, Dr Clive Ryder, the respondent's deputy medical director, met with the claimant and informed him that there was to be an investigation under the Maintaining High Professional Standards (MHPS) policy.

11.21 Specifically, 2 allegations were put to the claimant in relation to the incident on 27 May 2016. Firstly, that he had allowed an untrained member of staff to assist him by way of holding an instrument when she was not qualified to provide such support.

11.22 The second allegation was that the operation should have been cancelled as there was no one suitable to support the claimant in theatre.

11.23 Nothing much seems to happen for a further few weeks. This further suggests, perhaps, that the respondent did not view the matter particularly urgently, nor that there was a material ongoing risk to patient safety, nor a material risk of compromising the investigation, given that the claimant continued to practice unrestricted.

11.24 On 30 September 2016 a second incident occurred. The claimant attended a Local Negotiating Committee (LNC) meeting during the course of the morning, leaving a very experienced trainee to cover the remainder of his list of cataract operations.

11.25 The claimant had first raised his desire to attend this meeting several weeks earlier. There had been some debate with Dr Anil Negi, the Clinical Director for Ophthalmology, about whether, or not the claimant could attend and, if so, how his time should be recorded and whether or not his list should be cancelled. However, ultimately, by e mail on 23 September 2016, Mr Negi confirmed to the claimant that he had no issues with him attending the LNC.

11.26 An incident form was also submitted in relation to the second incident.

11.27 On 10 October 2016, Richard Steyn emailed Dr Rosser and Dr Ryder attaching the incident form and also the preceding email exchange between the claimant and his clinical director. This included the email stating that Dr Negri had no issue with the claimant attending the LNC meeting. It is worth noting that these emails were not originally disclosed by the respondent.

11.28 It is also worth noting that Dr Rosser had been consulted by Dr Negi in September 2016 in relation to the claimant's attendance at the LNC meeting.

11.29 Later on 10 October 2016, in the evening, Dr Ryder met with the claimant to inform him that he was to be immediately excluded because of concerns about his conduct. Specifically, it was stated that those concerns were that the claimant had attended an LNC meeting when he had pre-existing clinical commitments and that he did so despite explicit advice from his clinical director not to do so. It was further alleged that his absence in theatre led to a patient safety issue.

11.30 It was far from clear what was really going on in the mind of the respondent which resulted in the claimant's exclusion.

11.31 I only heard evidence from Dr Rosser who was consulted in relation to the claimant's exclusion and approved it. He claimed before me that the reason for the exclusion was the fact that the claimant had left a senior trainee Mr Ng unsupervised, or, at least that he had failed to inform another consultant on duty of the possible need to be available to supervise the trainee. He said that this, in combination with the previous incident, caused him to have considerable reservations about the claimant's fitness to practice and, in particular, his apparent lack of insight into actions which could unnecessarily increase avoidable patient risk.

11.32 It seemed to me that this was more likely to be an explanation after the event filtered with the benefit of hindsight rather than what was in his mind at the relevant time.

11.33 I consider it highly unlikely that Dr Rosser would have discussed those issues with Dr Ryder and then Dr Ryder would have proceeded to meet with the claimant and give very different reasons for the exclusion. Dr Rosser suggested that the paperwork left something to be desired but, again, that falls short of an adequate explanation.

11.34 What was clear was that both Dr Rosser and Dr Ryder should have known from the emails which had been provided to them, that, contrary to the allegation put to the claimant, Dr Negi had actually approved the claimant's attendance at the LNC.

11.35 As previously mentioned this only came to light following the claimant's subject access request under the Data Protection Act because the respondent had, for some reason, failed to disclose the relevant emails during the course of these proceedings.

11.36 When this was put to Dr Rosser he could offer no adequate explanation.

11.37 In addition, it seems that a brief discussion with Mr Ng and/or Dr Umeed, a Consultant Ophthalmologist who was called to assist Mr Ng in relation to one of his operations, would have revealed that the patient issue which arose was a very standard one, as was the need for assistance and the matter was ably resolved without any patient safety issue arising. That was the subsequent finding of the investigation but it seems to me that even the most basic of preliminary investigations would have revealed that the initial charges against the claimant were not made out.

11.38 Nonetheless, the claimant was excluded. On 13 October 2016 the claimant received a letter from the respondent confirming his exclusion and the fact that the second incident would be added to the scope of the MHPS investigation.

11.39 On 17 October 2016, Dr Ryder wrote to Mr Scriven, Vascular Consultant and the appointed investigator for the first incident, asking for the second incident to be incorporated into his investigation.

11.40 On 13 October 2016, Mr Steyn e-mailed Clive Ryder and Mark Scriven regarding the extension of the investigation and he said that Mr Scriven was keen to progress this quickly and that the process would have to be “squeaky clean”.

11.41 On 10 October 2016, Dr Clive Ryder had also telephoned the National Clinical Assessment Service (NCAS) as he was obliged to do in relation to possible exclusions.

11.42 On 17 October 2016, Dr Ryder received a letter from NCAS to confirm the contents of their telephone conversation.

11.43 That letter stated that the first incident had been in June 2016 when it was in fact in May.

11.44 It went on to state that with regard to the second incident the claimant left a junior doctor in charge of his operating list in order to attend an LNC meeting which had been rearranged at short notice when it hadn’t. It suggested that the claimant had asked for his patients to be re-booked, when he hadn’t. It also repeated the allegation that the clinical director, on the instruction of the medical director, had told the claimant that this could not happen.

11.45 It went on to say that the claimant did not act on the instruction to cancel his attendance at the LNC meeting which Dr Ryder had relied on as a reason for the claimant’s exclusion and which he, and Dr Rosser, ought to have known to be false.

11.46 The letter repeated the allegation that the claimant had caused potential harm to the patient by his absence.

11.47 The NCAS letter went on to suggest that Dr Ryder felt that the claimant’s alleged misconduct posed a threat to safe patient care and that his intention was to restrict the claimant’s practice. He was expressly instructed to

document the rationale for this decision which, as mentioned above, he did, albeit incorrectly.

11.48 Dr Ryder was reminded that, if the case proceeded to a professional misconduct hearing, the Panel must include a medically qualified member who was not employed by the Trust.

11.49 That letter from NCAS was never disclosed by the respondent and the claimant had to obtain it from them direct by way of a subject access request.

11.50 On 1 November 2016, Dr Ryder emailed NCAS stating that there was "one inaccuracy" which he needed to clarify. This was that, seemingly after his initial conversation with NCAS, the decision had been taken to exclude the claimant rather than restrict his activities. It was stated that the rationale for this was a breakdown in trust and an alleged concern that the claimant might approach junior staff to persuade them to alter their evidence.

11.51 It went on to state that the decision should be reviewed 2 weeks from the date of the original meeting, albeit that date had already passed.

11.52 Again, Dr Rosser was in more than considerable difficulty in attempting to justify that correspondence. He sought to write it off as a documentary error but that seems highly unlikely.

11.53 On 20 October 2016 in another e-mail that was not originally disclosed by the respondent, Mark Scriven emailed Dr Ryder to update him on this investigation and specifically to inform him that he had carried out interviews with Dr Negi, Arun Ng and Dr Umeed. He stated that it appeared that the delegation of the cataract cases to an experienced trainee was appropriate which, as mentioned above, ought to have been something that the respondent could have ascertained prior to exclusion.

11.54 It also stated that the big issue was the claimant not following the direction of his clinical director to either cancel his list or not attend the LNC meeting. As previously mentioned, both Dr Negi and Dr Ryder (and, indeed Dr Rosser) ought to have been aware this was a false allegation.

11.55 Mr Scriven went on to say that there had been no serious risk to patients in relation to incident 2.

11.56 The following day, 21 October 2016, Dr Ryder met the claimant having received the update from Mr Scriven. Again, the update suggested that the principal issue with regard to incident 2 was not following a management instruction, something which Dr Ryder should have known to be untrue.

11.57 Nonetheless, he continued the exclusion on the original grounds.

11.58 On 7 December 2016 the claimant had his investigatory meeting with Mark Scriven.

11.59 At the investigatory meeting the claimant was represented by his BMA representative in relation to the non-clinical matters and his MDDUS

representative in relation to the others. The investigation was to consider the 2 allegations from incident 1 and the 3 allegations from incident 2.

11.60 It was stated that the meeting was being conducted in accordance with the Trust MHPS procedure. The claimant then gave his version of events in relation to incident 1. He explained how the nurse had originally agreed to assist and then had withdrawn her consent at the last minute. The claimant went on to explain that he had contacted Sarah Watson to get a doctor to assist but she said none were available. As a result, the claimant said he did what he thought was best for the patient and proceeded with Ms Watson assisting him, notwithstanding the fact she was not medically trained.

11.61 The claimant said that all was required in support was skin retraction, specifically, holding back the patient's eye lid and he did not understand why the nurse had refused to assist as the nurses had, apparently, previously done so.

11.62 The claimant said there were no discussions about cancelling the patient. He felt he was left with only 2 options; either cancelling the patient and risking the patient losing their sight or allowing an unqualified member of staff to support him. The claimant went on to say that he wanted management to address the position of nurses withdrawing assistance.

11.63 The claimant reiterated that it was a sight sparing procedure and that, if delayed any further, it would, in all likelihood, have caused permanent vision loss. At no stage during the investigation or, indeed, the subsequent disciplinary, did the respondent have specialist assistance to confirm or deny this assertion albeit that, ultimately, before me it was acknowledged that the operation did need to be undertaken that day.

11.64 There was no mention at any stage of the investigatory procedure of any other options that it was suggested that the claimant should have considered in relation to, for example, seeking support from elsewhere. It appeared clear from Mr Scriven's questions and, indeed, his subsequent findings that he felt the claimant should have cancelled the operation which he referred to as "simple common sense". On the evidence I heard, however, cancelling the operation was likely to lead to serious and permanent deterioration in the patient's sight.

11.65 In relation to the second incident the claimant explained that he had raised the issue 2 months prior to the LNC meeting and had asked for his list to be kept clear. The claimant also produced the e-mails with Mr Negi which indicated that he was happy for the claimant to attend the LNC meeting. The claimant further confirmed that, on the day in question, he had dealt with a few cases in the morning before going to attend the meeting.

11.66 I note that Mr Negi acknowledged the claimant had told him on the day that he was leaving as well. There was no attempt to stop him and Mr Negi ought to have been aware that a trainee was covering the claimant's list. Mr Negri could hardly contend, as he appears to have done, that the claimant had attended despite his express instruction.

11.67 The claimant expressly stated that he had informed Mr Negi that the junior would be covering in his absence and that no objection or issues had been raised. There was then an explanation of the fact that the junior was, in fact,

highly experienced in relation to the cases which were left with him. The claimant's view was that, as long as there was a consultant in the building, which there was, it was reasonable to leave a senior trainee to perform the operations that were on the list that day.

11.68 The claimant did acknowledge that he should have ensured that a colleague who was in clinic was aware they may be called upon to supervise should any difficulties be encountered. The claimant did not do this but, when a difficulty was encountered, another consultant was available and the issue was deal with in the normal way.

11.69 The claimant suggested that others would have done as he did. There was no evidence that the respondent investigated this proposition.

11.70 The meeting went on to consider the complication that had arisen with an operation in the claimant's absence. The claimant stated that this was not unusual. In fact, it became common ground that there would have been no difference to the patient outcomes had the claimant been available on site as opposed to the trainee getting the assistance of another consultant, Mr Umeed. The patient outcomes were all satisfactory.

11.71 Following this investigation the claimant had a meeting with Dr Ryder at which it was confirmed that the claimant's exclusion would be lifted. Dr Ryder told the claimant, and confirmed this in a letter dated 20 December 2016, that the reason was because the claimant had produced the emails from his clinical director confirming that he was aware that the claimant would be attending the LNC meeting.

11.72 This further confirms, therefore, that the principal reason for the claimant's exclusion was the allegation that he attended the LNC meeting despite explicit advice from his clinical director not to do so, as opposed to the reason given by Dr Rosser before me.

11.73 Dr Rosser suggested that the original reason for the exclusion, in his mind at least, was that the claimant had failed to arrange appropriate supervision for his trainee even though that was not expressly mentioned in any of the contemporaneous documentation. He further suggested that the exclusion was lifted when he was made aware that the claimant had acknowledged in his investigation meeting that he was wrong in not arranging consultant cover.

11.74 Whilst the claimant did make that acknowledgment in his investigation meeting there was no evidence to suggest that Dr Rosser was made aware of that level of detail at that stage. It seems to me, therefore, that Dr Rosser's explanations, for both the exclusion and the lifting thereof, came about, consciously or otherwise, with the benefit of hindsight to fit the respondent's subsequent narrative.

11.75 I think that it is far more likely that the contemporaneous documentation reflected the reality of the respondent's position at the relevant times.

11.76 As a result, the principal reason for the claimant's exclusion was the allegation that he had failed to follow a direct management instruction even though

doctors Negi, Ryder and Rosser all knew this allegation to be false, or at least they ought to have done.

11.77 The exclusion was lifted when the claimant was able to prove that the allegation was without substance.

11.78 A secondary explanation that accorded with what the respondent had told NCAS also had little substance. There was no evidence that the claimant might attempt to interfere with the investigation, nor was there evidence subsequently that he had done so. The respondent did not consider the potential risk to patient safety or of interference with the investigation to be serious enough to warrant suspension either before incident 2 or after the exclusion was lifted. The claimant was allowed to continue his practice unrestricted over the summer of 2016 and from December 2016 until his dismissal. This suggests that the respondent did not view these matters as seriously as they subsequently claimed notwithstanding the fact that, on the face of it, they were, indeed, serious allegations.

11.79 This is further confirmed by the fact that at no stage was the claimant advised that these matters potentially amounted to gross misconduct and could lead to his dismissal. That was a clear breach of the MHPS, a point to which I shall return.

11.80 On 9 January 2017 the claimant, together with Dr Kipioti, another consultant ophthalmologist, wrote a letter to Mr Richard Steyn, Divisional Director of Thoracic Surgery at the respondent. They expressly raised their concerns regarding a lack of nursing support during operations and, specifically, the inconsistency of nurses sometimes agreeing to assist and, on other occasions, refusing, seemingly without just cause.

11.81 It was conceded on behalf of the respondent that this amounted to a public interest disclosure.

11.82 It was also clear from the evidence which I saw that similar issues had been raised on a number of occasions over the previous 4 years and little or nothing had been done.

11.83 The respondent conceded that neither the claimant nor Dr Kipioti received any response to their concerns either before the claimant's dismissal or subsequently.

11.84 There was also no evidence of any form of investigation into these issues although Dr Rosser suggested, somewhat vaguely, that subsequent process changes had addressed some of the issues, albeit considerably later.

11.85 On 13 January 2016 Mr Scriven completed his investigation and produced an MHPS report in which he upheld a couple of the allegations.

11.86 It appears that report was provided to Dr Ryder and, several weeks later, Dr Ryder wrote to the claimant enclosing a copy of the report.

11.87 The letter dated 27 February 2017 stated that it was Dr Ryder's decision that there was a case of "misconduct" that should be put to a disciplinary panel specifically regarding the following allegations:-

- On 27 May 2016 the claimant allowed an untrained member of staff to assist him in the operating theatre.
- The clamant attended an LNC meeting on 30 September 2016 when he had a pre-existing clinical commitment.

11.88 In addition to the above it was also stated that the claimant leaving a junior unsupervised on 30 September 2016 possibly led to potential harm and, as such, that issue also needed to be considered by the disciplinary panel.

11.89 By letter dated 5 April 2017 Dr Rosser informed the claimant that the disciplinary hearing would take place on 9 May 2017. That was subsequently postponed by the respondent to 1 June 2017.

11.90 There was still no mention in any other correspondence that the Panel would be considering an allegation of potential gross misconduct.

11.91 The disciplinary hearing took place on 1 June 2017 chaired by Dr Rosser, the Executive Medical Director, supported by Dr Vijay Suresh, Divisional Director, and Mr Chris Berry, Deputy Workforce Director.

11.92 The claimant was accompanied by a representative from the BMA and the management case was presented by Dr Ryder.

11.93 For a hearing of such importance the notes of the meeting were inadequate. I was, however, able to establish that, in relation to allegation 1, it was clear that the management case disputed the urgency of the need to operate on the patient. As a result it was maintained that it would have been a preferable option for the claimant to cancel the operation rather than to proceed with an untrained member of staff. That view appeared to continue into the decision, as confirmed by the reference to postponing the operation in the dismissal letter. Indeed, that view appeared to continue in Dr Rosser's Witness Statement prepared for the proceedings before me, at least until he amended his statement in opening questions.

11.94 Dr Rosser had sought to rely on a very old medical definition of the word "urgent" to attempt to justify any confusion over the need to amend his statement but that did not alter the fact that he altered the urgency of the need for the patient's operation from "days" to "hours". I think it unlikely that this was a drafting error on his part. Rather, the original draft appears to reflect his view on the urgency of the operation at the relevant time.

11.95 It seems to me far more likely that he sought to change his evidence having received independent expert evidence via the GMC hearing and the statement of Professor Rose. Such independent evidence should have been available to him at the disciplinary hearing. The experts seemingly confirmed the claimant's opinion that the operation did need to be carried out urgently and it became common ground that this meant on the day in question.

11.96 As mentioned, the fact that, at the relevant time, the respondent took a different view is confirmed both by the management statement of case and the dismissal letter. It was further confirmed by the original draft of Dr Rosser's statement.

11.97 Whilst it was obviously right for Dr Reuser to amend his statement once he realized it was inaccurate his failure to acknowledge the reasons for the initial error potentially casts doubt over his credibility in other areas.

11.98 This issue creates important context because the facts underlying the two remaining disciplinary allegations against the claimant were not materially in dispute by the time of the hearing before me.

11.99 Moreover, despite suggesting otherwise in their ET3, it was conceded on the part of the respondent that incident 2, on its own, would not have warranted anything more than a warning, let alone summary dismissal.

11.100 Much of the focus, therefore, became about the level of insight which the claimant had shown in relation to the potential seriousness of his actions in relation to incident 1. That was a valid concern on the part of the respondent.

11.101 The claimant acknowledged in his disciplinary hearing that, despite the fact that he had been informed that no one was available to assist him, he should have done more to check that information and search himself for some assistance or even to escalate the matter to more senior management.

11.102 The respondent, however, made much of the fact that the claimant also said that he didn't accept he had done anything wrong. If that was said, it was not a position that the claimant maintained before me.

11.103 This was an issue that was referenced in the respondent's notes of the disciplinary hearing and, indeed, in the dismissal letter. The claimant's evidence was that he could not recall whether or not he had made such a comment in the disciplinary hearing and I did not hear from his union representative.

11.104 In those circumstances I am prepared to accept that such a comment was made. That would, understandably, be something of concern to the respondent. That said, there was no clear evidence that they sought to understand what the claimant may have meant by such a comment.

11.105 When taken in context the claimant recognizing that he should have done more to find appropriate support was a clear acknowledgment that he had done something wrong or, at least, that he failed to do something important. That is, on the face of it, inconsistent with a subsequent, and immediate, suggestion that he had done nothing wrong. The respondent did not seek to explore this further in the disciplinary hearing. It seems to me that the most likely context was the fact that the claimant was still facing the suggestion that he should have cancelled the operation rather than proceed with an untrained member of staff. That was based on the respondent's lack of specialist knowledge about the urgency of this particular operation. That was due to a failure by the respondent to follow their own procedures.

11.106 It seems to me that if the claimant's stark choice was as simple as "if I don't use an untrained member of staff to assist me this patient is going to lose his sight" then, in his view, he did nothing wrong, notwithstanding the technical breaches of procedure that would entail. It seems likely that this was the context in which he made such a comment.

11.107 Had that been properly understood, the question then would have focused far more, as it did before me, on why the claimant didn't think of the other potential options for trained assistants and what those may have been.

11.108 There was some dispute about the length of the disciplinary hearing. Dr Rosser suggested that it took most of the day. However, the claimant suggested that the hearing itself was a little over an hour before an adjournment and was, in any event, concluded during the morning. I prefer the claimant's evidence on this point given that all of the notes which I saw reflected a relatively short meeting.

11.109 It was the respondent's case that, at the conclusion of the hearing Dr Rosser informed the claimant and his representative that no decision had been reached and it was agreed that the decision would be sent to the claimant in writing. The respondent suggested that they had, at this stage, made clear that the allegations were being treated very seriously and that "all available options" would be considered. The respondent suggested that this, therefore, made it clear to the claimant that dismissal was one of the potential options being considered but that is a proposition that I do not accept. The claimant had no recollection of this being said in any event.

11.110 Both the ACAS Code and the respondent's procedures make it clear that an employee is entitled to know if dismissal is a potential sanction prior to any disciplinary hearing. It seems to me that the other sections of the respondent's procedures and, indeed, any comments made at the disciplinary hearing must be viewed in that context. Specifically, therefore, "all available options" could only realistically mean those options up to, but not including, dismissal.

11.111 The respondent suggested that the claimant and his representative must have been aware that dismissal was a potential sanction given the seriousness of the allegations. This seems unlikely given that the claimant was not excluded (other than on a false pretense) or restricted and had been given no warning of the fact that the allegations were being treated as potential gross misconduct or anything serious enough that could lead to dismissal. Moreover, On 2 June 2017, Chris Berry emailed David Rosser in relation to the method of communicating the Panel's decision to the claimant and stated "I strongly suspect he does not anticipate this outcome". That was, indeed, the case. The suggestion that the claimant ought to have been aware that dismissal was a potential outcome, therefore, lacks credibility.

11.112 I also note that email was copied to Dr Ryder as opposed to the other Panel member. This, again, suggests some inappropriate level of involvement between Dr Rosser and Dr Ryder which goes right back to their discussions about excluding the claimant on grounds that they ought to have known to be false.

11.113 The decision to dismiss found, in relation to allegation 1, that the claimant showed a wilful disregard for clinical standards and safe medical practice. The Panel seemingly concluded that a refusal by the trained theatre staff to assist the claimant was on the basis they did not have the relevant qualifications or experience although, on the evidence before me, they appeared to have both. There was no dispute that the claimant allowed a non-clinical member of staff to assist him, and, before me at least, the claimant acknowledged that this exposed

the patient to risk and was not acceptable, although the Panel concluded that the claimant did not demonstrate this level of insight at the time.

11.114 That said, of course, this needs to be considered in context. The context was that the Panel concluded, wrongly, that the risk of proceeding with an unqualified assistant was greater than postponing the procedure, which it wasn't. Essentially, it seems that the Panel and the claimant were, perhaps, speaking at cross purposes. The claimant felt he had done nothing wrong when faced with the prospect of using an untrained member of staff or a patient losing their sight. The respondent felt, quite rightly, that he should have done more to seek assistance. However, contrary to what they contended before me, should such assistance not have been available, the panel concluded that the claimant should have postponed the procedure, which was equally wrong.

11.115 With regard to the second allegation it was common ground that the claimant did not put in place adequate supervision arrangements during his absence at an off-site LNC meeting on 30 September 2016 and that this had the potential to undermine patient safety. It was suggested that the claimant only grudgingly accepted that he should have informed a consultant colleague that they may potentially be required to supervise the trainee. However, the claimant had acknowledged this as far back as his investigation hearing and there was no, or insufficient, evidence from the respondent's notes of the disciplinary hearing to support their findings.

11.116 Nonetheless, the Panel did have a genuine concern that the claimant did not fully appreciate the seriousness of the incidents and that he displayed a lack of insight.

11.117 Whilst viewing incident 1 as the most serious the Panel seemingly upheld both allegations, individually, as gross misconduct. This remained the position in relation to allegation 2 in the pleadings but, quite rightly, not before me. That, perhaps again, suggests that the respondent was determined to dismiss and was attempting to make the case against the claimant, a long serving senior employee, as strong as possible.

11.118 The letter confirmed that the claimant was dismissed with immediate effect and he was given the right to appeal.

11.119 The claimant did not exercise his right to appeal. He said that he had lost all trust and confidence in the respondent, although there was no evidence that the Chair or the Chief Executive, to whom the appeal would ultimately have gone, were in any way involved prior to the claimant's dismissal.

11.120 Dr Rosser also informed the claimant that he was obliged to inform the GMC and the other organizations where the claimant undertook private practice.

11.121 Dr Rosser made the referral to the GMC Fitness to Practice Team later on 5 June 2017. That referral contained a number of material inaccuracies that suggest that either Dr Rosser was deliberately misleading the GMC or, at best, that he had failed to give the matter anything like the level of care and attention required.

11.122 For example, Dr Rosser suggested that the claimant's suspension had been lifted when sufficient safeguards were in place. As previously mentioned the suspension was made under false pretenses based on an allegation both Dr Rosser and Dr Ryder knew, or ought to have known, was false. When the claimant was able to demonstrate that fact the exclusion was lifted with no safeguards being put in place.

11.123 Dr Rosser also suggested that the claimant had stated that he had done nothing wrong with regard to incident 2, which did not appear to be supported by the evidence. He further suggested that the reason the nursing staff declined to assist was due to the complexity of the assistance necessary (deep retraction) which, on the evidence before me, was not actually required. This would have been known if appropriate expert advice had been sought.

11.124 There appeared to be no acknowledgement in the referral of any blame to be attributed to either the nursing staff or management.

11.125 Dr Rosser also described the claimant as "exceptionally arrogant" with "startling lack of insight" and having "demonstrated no reflection or learning." Those comments, whilst having some basis were not entirely accurate and, arguably, further confirm Dr Rosser's apparent bias against the claimant. The comments seemed to be unjustifiably weighted against the claimant particularly as they were not balanced with any recognition of the failings of others, nor the failings of the disciplinary process, nor any appropriate recognition of the clinical success of the operation.

11.126 In making any such referral to the GMC, Dr Rosser was obliged to disclose whether or not the claimant had been a "whistle-blower".

11.127 It was common ground that the claimant's letter of January 2017 did amount to a public interest disclosure. However, Dr Rosser stated that the claimant had "not been involved in any whistle-blowing episode or other attempt to raise concerns within the organization."

11.128 It was the respondent's case that this was an oversight on the part of Dr Rosser, although his explanations in cross examination were, to some degree, inconsistent and unconvincing.

11.129 Following his dismissal the claimant was asked to return Trust property and his name was removed from letter heads and email lists.

11.130 The claimant highlighted his concerns about the referral to the GMC in his ET1. As a result, Dr Rosser was aware of the issue from around the time that the respondent received the Claim Form. He was asked when he notified the GMC of his errors and he claimed to have done so orally to his local liaison officer although this was not even mentioned until it was expressly put to him. If true, it was surprising that there was no mention of this in the GMC's findings.

11.131 There was no evidence to support Dr Rosser's assertion and, given the seriousness of his failing, it does appear to be unsatisfactory that he had not put an apology and clarification in writing.

11.132 The GMC reported on 8 May 2018 and determined that there should be no further action against the claimant.

11.133 The GMC Panel considered all of the respondent's investigation reports.

11.134 The GMC asked an independent consultant ophthalmic surgeon to review the complaint. With regard to incident one the expert confirmed that the claimant should not have asked a non-clinically trained person to assist him but he also identified both system failures and failures of other members of staff. Specifically, it was suggested that the investigation should have understood why the nurse had refused to assist.

11.135 The expert seemingly acknowledged the urgency of the surgery and the risk of cancellation.

11.136 With regard to the second incident the expert concluded that the claimant should not have left the trainee to do an unsupervised cataract list but this was not particularly serious because the claimant had assessed the situation and ensured the trainee was comfortable, competent and experienced. The expert highlighted the fact that the Royal College of Ophthalmologists had clearly indicated that a senior trainee could do cataract lists as long as there was adequate consultant cover. The expert did, however, conclude that the claimant should have informed a consultant colleague of the possible need to be available to supervise.

11.137 Overall the expert concluded that allowing an unqualified person to assist the claimant in theatre fell seriously below the standard expected of a consultant but he went on to conclude that the overall standard of care was not seriously below the standard expected. The reason for this was because the whole surgical team could have handled the situation better. The expert also accepted that the ultimate aim of the claimant was to proceed with the surgery for the patient's benefit.

11.138 The expert, therefore, concluded that the overall care in incident 1 was below, but not seriously below, the standard expected of a reasonably competent consultant. This was due to the mitigating circumstances. Specifically, it was accepted that the claimant proceeded with the orbital decompression with the patient's best interests at heart. He reasonably believed that the nurse would be assisting him and there were procedural failings in this regard.

11.139 With regard to the second incident it was acknowledged that the claimant should have arranged for consultant cover for the specialist trainee but this failing was not seriously below the required standard of care because the trainee was experienced enough to perform the surgery.

11.140 As a result of the expert's opinion the GMC Panel accepted the overall conclusions and determined that, given the mitigating circumstances and the claimant's commitment not to repeat the same mistakes, there was no realistic prospect of establishing that the claimant's fitness to practice was impaired.

11.141 They went further, however, and also determined whether or not a warning would be appropriate or proportionate. Warnings are given where a doctor's conduct represents a significant departure from GMC guidance albeit falling below the threshold for a finding of impairment. Taking everything into consideration the Panel and the expert considered that, in all the circumstances, that lower threshold was not met either, taking into account all mitigating factors.

12 The Issues

The agreed issues were as set out in the Claimant's opening note.

12.1 In short, the claimant alleged that his dismissal for the potentially fair reason of conduct was unfair on a number of grounds. I was required to consider s.98 Employment Rights Act 1996.

12.2 The Claimant further alleged that the reason for his dismissal was that he had made a public interest disclosure.

12.3 He also argued that his summary dismissal was wrongful and that he was entitled to notice pay.

13 The Law

Unfair Dismissal

13.1 The statutory test of fairness is set out at s98 Employment Rights Act 1996

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

a. the reasons (or, if more than one reason, 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 holding the position which the employee held.

(2) A reason falls within this subsection if it

… b. relates to the conduct of the employee

13.2 The test of fairness is set out under section 98(4) ERA

"(4) … the determination of the question whether the dismissal was 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."

13.3 In *London Ambulance Service NHS Trust v Small* [2009] IRLR 563, the Court of Appeal held that a tribunal should not substitute its own factual findings about events giving rise to the dismissal for those of the dismissing officer, nor should it impose its view of the appropriate sanction for that of the employer. The Tribunal should ask if (consistent with *BHS v Burchell* UKEAT/108/78*)*

(i) there were reasonable grounds upon which the employer could believe that the employee had committed the misconduct in question,
(ii) whether the employer completed a reasonable investigation prior to dismissal; and
(iii) whether the decision to dismiss for the misconduct in question fell within the band of reasonable responses

13.4 The band of reasonable responses test applies equally to procedural fairness as it does to the substantive fairness. Mummery LJ explained that "the range of reasonable responses approach applies to the conduct of investigations as much as it applies to other procedural and substantive aspects of the decision a person from his employment for a conduct reason" (*Sainsburys Supermarket v Hitt* [2003] ICR 111, in para 34)

13.5 In *Weston Recovery Services v Fisher* UKEAT/0062/10 HHJ Peter Clarke stated that the question of section 98(4) is not simply answered by deciding whether or not the employer or employee is in breach of the contract of employment. In *MacMillan v Airedale NHS Foundation Trust* [2015] I.C.R. 747, Underhill LJ explained that the fact that the employer has not followed the terms of a contractual disciplinary procedure will not automatically entitle a dismissed employee to a legal remedy.

13.6 In *Stuart v London City Airport* [2013] EWCA Civ 973 the Court of Appeal held that whether the employee asked for a particular step to be undertaken is a consideration in determining whether a particular step was required.

13.7 In *Buzolli v Food Partners Ltd* (2013) UKEAT/0317/12/KN, HHJ Peter Clark concluded that a decision to dismiss fell within the band of reasonable responses notwithstanding that the Claimant had not been informed in advance of his disciplinary hearing that dismissal was a potential sanction.

13.8 The ET had concluded that the decision to dismiss had been fair notwithstanding that it would have been preferable to put the Claimant on notice that the misconduct might lead to his dismissal. The EAT noted that the ET had correctly directed themselves on the law and was consistent with the approach in *Sainsburys v Hitt* [2003] IRLR 23 and asked the question whether the procedural approach adopted and the sanction decided upon were open to a reasonable employer in the circumstances.

Wrongful dismissal and gross misconduct

13.9 In *Westwood v Sandwell & West Birmingham Hospital NHS Trust* (2009) UKEAT/0032/09 HHJ Hand stated

> "Gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee .....and involves either deliberate wrongdoing or gross negligence."

Automatic Unfair Dismissal – Protected Disclosures

13.10 Section 43B of the Employment Rights Act 1996, provides:

> "(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."

13.11 The aim of the provisions is to protect employees from unfair treatment (i.e. victimisation and dismissal) for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace. The provisions strike an intricate balance between (a) promoting the public interest in the detection, exposure and elimination of misconduct, malpractice and potential dangers by those likely to have early knowledge of them, and (b) protecting the respective interests of employers and employees. There are obvious tensions, private and public, between the legitimate interest in the confidentiality of the employer's affairs and in the exposure of wrong.

13.12 The words “in the public interest” inserted into section 43B(1) of the 1996 Act in 2013 were intended to reverse the effect of Parkins v Sodexho Ltd [2002] IRLR 109 in which it was held that a breach of a legal obligation owed by an employer to an employee under his or her own contract of employment may constitute a protected disclosure.

13.13 A worker has the right not to be subjected to an act of victimisation by his employer for making what is termed "a protected disclosure". A qualifying disclosure as defined by section 43B of the 1996 Act becomes a protected disclosure when, for example, as here, made to the employer under s43C. It is the disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show that certain wrongdoing may have occurred.

13.14 The protection is given to workers and not merely employees. The worker is protected against acts or omissions by his employer. Where the complaint is that there has been an omission or failure to act, it will need to be a deliberate failure in order to attract the protection. The act suffered by the worker must be done on the ground that he has made a protected disclosure. Where the detriment of which the employee complains takes the form of a dismissal then the protection is afforded not by section 47B but by the unfair dismissal provisions in Part X of the 1996 Act. The unfair dismissal provisions were amended in 1998 and a new section 103A was inserted as follows:

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

13.15 It is to be noted, therefore, that in the dismissal context it is expressly provided that the protected disclosure must be the reason or the principal reason for the dismissal before that dismissal can be found to be automatically unfair.

Decision

14 The Respondent sought to present this as a largely straightforward case. Simply put they suggested that the Claimant did something serious and overtly wrong, yet he lacked and, to a lesser degree, continued to lack insight and remorse. As a result, it was said the Respondent had no option other than to dismiss him.

15 The Claimant, on the other hand, focused on his allegations that the respondent was responsible for a significant number of procedural failings. In addition he referenced what he characterized as a misleading referral to the GMC

and the difficulties he had in obtaining certain documents, including some that were potentially damaging to the respondent's case, to support adverse inferences as to the real reason for his dismissal.

16 Before me the Claimant acknowledged that he was wrong to act as he did in allowing Ms Watson to assist him in theatre. There were a variety of approaches he could have taken to attempt to secure alternative qualified assistance within the timescale necessary for proceeding with the operation. In submissions he acknowledged that the headline allegation was a dramatic one but not one that warranted his summary dismissal after "decades" of exemplary service.

17 The Respondent had a detailed Disciplinary Policy as well as a policy in accordance with Maintaining High Professional Standards in the Modern NHS ("MHPS").

18 It was agreed that the letter of 9 January 2017, in which the claimant and a colleague raised concerns about theatre nurses sporadically refusing to assist with operations for which they were both qualified and experienced, possibly as a result of instructions from their manager, amounted to a protected disclosure. The question for me under s103A ERA was whether he reason or principal reason for the dismissal was the making of that protected disclosure.

19 As to the case on wrongful dismissal, the question is whether the claimant's actions amounted to gross misconduct so as to be treated as a repudiatory breach of the contract of employment. The parties disagreed about the relevance of the claimant's alleged failure to show the necessary level of acknowledgment of wrongdoing and insight to my considerations on this matter.

<u>The Claimant's challenges to fairness</u>

20 I will first address the claimant's challenges to fairness which relate to certain acts and omissions of the Respondent. They include matters of procedural fairness, but also those that potentially go to substantive fairness and the credibility of Dr Rosser, the only witness called by the respondent. They also include those from which it is said I could, and should, draw inferences as to the real reasons for the Claimant's dismissal.

21 The claimant alleged that the respondent was guilty of:

(1) misleading the GMC;
(2) giving false/misleading reasons to Mr Reuser for his exclusion;
(3) misleading NCAS;
(4) failing to comply with its disclosure obligations to this tribunal;
(5) failing to comply with its obligations under the Data Protection Act;
(6) failing to ensure that the Case Investigator obtained appropriate independent advice;
(7) failing to notify Mr Reuser of the possibility of dismissal;
(8) failing to include an independent doctor on the disciplinary panel;
(9) failing to agree the panel selection with the Medical Staff Committee Chair.

22 For the most part those failures were not disputed, although the Respondent understandably sought to suggest that the claimant should also

accept some responsibility and that, in any event, they were not serious enough to undermine the fairness of the dismissal. By of example it was said that,

(1) the claimant should have identified and raised the MHPS breaches at or before the hearing;
(2) he should have recognised that he faced dismissal without being told;
(3) he failed to raise questions relating to his exclusion at the disciplinary hearing;
(4) he failed to instruct his solicitors to make further disclosure applications.

23. Dealing with the issues in turn:-

Misleading the GMC

23.1 The GMC were given inaccurate and misleading information and those failings were serious.

23.2 The respondent suggested that these failings were both inadvertent and after the decision to dismiss and hence irrelevant. However, it seems to me that I am entitled, and required, to consider all the circumstances when, for example, considering whether to draw adverse inferences in the whistle-blowing claim. It is also potentially relevant in the context of assessing the independence and neutrality of Dr Rosser.

23.3 In his referral to the GMC Dr Rosser's failure was far more than the omission of a piece of insignificant information. He was required to address whether the claimant had raised protected disclosures and asserted positively that,

> *"To my knowledge Mr Reuser has not been involved in any whistleblowing episode or other attempt to raise concerns within the organization."*

23.4 It may well be that Dr Rosser was unaware of the full details of the Hooper Review on the handling by the GMC of cases involving whistle blowers but, as the responsible officer, he was required to be aware of the main principles and purpose. For example:

> *"If a doctor being referred to the GMC has raised concerns about patient safety or the integrity of the system with the organization making the referral, then the necessary steps should be taken to obtain from the organization material which is relevant to an understanding of the context in which the referral is made."*
>
> *"Investigators assessing the credibility of an allegation made by an organization against a doctor who has raised a concern should take into account, in assessing the merits of the allegation, any failure on the part of an organization to investigate the concern raised and/or*

have proper procedures in place to encourage and handle the raising of concerns."

23.5 In relation to that latter quote, it was not in dispute that the respondent had failed to properly investigate and respond to the claimant's concerns. It is possible that, irrespective of any link to the reasons for the claimant's dismissal, Dr Rosser wanted to conceal this failure.

23.6 The Hooper review continues:

"Failure to answer the question truthfully would no doubt lead to the signing doctor's fitness to practise being investigated and, if discovered during the course of the investigation, would be an important factor in assessing the credibility of the allegation."

23.7 Dr Rosser was taken in re-examination to the GMC response to Hooper and confirmed that he believed all documents from the GMC were given to him by the GMC liaison officer.

23.8 Dr Rosser initially suggested that he must have overlooked the claimant's whistleblowing letter when writing to the regulator. That appears surprising given that the letter was included with, and referred to in, the Claimant's Statement of Case and emailed separately to the disciplinary panel before the hearing. It was also referred to at the hearing just 4 days before Dr Rosser wrote to the GMC.

23.9. Dr Rosser accepted that he was required to consider the documents on both sides before reaching a decision. The decision was reached and written on the same day as the GMC referral was made. Dr Rosser wrote both letters. It is unlikely, therefore, that he had forgotten the protected disclosure.

23.10. In response to this challenge, Dr Rosser's second, somewhat contradictory, explanation was that he misunderstood the legal terminology and did not consider that the letter should be treated as a protected disclosure.

23.11 It seems to me surprising that the Respondent's Responsible Officer would not understand what amounted to a whistle blowing episode, not least because he asserted that he had focussed on encouraging reporting of concerns. He certainly ought to have enquired about any whistle blowing episodes before making an express representation about them to the regulator.

23.12 In any event his assertion was that there had been no *"other attempt to raise concerns within the organisation."* If Dr Rosser had not identified the claimant's letter as containing protected disclosures it remains difficult to understand how he did not view them as "concerns".

23.13 Dr Rosser has not written to the GMC to inform them that he misled them. He asserts that he told the liaison officer but there is no record of that discussion. If Dr Rosser did inform the GMC it is, at best, surprising that they did not write to Mr Reuser to inform him of the new information received, nor was there any mention of it in their findings.

23.14 The claimant submitted that it was impossible to avoid the conclusion that Dr Rosser misled the regulator deliberately and had subsequently sought to conceal his actions from this tribunal.

23.15 That submission carried some weight. However, it would amount to a very unwise and risky strategy on the part of Dr Rosser. In addition, it would support the claimant's case on automatically unfair dismissal.

23.16 It seems more likely to me that Dr Rosser's actions reflect a pre-disposition within the Respondent against the claimant. This was evidenced by the claimant's exclusion the previous year, procedural failings, certain unsustainable findings and the strong language of the dismissal letter and GMC referral. These indicate, at the very least, a lack of appropriate care and attention to very serious matters.

Exclusion

24.1 The GMC referral suggested that, following his exclusion, Mr Reuser was allowed to return to work because sufficient safeguards were in place. Dr Rosser asserted that this is what he was told by Dr Ryder but the only documentation recording the end of the exclusion stated that the reason for lifting it was that,

> *"following your recent investigation meeting, you had provided an email trail from your CD dated 23 September 2016 which suggests that he was aware that you would be attending the LNC meeting."*

24.2 It seems clear that the decision arose from the claimant proving that an allegation was unfounded.

24.3 It became clear that both Dr Ryder and Dr Rosser knew, or ought to have known, that it was unfounded before the exclusion was even put in place. That only came to light from documents which had not been disclosed but which were obtained by Mr Reuser through a subject access request (SAR).

24.4 No action was taken against Mr Negi in relation to what appeared to be a false allegation. This, coupled with my more detailed findings in relation to the exclusion earlier in this judgment, potentially suggests a level of bias and collusion at a senior management level against the claimant. Again, at the very least, it suggests a very serious lack of due care and attention to an important matter.

NCAS

25.1 The Respondent disclosed no documents at all from NCAS, either in the litigation or via the SAR. Mr Reuser obtained them direct from NCAS. I was invited to draw the inference that they were withheld intentionally.

25.2 It appears that Dr Ryder gave NCAS seriously misleading and inaccurate information as identified earlier in my findings. This further supports my view on apparent bias and/or incompetence at a senior management level.

25.3 Dr Rosser sought to explain the discrepancy, here and elsewhere, by reference to poor paperwork. However, the contemporaneous documents

appear to show a sham exclusion and an NCAS notification that cannot be justified as mere clerical errors.

Investigation

26.1 MHPS requires that the Investigator *"must obtain appropriate independent professional advice"* wherever issues of professional conduct arise (para 6.2). Mr Scriven obtained no such independent advice.

26.2 Dr Rosser suggested that such advice was unnecessary because anyone with medical qualifications would know that what the claimant did was inappropriate and increased avoidable risk. That contention had some merit in the context of the band of reasonable responses in the case as presented before me but I remind myself that this was not identical to the case the claimant was facing at the relevant time.

26.3 The claimant and/or his representative could, and perhaps should, have challenged this and other procedural matters at the relevant time. The fact that he did not, however, does not make the respondent's failure to follow their own procedures irrelevant to my deliberations.

26.4 It seems to me that had an independent expert been engaged, as required by the policy, the respondent would have swiftly realised that the second incident was not as serious as it first appeared and they certainly would not have considered it to amount to potential gross misconduct, a position which they had maintained up to and including the filing of their ET3.

26.5 Moreover, an independent expert would have explained the urgency of the operation in incident one such that the investigation and disciplinary could have focused on the issue of what more the claimant should have done to find suitably qualified assistance. The respondent would not, in those circumstances, have made the important and inaccurate findings that it was reasonable for the nurse to refuse to assist the claimant and that it would have been preferable for the claimant to postpone the operation rather than proceed. It was only before me, after seeing the independent expert advice before the GMC and of Professor Rose, that the respondent acknowledged that to postpone would have risked the patient losing their sight.

26.6 It seems to me that if the respondent had this information at the relevant time there would have been less risk of confusion over the claimant's alleged lack of insight and a greater chance of leniency on the part of the respondent, giving appropriate recognition to the difficult choice that the claimant believed he faced in the moment and the ultimate good result for the patient.

26.7 That appears to be borne out by the conclusions of the GMC who did have the benefit of such independent expert advice.

Warning of dismissal

27.1 It was common ground that no such warning was given. The Respondent suggested that the claimant had plenty of material to make him aware of the risk but I accept his evidence that he was not aware and no such suggestion was made by his advisers. I further accept that if he had been aware he would have sought the legal advice and representation to which he was entitled. The fact

that he did not confirms that he did not believe that dismissal was a possibility. It would be unlikely for a consultant facing a potential career damaging dismissal not to seek such advice and support.

27.2 The Respondent's own MHPS policy provides expressly at 4.6.3 that the employee will be notified of the possibility of dismissal in the most serious cases. The respondent accepted that it was a failing not to give the claimant such a warning. Any other provision of the policy must be read in the context of that provision.

27.3 This is further confirmed by Mr Berry, who felt it was not appropriate to email the dismissal decision to Mr Reuser as *"I strongly suspect he does not anticipate this outcome"*

27.4 It seems that Mr Berry may have been uncomfortable with the decision to dismiss given the failure to warn that this was a potential outcome. The fact that this was emailed to Dr Rosser and Dr Ryder, but not the other panel member, again raises concerns about what was really going on.

27.5 Dr Rosser's statement sets out most of the panel's reasoning referring only to himself ("I" rather than "we"). It appears clear that he was the driving force behind the dismissal.

27.6 It seems to me that the failure to identify the possibility of dismissal prior to the disciplinary hearing was not an oversight repeated several times. Rather, it was because HR did not consider that the allegations were potentially gross misconduct as seemingly confirmed by Mr Berry. Dr Rosser acknowledged that, had the claimant shown more contrition and insight, they may not have dismissed. Effectively, it was his case that the lack of insight upgraded the seriousness of the offence to gross misconduct.

27.7 If that were the case there was no reason that the respondent could not have reconvened the Hearing explaining the position to the claimant.

27.8 The failure to warn the claimant of the potential for dismissal was a breach of the respondent's own policy and the ACAS code. It does not, however, necessarily render the dismissal unfair. That said, in the circumstances of this case, I suspect that it does, even before considering the other failures.

27.9 Had the claimant known of the potential for dismissal he almost certainly would have obtained legal advice. Having done so, he probably would have challenged some of the other procedural failures. The real issues facing the disciplinary panel would have been clarified. The claimant would doubtless have shown the insight and contrition that he showed before me and the GMC. As a result, there would have been a different outcome.

<u>The disciplinary panel</u>

28.1 The panel was chaired by Dr Rosser, notwithstanding that he had been involved in preliminary discussions about whether the claimant should be

allowed the time off in relation to the second incident. He was in possession of the relevant information in October 2016 that confirmed that the claimant's exclusion was on a false basis, but he approved it nevertheless. He was not, therefore, sufficiently impartial.

28.2 The Respondent relied on the fact that Dr Rosser was on secondment to fulfil the requirement under MHPS 6.2 that the Panel include a member who is medically qualified and not currently employed by the organisation, although no documentary evidence was advanced to support this proposition and Dr Rosser clearly held a senior executive role within the respondent, whoever may have technically employed and paid him.

28.3 It stretches credulity to suggest that the Trust's own Executive Medical Director was suitable to provide independent medical input to the panel. The Respondent also did not comply with the requirement to agree the selection of the medical member of the panel with the Medical Staff Committee Chair (Mr Rahman).

Overview

29 It is true that that Mr Reuser had the policy and did not complain but that does not completely absolve the respondent from the catalogue of failings that ultimately render this dismissal unfair.

30 In the specific circumstances of this case the failure to warn the claimant that he may be dismissed was potentially enough on its own to take the respondent's actions outside the band of reasonable responses.

31 The other failings only confirm that view.

32 Dr Rosser was not sufficiently independent. There is a strong suspicion of bias given his approval of the exclusion on grounds he ought to have known were false. This appears further confirmed by the omissions and unjustifiably strong language of the GMC referral.

33 The failure to appoint an independent expert to advise on the allegations did have a material impact on the outcome notwithstanding the alternative case presented before me. The result of this failure was that the respondent viewed the second incident as more serious than it was in practice.

34 Moreover, the respondent was unaware of the urgency of the situation that arose in the first incident and this provided important context to their deliberations. Their incorrect conclusions did form part of the decision to dismiss as did their failure to attribute any responsibility to the nurse.

35 That is not to say that the claimant's failures were not serious ones. He should have done more. I accept that these failures were the principal reasons for dismissal. As the allegations were largely admitted it was reasonable to find the claimant culpable.

36 However, I do not accept that the respondent genuinely viewed the incidents as potentially gross misconduct. They were not labelled as such until the dismissal itself. The claimant was not excluded or restricted for the best part of a year other than for a highly questionable period of two months on seemingly false pretences. No reasonable employer would have viewed these allegations, when appropriately considering all the circumstances, as gross misconduct. No reasonable employer in the absence of the procedural failings, would have been able to classify the claimant's actions as wilful. When faced with an apparent lack of support to perform an urgent sight saving operation the claimant failed to properly consider alternative safer options but ultimately acted with the patient's best interests at heart and was successful in doing so.

37 The only thing that seemingly justified the respondent elevating the charges to ones of potential gross misconduct was the claimant's alleged lack of insight. I would accept that such a consideration can, in theory, justify a dismissal in circumstances where there was a genuine fear of further misconduct with potentially serious consequences.

38 However, in this case, it seems to me that the claimant did acknowledge what he should have done differently in relation to each incident. His alleged contradictory failure to admit wrongdoing only makes sense in the context of the respondent's wrong conclusion that the claimant should have postponed the operation to another day.

Polkey

39 In any event, had the claimant been made aware of the possibility of dismissal he would almost certainly have obtained legal advice. As a result, he would have been able to challenge the other procedural matters. Moreover, he would doubtless have been advised to show the additional insight and contrition that he did once he had received such advice, as demonstrated before the GMC and me.

40 In those circumstances, if the procedural failings were rectified the claimant would not have been dismissed. Ultimately, if the respondent's failings were rectified, it seems to me that the matter would have played out as it did before the GMC. There would have been adverse findings against the claimant but nothing serious enough to warrant dismissal.

Contribution

41 The claimant's failings were, however significant and serious. As serious, in fact, as the failings of the respondent. He subjected patients to avoidable risk in relation to both allegations.

42 In those circumstances I consider that the claimant contributed 50% to his dismissal.

ACAS Code

43 The claimant's failure to appeal is balanced against the respondent's procedural failings such that it is not just and equitable to award any adjustment, up or down, in relation to breaches of the ACAS code.

Protected Disclosure

44 In relation to the suggestion that the claimant's dismissal was because he had made a protected disclosure there was certainly material from which I could draw adverse inferences.

45 The allegations were not being treated as potentially justifying dismissal until after the claimant's disclosure.

46 The failure to act on the claimant's disclosure and the failure to mention it in the GMC referral give further grounds for suspicion.

47 However, it seems clear to me that the principal reason for dismissal was the claimant's use of an untrained member of staff in theatre and his perceived lack of insight, coupled with the additional supervision concerns raised by the second incident.

48 Moreover, no action was taken against the other author of the protected disclosure, nor others who had raised similar concerns previously.

49 In addition, there was significant evidence that suggested that Dr Rosser, and others in senior management, were predisposed against the claimant prior to his disclosure for reasons that remain unclear.

50 In fact, it appears that the respondent did not consider the contents of the claimant's disclosure about the Solihull nurses properly, if at all, in the context of his dismissal.

51 As a result, the disclosure cannot have been the principal reason for dismissal and the claimant's claim for automatic unfair dismissal must fail.

Breach of Contract

52 In relation to the claimant's claim for notice pay for breach of contract I have already found that the allegations, when properly considering all the circumstances, could not be said to amount to wilful misconduct or gross neglect. The respondent seemingly did not consider them to amount to gross misconduct until the claimant showed what they identified as a lack of insight. I am not convinced that an employee's response to earlier mistakes can necessarily elevate such acts or omissions to gross misconduct.

53 In any event, had the respondent's failings been rectified the allegations would not have been considered as gross misconduct. The GMC findings, to the extent that they are relevant and able to, appear to confirm that view. I agree with the findings of the GMC. The claimant's conduct did not render

him unfit to practise. When viewed properly, with all the surrounding circumstances, it could not amount to gross misconduct.

54 In addition, the respondent breached the claimant's contract by not following their own procedures.

55 In all those circumstances the claimant's claim for breach of contract succeeds.

56. The parties have 28 days to either resolve remedy or to agree directions for a Remedy Hearing.

Employment Judge Broughton

8 October 2018