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EMPLOYMENT TRIBUNALS

Claimant

Mr O A Akinosho

Heard at: London Central

Before: Employment Judge Walker

Respondents

AND London Borough of Camden

On: 6 & 7 December 2018
18 December (Reserved Decision)

Representation

For the Claimant: Mr O Lanlehin, of Counsel

For the Respondent: Mr S Sudra, of Counsel

RESERVED DECISION

1. The Tribunal finds that the Claimant was unfairly dismissed.
2. The Respondent breached the Claimant's contract of employment by dismissing him without notice.

Claim

3. The Claimant claimed unfair dismissal, breach of contract and other payments arising out of a situation when his employment was terminated by the Respondent by reason of gross misconduct.

Evidence

4. The Tribunal had before it a bundle of documents to which other documents were added during the course of the Hearing. Additionally, the Tribunal heard evidence from the Claimant himself and from a Mr Boyce who gave evidence on his behalf. For the Respondent, the Tribunal heard from Mr Christopher Stone, Service Manager of the Access and Response Service for the Respondent, Mr Andrew Reece, Head of Camden Learning Disability Service for the Respondent

and from Debora L'Esteve, Employee Relations and Policy Manager for the Respondent.

Background

5. It was a feature of this claim that some documentary evidence was not available. The Tribunal was eventually told that the parties had only exchanged documents a week prior to the date of the Hearing and that witness statements had been exchanged on the morning of the first day. The result was that various documents that should have been in existence were not produced. Some of those were located by the Respondent in various breaks at lunch time or overnight but other documents were simply never produced.

Issues

6. The issues which the Tribunal had to consider are the following:

Unfair Dismissal

(a) What was the reason for the dismissal? The Tribunal notes the Respondent said it was gross misconduct but the Claimant says that it was because he asserted a statutory right. In particular he pressed for the Respondent to address an underpayment to him of salary.

(b) The Tribunal had to consider the Burchell test. If it were to conclude that the reason for dismissal was conduct, that requires the Tribunal to consider;

whether the Respondent had a genuine belief in the Claimant's guilt

whether it had reasonable grounds for that belief and;

whether at that time, the Respondent had carried out as much investigation as was reasonable in the circumstances.

(c) The Tribunal were told that the Claimant challenged the reasonableness of the procedure and, in particular, argued that there were procedural defects which made the dismissal unfair. Was that the case?

(d) In terms of the dismissal, the Tribunal also had to consider whether dismissal was within the range of reasonable responses.

Notice Pay

- (e) The Tribunal had to consider whether the Claimant had committed an act of gross misconduct i.e. an act of this conduct of such a fundamental nature that the Respondent was entitled to accept that as bringing the contract to an end so as to entitle it to terminate without notice.
- (f) Had there been a delay, which was such as to amount to an affirmation of the contract?

Unauthorised Deductions

- (g) The Claimant also sought holiday pay, plus arrears of pay and other matters, which amounted to unauthorised deductions.
- (h) The Tribunal understood that there was a period of time when the Claimant thought he was overpaid and notified the Respondent but later realised there had also been an underpayment. The Respondent took steps to recover the overpayment but the Claimant argued that they had not addressed the underpayment. Therefore, the issue for the Tribunal was whether the Claimant was underpaid.
- (i) The Claimant also argued that when he pressed for his underpayment, this also caused the Respondent to take steps which led to his dismissal and he believed it was that which was one of the reasons for his dismissal. In other words, he argued that he was dismissed because of his insistence on being correctly.
- (j) The holiday pay claim had not been particularised. The Tribunal was unable to conclude the Hearing within the time allotted. Therefore, the holiday pay claim and claim for arrears will be dealt with on another occasion. The focus of this Judgment is on the question of the unfair dismissal and the claim for breach of contract.

Facts

1 The Claimant, Mr Akinosho, worked for the Respondent but was seconded to an NHS Trust which covered a region over both the Respondent, Camden, and Islington.

2 Originally, Mr Akinosho had worked for Islington Council, but had applied to Camden for a role and had been successful. In his ET1 form he put his date of commencement as October 2005. The Respondent put it at 11 October 2005. Mr Akinosho had, however, worked in the crisis team for the NHS Trust for some

years before that and his total service in that team was of the order of eighteen years.

3 As a member of the Crisis Team, Mr Akinosho was responsible for going out when there had to be a crisis intervention in relation to a vulnerable person.

4 Mr Akinosho reported to Sam Rigby, who was the Clinical Team Manager for the South Camden Crisis Resolution Team. Mr Rigby was not an employee of Camden but in the context of the crisis team, he was Mr Akinosho's line manager.

5 The evidence given by Mr Boyce, a former colleague of Mr Akinosho who gave evidence, was that Mr Rigby had openly talked about his intention to get Mr Akinosho dismissed. This is undisputed. Mr Akinosho submitted a grievance in the course of his disciplinary process. That grievance was passed to the NHS Trust because the grievance very largely related to staff members who were employed by that Trust rather than by the Respondent. In particular, Mr Akinosho complained about Sam Rigby's determination to dismiss him and the comments that had been made about that to other staff. That complaint was upheld at the end of the grievance. The NHS Trust took a considerable time to deal with the grievance and it was not concluded when Mr Akinosho was dismissed.

6 It is also not disputed that Mr Akinosho raised a question over an overpayment and then an underpayment with his Camden Manager, Debbie May. In his evidence Mr Akinosho says that Debbie May asked him to show her the evidence, which he did, and that she calculated his underpayment hours to be 560 hours after subtracting some hours from it. I was not provided with any documentation relating to that admission, nor did I have Mr Akinosho's documentation or the correspondence between Mr Akinosho and Debbie May. So far as I am aware from the evidence that was supplied to me, there was a question about Mr Akinosho's payment and that is as much as I am able to determine at this point in time.

7 There is another matter mentioned by the parties about which I have little information, which was that Mr Rigby had apparently made a number of allegations against Mr Akinosho prior to the incident that led to this claim. There was a disciplinary investigation, which pre-dated this particular investigation. That investigation was conducted by another Manager, Mr Michael Dunning, and ultimately no action was taken against Mr Akinosho. Mr Akinosho was, however, aware of Mr Rigby's campaign to remove him and talked of being repeatedly brought in to meetings without any warning by Mr Rigby to talk about his work and his performance.

8 The incident which led to Mr Akinosho's dismissal, was a visit to a vulnerable person, Mr X, made by Mr Akinosho and Dr Louisa Douglas, a Clinical Psychologist at the Intensive Support Team for Camden and Islington NHS Foundation Trust on 15 July 2016. Dr Louisa Douglas knew Mr X well and she had requested the crisis team intervention. She was unhappy about the way in which Mr Akinosho had behaved and had checked the assessment report and found that was unsatisfactory in her view. She had a meeting with Mr Rigby and subsequently wrote a letter to him dated 2 August 2016. The letter was headed "Re statement regarding the conduct of staff member Olajide Akinosho". It said "Please find below the formal statement outlining events and concerns also discussed with you directly following a recent assessment with the SCCT".

9 The letter continued "I raise these concerns as I believe the manner in which the assessment was conducted may impact the service and support that clients receive at the point of crisis – the time when it is most needed. I hope that this supports the development of the practice of the above member of staff and improves the experience and quality of assessments completed in future – essential for devising appropriate treatments".

10 Attached was a document headed "Statement of events and concerns". The gist of the statement was that a vulnerable individual, who I will refer to as Mr X, was referred to the crisis team following concerns about him. The assessment by the Crisis Team was to be completed together with Dr Louisa Douglas who had been working with Mr X and his mother for over six months and who knew him very well. The assessment took place at Mr X's home on 15 July 2016 and lasted for half an hour. Dr Douglas's report set out concerns about the engagement and clinical assessment skills of Mr Akinosho. It also referred to the clinical note keeping and information gathering and said "later when I checked the entry on the care notes I found a very long note including information that was not gathered at the assessment and was unclear where this had been sourced from."

11 She pointed out "Of note the background history was factually incorrect, "for example reporting [Mr X's] father as alive and working as a courier. [Mr X's] father died more than ten years ago and this is a source of distress for [Mr X] and his family."

12 She also referred to Mr X as having lots of weight with no evidence of thought disturbances as his speech followed a logical speech pattern, which was in her view contradictory to her own assessment of Mr X's behaviour.

13 Importantly, there was no statement that there was any error in the report in relation to any recording about Mr X's alcohol or drug taking.

14 Before having had the report from Dr Douglas, Mr Rigby met with Mr Akinosho. Mr Rigby wrote a note, which is dated 29 July 2016, although Mr Akinosho appeared to think that this meeting happened on 19 July 2016. In any event Mr Rigby clearly raised with Mr Akinosho several points including the question of his possibly having fallen asleep, which had been mentioned by Dr Douglas, and the second part of the complaint that the assessment was not salient and was copied and pasted from a previous assessment. This was an informal management meeting, Mr Akinosho was not given any prior warning about what was to be discussed.

15 It appears that the possibility that the assessment had been copied and pasted from another report was Mr Rigby's own conclusion. There was a new system used at this time, it was about one year old, I was told. The previous system was called Rio and users had to enter all input. The new system was capable of taking information from a previous assessment and automatically moving it into the next version of the report. When Mr Rigby told Mr Akinosho that he thought he had copied and pasted information into the report, Mr Akinosho showed Mr Rigby how the care notes of the history of the patient self-populate in the boxes if there has been a previous assessment.

16 The notes say that Mr Rigby pointed out this was the patient's first assessment and it could not have self-populated but Mr Akinosho disagreed and thought that the information had migrated from the old system (which was called Rio).

17 Mr Rigby said he would investigate further for clarification and Mr Akinosho admitted that he had not checked if the history of the patient was still relevant. Then there was a discussion about some other matters including Mr Akinosho taking a Trust car to his home address and how this had left the staff unable to drive to visit patients, and other matters.

18 Mr Rigby appears to have referred the various matter to the Respondent's HR Team. Meanwhile, on 4 September 2016 Cynthia Walters, who was the HR Strategic Lead for the Respondent, sent an email to Mr Akinosho referring to a meeting they had had regarding the refund of what Mr Akinosho perceived to be an underpayment. Then she said that that meeting would take place on 4 October but meanwhile they would continue to deduct repayments on the overpayment in any event. I was not given any documents showing any follow up or subsequent meeting and there was no evidence about it, so I do not know what happened after this.

19 The Respondent's HR Department took up the complaints about Mr Akinosho, and asked Mr Stone to act as the Investigating Officer. He had a face to face meeting with Mr Rigby on 8 September 2016. No record of that meeting

was produced in the Bundle. Then Mr Stone held an investigatory meeting with Mr Akinosho on Thursday 14 October 2016. Mr Akinosho was accompanied by his Trade Union representative. Mr Akinosho was confused at the time because he thought that meeting should have been postponed until after a meeting with Debbie May on 25 October since he considered these matters were an add on to the Michael Dunning investigation, and should not have been considered until previous matters were resolved. The HR Business Advisor who was present told him these were not add on matters, rather they were new and separate issues.

20 Mr Stone then explained that there were three allegations under investigation, the first being that Mr Akinosho had taken a Trust car home on 9 July leaving colleagues working on a late shift unable to visit patients; secondly failing to show due care when completing a patient assessment following a visit on 15 July 2016 which resulted in incorrect and historic information being included in an assessment and finally that he was observed to fall asleep during the assessment on 15 July. He explained that he was required to investigate the facts in relation to each allegation whether further action would be required under the formal procedure.

21 There was a lengthy discussion of each the allegations. The meeting started at 9:41am and Mr Stone he moved on to allegation two at 11:08am. The discussion about that matter continued until 11.45 am and the meeting ended at noon.

22 Mr Akinosho produced printed copies of a patient's case record which he had printed out on 4 October and 14 October and explained that the printouts were blank and new case records and that no one had added or amended the records and he then took Mr Stone through various sections of the assessments highlighting that information on the record from 4 October reappeared on the care record dated 14 October. He then produced a copy of the assessment from 15 July and stated that he had not entered incorrect or historic information in to the care note as per the allegations. He basically explained the population system under which information from the past was dragged forward in to the present assessment. Mr Stone confirmed that he was required to work on a similar record keeping system albeit not the same but when information would repopulate he would modify it to ensure it was accurate and asked if Mr Akinosho would have thought it appropriate to modify it in this instance. Mr Akinosho explained that there was various responsibilities of different parties and said that service users will have allocated care coordinators whose responsibility it is to update the system periodically and in this case he thought it was Louisa Douglas's responsibility to update the record on the system. This was confirmed by his Trade Union representative. Mr Akinosho explained he worked with service users on a short-term basis and it was not his responsibility to maintain

the records. The discussion then went on to consider third allegation, which for these purposes is not relevant.

23 In evidence Mr Akinosho said he was worried about updating the records once he was told they were wrong in case he was regarded as attempting to tamper with evidence against him and so he did not do so. No-one else updated the records either.

24 The notes of the investigation meeting were supplied to Mr Akinosho and there was some correspondence about whether they were correct or not. First of all, they were supplied on 17 October. Then they appeared to be returned on 26 October and revised on 14 November. Ultimately Mr Akinosho confirmed they were accurate on 13 December 2016.

25 Mr Stone then met with Debbie May the Operational Service Manager on 14 December 2016. He asked various questions, Debbie May confirmed everyone had a responsibility to update the case record and it was the responsibility of the clinician also to update their information if not correct. According to the minute of that meeting, some comments were made at that meeting by somebody with the initials SR. The list of those present were Mr Stone, Miss May and the HR Advisor, Aarti Shah. The only person who has the initials SR that the Tribunal is aware of, is Mr Rigby. It therefore seems Mr Rigby was present at the meeting, albeit not identified as such on the list of parties present. Mr Rigby advised that the assessment that Mr Akinosho was working on had no pre-recorded information. This led Ms May to review the system and she said that only one core assessment was completed being the one completed by Mr Akinosho on 15 July and that no information could be pulled through as there was no other core assessment on the system. She also said the system indicated that Mr Akinosho had altered the case record. However, if there was an attempt to create a new case record that would pull through the information from the original case record of 15 July.

26 Ms May then opened another part of the record system where progress notes could be captured and she said that most clinicians would complete the progress notes and most people would review the progress if they wanted information about the case. She also opened part of the system that allowed the user to attach files and documents and located a document from 2001. The text within that document mirrored the entry within the core assessment that Mr Akinosho was understood to have completed dated July 2016. The 2001 document referred to the parents. The 2016 assessment also referred to the parents in almost identical language, but had been updated to reflect their ages as of 2016.

27 On seeing that letter, the notes indicate that the text similarities suggested that some wording about Mr X's parents of had been lifted from the 2001 document.

28 Mr Stone followed up by asking Ms May for the contact details for Mr X's case co-ordinators /key workers and on 6 January he enquired of two members of staff whose details were provided to him by Debbie May on 5 January 2017, namely Stephen Burrows who was a Primary Worker, and Louise Cantrell, who was a Service Manager, both Camden staff. He did not make further enquiries of Dr Douglas who was present with Mr Akinosho at the relevant assessment.

29 At this stage, Mr Stone appeared to have thought that not only was the wording about the father out of date and lifted from the earlier letter but that the information in the assessment which Mr Akinosho had completed which addressed Mr X's alcohol and drug usage might also have been taken from the earlier letter.

30 Miss Cantrell replied on 6 January saying that she did not know the service user and he did not have an allocated worker at the current time. All she could say was that there were significant drug and alcohol issues she would expect this to form part of the care plan. She could not comment on the family history.

31 Mr Burrows responded on 11 January 2017 stating that he had been working with Mr X since late 2015 and not witnessed any behaviour risking and any evidence to suggest that he was using drugs and alcohol to any extent if at all. He also said, "As far as his father is concerned [Mr X] advised that he passed away approximately ten years ago."

32 Ms May then contacted the IT Department. It is not clear what the initial enquiry said as I do not have it, but their response dated 11 January 2017 was that the initial assessment was created by Mr Akinosho at 2pm on 15 July and had no information other than the date and time. All other fields were completed by 18:35pm on 16 July. The IT Department said that they had been no previous core assessments for this patient and none of the information would have been brought through from elsewhere except where there was a previous physical health assessment in which case the smoking section would have been populated. However, those had not been completed in the physical health assessments and the smoking information had not gone directly on to the core assessment forms. Miss May forwarded that email to Mr Stone.

33 Mr Stone made no further enquires and no steps were taken after the email enquiries in early January. He prepared an investigatory report dated 10 March 2017. The investigatory report gave an overview about the participants, Mr Akinosho's personal details, the reason for the disciplinary allegations, the method he had adopted which referred to the people that he had contacted about

the matter and the sequence of events. The only explanation for the time taken to produce the report was that Mr Stone had been away for a while on holiday and had a busy workload.

34 The report went through each of the three allegations as well as additional observations and findings and conclusions and recommendations. In relation to allegation one, Mr Stone reported that, given the circumstances, it was not possible to evidence that this issue amounted to misconduct as there was a culture of staff taking Trust cars home and it was unclear whether this was unacceptable or not. He recommended that the process was reviewed and clear expectations regarding use of the Trust cars and other property be set out. In relation to the third allegation, Mr Stone was unable to confirm or deny whether the allegations were true, but he thought there should be a few protocols suggestions considered.

35 In relation to allegation two, Mr Stone was concerned about two salient issues, the first one being that Mr Akinosho had denied inputting incorrect information about Mr X's family, and his drug/alcohol use but these assertions had since been proven to be false and secondly by modifying information from a document created in 2001, Mr Akinosho had undermined the assessment process commenting misleadingly in areas that were likely to be emotionally sensitive to the client and which may have a bearing on his treatment intervention/conclusions. He thought that both points were serious but the latter was more acute "as the purpose of the Crisis team was to make informed interventions into the lives of people experiencing a mental health crisis. Any action which compromises this must be seen with greater seriousness as this can affect the treatment decisions made about a vulnerable person". He also commented that the evidence supported the view that "Mr Akinosho has failed to show due care when completing a patient assessment. Additional issues regarding the testimony of Mr Akinosho raise concerns of honesty and integrity".

36 Mr Stone referred to the Council's code of conduct, citing some gross misconduct provisions as follows:

"knowingly making any false, misleading or inaccurate oral or written statement or entry in any record or document that is made, kept or required for the purposes of the Council".

"misconduct in relation to official documents, e.g. destroying or mutilating any record made or kept for the purposes of the Council, or altering or erasing or adding to any entry in such a record or document without legitimate reason".

"deliberate and wilful negligence in the performance of duties which has serious implications for the Council, its tenants, users, members of the public, employees of the Council and Members of the Council".

37 Also, Mr Stone referred to the HCPC standards of guidance. The Tribunal understands the HCPC is the health care practitoning body to which Mr Akinosho belongs. Those standards at Appendix 11 require an individual

“to be able to maintain records appropriately”;

which is described as

“to be able to keep accurate, comprehensive and comprehensible records in accordance with applicable legislation, protocol and guidelines”;

and to

“recognise the need to manage records and all other information in accordance with applicable legislation, protocols and guidelines”.

38 It was Mr Stone’s conclusion that gross misconduct should apply to these concerns and that the actions of Mr Akinosho were questionable from an HCPC perspective. However, Mr Stone noted that, as he was not a mental health practitioner/manager, he would suggest that the clinical implications of this inaccurate information being inputted on the case file should be considered by a manager, who was a relevant specialist, to assess whether this could have been detrimental to this client’s care. This would help determine whether the gross misconduct recommendation could be reduced to a misconduct charge.

39 In response to this report on of the Respondent’s HR Managers, Arti Shah, sent an email dated 29 March 2017, to Debbie May and another person confirming that a disciplinary investigation was now complete and that the investigator had found evidence to suggest there was enough evidence to warrant further consideration at a Hearing. Given leave arrangements she thought it would be convened in early May. She noted that three allegations had been considered which she listed. She explained that the investigator had found evidence to support allegation two. She said she would continue to keep the two individuals updated regarding hearing dates and related developments.

40 Mr Akinosho was invited to a Disciplinary Hearing by a letter that was not included in the bundle and was thus unavailable to the Tribunal. The disciplinary hearing was conducted by Mr Reece. It seems that before proceeding with the Disciplinary hearing Mr Reece took up Mr Stone’s suggestion about what level of impact on the service user this situation could have caused, with someone he thought appropriately qualified, namely Debbie May. An email was provided by Debbie May dated 11 May 2017. I do not have that email, nor do I have the request put to Ms May to which she replied, but I do have an extract from it.

41 In response to a question please can you advise on the general clinical implications of inaccurate information being inputted on the service users case

file, and whether in this specific case, it could have been detrimental to this client's care, the response was to summarise the inaccuracy about the father and to say

“Staff who read the notes may have gone on to ask after Mr X's father assuming he was still alive as OA's notes were considered the latest information at the time

Mr X has a history of assault on staff and his mother.

It would require skilful handling of this error by staff and may have impacted on Mr X's mental state somewhat or that of his mothers.”

and then to say in response to a question about the possible implications for a social worker in the Crisis team entering inaccurate information onto the system for the service user or other practitioners, that she felt it to be a breach of the HCPC Standards of Proficiency and she listed certain standards. Ms May also suggested that it was wrong of Mr Akinosho not to have declared what he had done or offered an apology to the service user or carer. At one point Ms May said that a concern she would have is why Mr Akinosho did not annotate the record with a note that his writing was taken from the summary from 2001 and declare this.

42 There is no copy of any letter sending Mr Akinosho the Investigation report. I do not have a copy of the invitation to the disciplinary hearing. I therefore do not know when Mr Akinosho was given the detailed information which showed him that the system could not have self populated the incorrect information and that he was the only person shown to have worked on the record, as this would have led him to reflect on the position. When I asked Mr Reece who conducted the disciplinary hearing, he did not know.

43 Mr Akinosho attended the disciplinary hearing on 12 May 2017, and was accompanied by his Trade Union representative. The outcome letter records the allegations as follows:

1 Mr Akinosho took a Trust car home on 9 July 2016, leaving colleagues working on the late shift unable to drive to visit patients;

2 Mr Akinosho failed to show due care when completing a patient assessment following a visit on 15 July which resulted in incorrect and historic information being included in an assessment; and

3 that on 15 July 2016, during the joint assessment Mr Akinosho was observed to fall asleep.

44 It follows that the allegations put to Mr Akinosho in the invitation letter were each of the allegations considered by Mr Stone, notwithstanding that he had found no basis for pursuing two of them.

45 There was a lengthy hearing. Each allegation was taken in turn and examined by Mr Reece. The hearing notes show that the procedure followed was that the HR adviser present confirmed that this was a disciplinary hearing and that the sanctions included issuing a final formal warning or dismissal as one allegation could be considered as an act of gross misconduct. Mr Stone as the investigating officer was asked to present the management case after which there was an opportunity to ask questions. Then Mr Akinosho and his representative were given an opportunity to present their case and there were further questions after which there was an adjournment followed by a decision. The management case included showing Mr Akinosho the IT audit on screen and demonstrating that no information was entered into the system prior to 15 July 2016, so nothing could have been pulled through as Mr Akinosho had presumed.

46 The notes show that Mr Akinosho presented his case on allegation 2 by first explaining his history with the Crisis team and then explaining how he had called IT and they had confirmed that the system would self-populate. He then said there was a very high possibility that he had referred back to the 2001 discharge summary to ensure there was a comprehensive record. Both Mr Akinosho and his representative pointed out that 10 months later the record was still the same and had not been updated. Mr Akinosho also referred to the bullying and harassment he felt he had suffered from Mr Rigby who had put him through 10 investigations between January and July 2016 when he had not had any issues previously. He referred to the grievance he had lodged about Mr Rigby and Ms May in December 2016. He explained that at the initial investigation he had said the information would have self populated but now he had the information from IT, he would have updated the entry. On questioning by Mr Stone later, Mr Akinosho agreed that he must have taken the information from the document in order to build the history. It was then put to him by Mr Reece that the evidence suggested he had deliberately been misleading the investigation and was doing so now, Mr Akinosho said the investigation meeting invitation was received when he was on annual leave. There was a high turnover of clients. It was human not to recall everything. He had to review the data clearly to come to this decision. There was no intention to mislead the enquiry.

47 Mr Reece then put it to him that he could recall doing this now but couldn't recall doing it 4 days after the assessment. As he considered the meeting with Mr Rigby took place on 19 July and not 29 July as recorded in the note. Mr Akinosho explained that they had a meeting in Mr Rigby's office and that he and Mr Rigby went into the patient's record and the information self-populated. It wasn't clear that it was Mr Akinosho's assessment which had self-populated the other

assessment. On further questioning he said he now accepted that the information wasn't self-populated and he had entered it into the system.

48 It is clear from the case summary in the decision letter that Mr Reece decided to dismiss Mr Akinosho from the Council's service due to gross misconduct relating to allegation two. He recorded the factors which he had taken in to account which included the investigation report, which he says was provided to Mr Akinosho in advance of the Hearing and an email from Debbie May at 11 May 2017 which he says was also provided to Mr Akinosho in advance of the Hearing, a supervision record which Mr Akinosho produced at the Hearing and emails provided by him confirming that he had made contact with the Camden and Islington Foundation Trust ICT Department as well as the grievance submission lodged by Mr Akinosho dated 10 December 2016 against Mr Rigby. There were other items such as screenshot of the core assessment, case notes for the service user, emails from Debbie May and submissions and representations as well as the Council's disciplinary Policy and Procedure.

49 Allegation one was not acted on because, as recommended by the Investigating Officer, this allegation was not upheld. Mr Reece had considered allegation three and, while he had considered Mr Akinosho must have closed his eyes for some time during the assessment, he could not determine whether he fell asleep and could not make a finding regarding the allegation.

50 In relation to allegation two, which he said was an allegation of gross misconduct, he referred to the evidence which he took into account and listed a number of items. He reported that during his Disciplinary Hearing, Mr Akinosho maintained the denial that inaccurate information had been pulled through but, towards the end of the Hearing, he conceded first that there was a high probability that he had made the inaccurate entries implying that he must have made the inaccurate entries. He then provided an explanation that he was acting to ensure that comprehensive information was on the service user's file.

51 Mr Reece said at the end of the Hearing Mr Akinosho had still not absolutely admitted the allegations. Mr Reece noted that Debbie May, who was Operations Service Manager, had said that if information is copied on to an assessment that was not obtained during the assessment the source of information should be recorded in the document. Mr Reece said he took full account of the various submissions including Mr Akinosho's eighteen years of experience of working for the Crisis Team, the fact that the core assessment printed out in May 2017 had still not been updated so the incorrect information had still been left on it, the fact that Mr Akinosho had a relatively good performance record in most respects and was one of the three staff members who did not have any outstanding activities which required follow up. He also took account of an apology from Mr Akinosho at the end of the Hearing and referenced Mr Akinosho's assertion he was a victim of a campaign to get rid of

him by his previous manager and the reference to the grievance which had been lodged in December 2016 which was still outstanding.

52 Mr Reece said that he took into account that Mr Akinosho was given an opportunity to admit his error very soon after the incident but he had knowingly continued to mislead the investigation and hearing for nearly ten months. He concluded that entering inaccurate information that was fifteen years old onto a current document without checking that information or noting the source was reckless. This he thought amounted to misconduct in relation to official documents which constituted an act of gross misconduct.

53 He said that continuing to deny the allegation for a period of nearly 10 months was an act of gross misconduct as Mr Akinosho knowingly made “false, misleading or inaccurate oral or written statements or entries in any record or documents that is made kept or required for the purposes of the Council”, which is defined as gross misconduct.

54 Mr Reece said he took into account the seriousness of the misconduct and the potential risk that the inaccurate information could have presented to Mr X’s care and support and to the staff working with him. He took into account the fact that when asked Mr Akinosho considered the risk was minimal, which he contrasted with Ms May’s view. He also took into account the apparently weak management and poor quality assurance systems present in the Crisis Team which he treated as a mitigating factor. He had considered the appropriateness of a lesser sanction such as an indefinite warning and had consulted the Assistant Director of HR as required under their procedure. This applied in cases where the act was considered to be so serious that it was verging on gross misconduct. However, the information he had received was that it was not appropriate to consider actions short of dismissal given that the allegations constitute gross misconduct and that Mr Akinosho exacerbated the seriousness of the allegations by continuing to deny the allegations in the face of proof to the contrary from his line manager, service manager, and the IT Team. Based on this information, Mr Reece decided the decision to dismiss was appropriate.

55 Further recommendations made by Mr Reece including the fact that Mr Akinosho’s conduct should be referred to the Health and Care Professions Council so as to enable them to consider whether to apply any additional sanctions in relation to his gross misconduct.

56 Meanwhile, the grievance that Mr Akinosho had lodged on 10 December 2016 was outstanding. This included references to harassment at work, intimidation at work, bullying at work and discrimination at work, all of which were complaints against his line manager, Sam Rigby, over a period from 4 January 2016 till 26 August 2016. The grievance report form asked Mr Akinosho to outline the main points of his complaint or allegation and in that section, he named only

Mr Rigby. However, where he was asked what actions have already been taken to try to resolve the grievance and he had noted that the Service Manager, Debbie May, met with both of us but this failed to address the main issues. The complaint noted various problems with Sam Rigby and then it recorded

“I am so disappointed that Debbie May, the Operational Services Manager, for the Crisis Resolution and Liaison team actually encouraged and condole this type of behaviour under her watch when I raised concern to her about some of the above issues she did nothing to address it, a possible indication that she was party to what Sam Rigby was doing, this I picked up in other issues to do with underpayment of salaries that Debbie May was directly involved in. I believe Sam Rigby may not have been acting in isolation.”

57 The Respondent's response to the grievance was to pass it to the NHS Trust who treated it as a formal grievance and after a very lengthy gap, eventually responded by a letter dated 30 June 2017. I understand the NHS Trust dealt with it because it related to Mr Rigby who was not an employee of the Respondent.

58 The NHS Trust outcome letter identifies twelve components to the allegations and as I have noted upheld the fact that Mr Rigby had told staff members that he would make sure that Mr Akinosho would be sacked from his job. There was no reference to Debbie May in that outcome letter, notwithstanding the fact that Mr Akinosho expressed his disappointment in the possibility that she was involved in a party to Mr Rigby's wish to get rid of him. Ms May was not an NHS employee but rather an employee of Camden. No-one took up the question of Ms May's involvement in what was a clear statement of intention by Mr Rigby to have Mr Akinosho dismissed. Ms May's appropriateness to supply a view about the implications of the out dated records was never questioned.

59 Mr Akinosho appealed from the decision to dismiss him on 5 June 2017. He followed the process of appeal and set out various grounds including the fact that it was a decision that no reasonable person properly directing themselves on all the facts and procedures of the Trust could have reached. Mr Akinosho argued that the dismissal was excessive and disproportionate and that the Chair of the Disciplinary Hearing had acknowledged an apparent weak management and poor-quality assurances in recordkeeping in the Crisis Team, which was not given due consideration.

60 Mr Akinosho pointed out that for ten years there had been no entry in the care records by any other member of staff who had previous contact with Mr X, that his father had passed away and if other people had updated information, the system would have provided it. He pointed out that he had admitted it and

apologised and his line manager could very easily have given him the necessary support or training to prevent future recurrence rather than escalate the matter to disciplinary procedures.

61 He pointed out that none of the staff members who failed for the last ten years to update the file with necessary information had been disciplined. He regarded the decision to dismiss him as unreasonable and unfair and compared the situation to a staff member who made a drug error on two occasions but was not dismissed.

62 He pointed out that he had worked in the Crisis Team for a total of eighteen years and since 2005 for Camden and it was the first time there had been any finding of this nature. He had never had a written or final warning in the past and was therefore baffled as to why this should have led to his instant dismissal.

63 The Appeal was not heard for over a year. The Respondent accepted that they had problems in their processes and the delay was entirely their fault. I was told there had been unprecedented levels of work which had caused the delay. When it was eventually heard at an Appeal Hearing on 4 October 2018, it was not upheld. The outcome letter for the Appeal referred to the Disciplinary Officer's statement that the conduct constituted gross misconduct as outlined within the Council's disciplinary procedure and stated that Mr Reece "also explained that while he had considered alternatives to dismissal, "he concluded that given that you continued to deny your actions right up until the Disciplinary Hearing where you were presented with incontrovertible evidence, and due to the potential serious risks caused to a vulnerable client by your actions, in the end he had no option but to terminate your contract of employment".

64 Mr Akinosho complained that the Appeal Hearing was not properly constituted and that it should have been a larger panel. It was accepted that the correct procedures required a larger panel but the Respondent's said he had agreed to a smaller panel. It is not clear from the notes of the meeting that Mr Akinosho did in fact get a proper choice about the matter. It appeared there was some concern that it would have to go ahead with a smaller panel and that Mr Akinosho, rather than agreeing, did not object as he did not have full understanding of his other options. There is no evidence the other options were explained to him.

65 Mr Reece provided a written report to the appeal panel and attended to effectively defend his decision. His written report recorded the fact that he thought the outcome was reasonable given the following factors and he listed the fact that Mr Akinosho had deliberately misled his Manager, the Service Manager, the Investigating Officer and the Hearing and this demonstrated a willingness on his part to be dishonest in his dealings with his Managers and the Council as a whole and a willingness to maintain this dishonesty over a period of nearly ten

months, which Mr Reece considered to be a serious act of misconduct. Mr Reece referred to the Council's Code of Conduct which states that you must always be honest with your Manager. He referred to the fact that Mr Akinosho entered the information from a document from 2001 on to the service user's record consciously updating certain information to reflect it as if it were accurate at 2016. The fact that he uploaded the information to appear as accurate at the time was reckless, dishonest and dangerous and Mr Reece referred to Appendix B of the disciplinary procedure which states "it is an act of gross misconduct to knowingly make any false, misleading or inaccurate oral or witness statement or entry in any record or document made, kept or required for the purpose of the Council."

66 Mr Reece recorded a potential risk that inaccurate information could have affected the provision of care to the service user's care, which could have been harmful and put the service user at risk and he referred to the statement provided by Debbie May dated 11 May 2017. He then said Mr Akinosho's actions had resulted in a total loss of confidence and trust in his abilities to continue as a Social Worker. Overall, he considered that the dismissal was appropriate and proportionate.

67 Mr Reece also in his report to the panel stated that he was aware of the need to ensure that his decision was consistent to the decisions made in similar circumstances and sought advice from HR regarding the range of possible sanctions that were available that would be appropriate. He thought the case that Mr Akinosho referred to regarding the drugs error was not a relevant comparator, not only because of the differences but also because the employee concerned was not a Camden employee. He recorded that he consulted and took advice from the Assistant Director HR before making his decision. In consulting with the Assistant Director HR, he explained he found Mr Akinosho had committed acts of gross misconduct and since the rules provided that misconduct would normally lead to dismissal he sought advice as to whether the account that Mr Akinosho had provided could warrant the alternative sanction allowed by the disciplinary procedure which was an indefinite final warning. Mr Reece had not found Mr Akinosho's explanation that he did not remember copying the entry at the time of the meeting with his line manager believable. His reason for this was that the meeting was less than two weeks after the event and therefore he concluded that Mr Akinosho must have deliberately misled the Manager and continued to mislead his Manager, the Service Manager, the Investigating Manager and the Disciplinary Hearing until towards the end of the Hearing ten months later.

68 By acting in this manner, which Mr Reece judged to be deliberately misleading, Mr Akinosho broke the relationship of trust with Camden NHS and employers. He then said that Mr Akinosho was not disputing the finding of gross misconduct but rather suggesting that the decision to summary dismissal was

unreasonable. He then referred to the Code of Conduct and to the Social Worker profession and the HPC Standards of Conduct and so forth. He concluded saying

“the breach of trust resulting from Mr Akinosho’s 10 months of dishonest behaviour was a significant part of my consultation with the Assistant Director of HR on the day of the Hearing. We discussed that Mr Akinosho had numerous opportunities over the period in which he was under investigation to tell the truth either to his Manager, the Investigating Officer, his Representative or the Hearing Chair about his decision to copy out of date and unchecked information from fifteen years ago into a new assessment. Towards the end of the Hearing he was presented with incontrovertible evidence from ICT records that only he had entered in the information in to the core assessment. Only at this point did he reluctantly concede he must have copied information from the fifteen-year-old record in to his new assessment. It is important to note that even at this point this was not an unequivocal admission that he had done this, rather reluctant acceptance that “he must have”.

This 10 month period of this persistent dishonesty meant that in my consultation with the Assistant Director of HR I reached the view that Mr Akinosho’s ongoing employment with the Council had become untenable such that issuing an indefinite warning was not appropriate but summary dismissal was the only outcome I could reasonably consider with the findings of gross misconduct.”

69 In the course of giving evidence the Tribunal asked Mr Stone and Mr Reece if they could explain the relevant records and how they operated. Both of them made it clear that they worked in different departments with different record keeping systems. Neither of them had access to the system which Mr Akinosho used. Neither of them understood how the record in question interacted with other records maintained by other people. Neither of them could tell the Tribunal how the records worked or which records were significant or indeed what information would have been available to other users.

70 Mr Akinosho was never suspended from the Respondent’s operation and he continued to do his work from the point when Mr Rigby first heard about the issue of the report in July 2016, through the time when he was called to the investigatory meeting in October 2016, until his dismissal on 12 May 2017.

Submissions

The Respondent’s Submissions

71 The Tribunal was reminded of the requirements of *Burchell v British Home Stores* and of the requirement not to substitute its own view for that of the

employer. The question it was suggested the Tribunal has to decided was whether dismissal is within the range of reasonable responses and even if the sanctions harsh, it can still be on that scale.

72 It was suggested that the problems with the line manager Mr Rigby were not relevant and the Investigation was carried out by Mr Stone and the disciplinary by Mr Reece and both were impartial and not involved previously.

73 It was implausible that the Claimant as a professional would have forgotten for nearly ten months that he had copied and pasted a document which was the subject to of the investigation. The Claimant had to update the ages of the parents and it was not credible for him to say he had forgotten this. He had three opportunities to correct the position being the meeting with Mr Rigby in July, the investigation on October 2016 and then the 12 May hearing. It was a lame excuse for the Claimant to say he had been told not to discuss the case with anyone. He could have gone to his line manager, to Mr Stone, to HR or anyone to tell them. He had a union representative and he could have told them.

74 The reason for the dismissal was that the Claimant had entered historic or false information onto the system and his actions were dishonest. The dishonesty aspect led to the sanction and the ultimate dismissal.

75 It was indisputable that there was significant delay in relation to the appeal. However, this was due to exceptional circumstances.

76 The grievance had to be conducted by a totally different organisation. While the Claimant used the Respondent's template, they had no jurisdiction to deal with it.

77 In relation to the breach of contract allegation the Respondent said that the Claimant was guilty of breaching the implied duty of trust and confidence and the employer could not have trust and confidence in him which went to the root of the contract. In relation to the question of delay the Respondent said there was no affirmation of the contract. The matter came to the fore after the March investigation report. Suspension on full pay was a sanction which should not be used unless it was necessary and only sparingly.

The Claimant's Submissions

78 The Claimant submitted that the acts which led to the dismissal did not amount to gross misconduct. The decision to dismiss was unfair and disproportionate.

79 The Claimant maintained that the reason was in fact that he had insisted on being paid money due to him as a result of underpayment of wages.

80 The Respondent had not taken proper account of a range of issues including the fact that the other staff had not kept records for ten years which would have updated the information about the parent.

81 The Claimant could very easily have been referred to necessary support or further training to prevent a future occurrence rather than escalating the matter to a disciplinary.

82 Accurate information had not been inputted on the file for some ten months after the staff became aware of the error. This suggested the level of potential risk to which the information presented was in this case minimal.

83 There was a comparable case where no action was taken involving prescription drugs which was more serious.

84 The investigation was flawed and there was no appeal for 17 months after the dismissal and that was effectively only a sham. The grievance was not completed until after the dismissal rather than before the disciplinary hearing.

85 As regards the breach of contract claim the Claimant submitted that the Tribunal had to make a finding of fact about the conduct and whether it as such conduct that was so serious as to justify the dismissal without notice and the evidence showed the Claimant's motive was not malicious and did not amount to gross misconduct.

The Law

Unfair dismissal

86 The relevant statutory provision is Sections 98 of the Employment Rights Act 1996 which provides as follows.

98 General.

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

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(b) relates to the conduct of the employee,

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

87 The Tribunal is expected to take account of the ACAS Code of Conduct. Relevant provisions include the following in relation to acting promptly in convening a disciplinary hearing

“The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.”

88 Also the ACAS code of Practice on Appeals provides the following.

“Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let employers know the grounds for their appeal in writing.

The appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case.”

89 The ACAS Guide expands on the Code and is helpful. It sets out key points on a fair procedure which include the following.

Whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:

- Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.

- Employers and employees should act consistently.

- Employers should carry out any necessary investigations, to establish the facts of the case.

- Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response

- Employers should allow an employee to appeal against any formal decision made.

90 Relevant case Law on the procedure where the dismissal is a conduct dismissal include the seminal case of **British Home Stores V Burchell [1978] IRLR 379 EAT** which sets out the main procedural approach to a conduct related dismissal.

“First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.”

91 **Foley v Post Office {2000} EWCA Civ 3030** is a case in which the Burchell test was approved and the tribunal was told it must not substitute its own view for that of the employer.

“When an Employment Tribunal looked at whether a dismissal was reasonable, the test related not to an assessment of what tribunal members would think or do, but rather whether to ask whether the employer’s response was within a ‘band or range of reasonable responses’ of a reasonable employer to the situation.”

92 **Sainsbury Supermarkets Ltd v Hitt [2003] IRLR 23** not only approved the approach but also indicated that it is relevant to the procedure as well. In this case, the Court of Appeal also applied the ‘reasonable responses’ to the reasonableness of the employer’s investigation and the procedure followed by the employer (the third Burchell requirement).

“Whilst the employer’s discretion is not completely unfettered as the test to be applied by the tribunal is ‘objective’ as stated by the Court of Appeal in *Fuller v London Borough of Brent* [2011] IRLR 414 and reaffirmed by the Court of Appeal in *Turner v East Midlands Trains Ltd* [2012] ICR 375/ *Newbold v Thames Water Utilities Ltd* [2015] IRLR 734 and the employer must act ‘proportionately’ (*Connolly v Western Health and Social Care Trust* [2018] IRLR 239). Further, under S98(4), regard must also be had to ‘equity and the substantial merits of the case.’”

93 However the Tribunal should look at the employer’s actions and other procedural matters can render a dismissal unfair. In 2013 (**Brito-Babapulle v Ealing Hospital NHS Trust**), the Employment Appeal Tribunal found that when considering the fairness of a dismissal, and in particular whether the decision to

dismiss falls within the band of reasonable responses open to a reasonable employer, an employer (or Tribunal) should not jump straight from a finding of gross misconduct to a conclusion that dismissal was within the range of reasonable responses. The Employer should consider any mitigating factors, such as exemplary service, normal behaviour and conduct, the consequences of dismissal (for their career), any provocation, length of service, consistent treatment between employees – a finding of gross misconduct won't necessarily justify instant dismissal.

94 The right of appeal is a fundamental aspect of any fair disciplinary procedure and a failure to provide a valid appeal can render the dismissal unfair, An example of this was in **Thomson v Imperial College Healthcare NHS Trust**. In this case there was an appeal but the Employment Appeal Tribunal agreed with the Tribunal that a dismissal can be unfair if the Disciplinary Panel Chair had no previous experience.

Conclusions

Unfair Dismissal

What was the reason for the dismissal

95 In relation to the question of what was the reason for dismissal the Tribunal conclude that the reason was Mr Akinosho's failure to admit to the Respondent that he had himself filled in the assessment form in part by copying out information from a 2001 letter which he had updated with what should have been the current ages, without noting in the form that this information was taken from a letter and needed to be checked. That failure was characterised by the Respondent as dishonesty over a ten-month period.

96 I reject Mr Akinosho's suggestion that the dismissal was due to his having complained about underpayments as I was given almost no evidence about this and nothing to suggest this could have been the reason for his dismissal.

97 The reason was therefore a conduct reason.

Did the Respondent have a genuine belief in the Claimant's guilt?

98 In relation to the question whether the Respondent had a genuine belief in Mr Akinosho's guilt, it appears that Mr Reece did have a genuine belief that Mr Akinosho must have known or recalled that he personally had located the information and filled it in the form rather than self-populating as Mr Akinosho had explained it did.

Did Mr Reece for the Respondent have reasonable grounds for that belief?

99 There was no reasonable ground for that belief. Mr Reece based his assumption on the view that Mr Akinosho would have recalled the process of filing in the report from an older letter and that he could only have failed to explain this because he was deliberately misleading the hearing. He did not understand the history of the system keeping, or the report system itself.

100 It was clear that the old system, which was called Rio, did require individuals to enter information themselves which they would have to locate. The system that Mr Akinosho worked on was a relatively new system. It had been in place for approximately a year. While Mr Akinosho would have used it from time to time, over his eighteen years of service he would have been very familiar with a process of collecting information and filling new assessments out.

101 Furthermore, Mr Akinosho had not been incorrect when he stated that in the usual case, where there was a prior report, it would self-populate. It was, however, the case that there was no prior report in this particular instance.

102 There is no information available to show that Mr Akinosho had been deliberately dishonest. It was not clear at what point Mr Akinosho was shown sufficient information for him to have understood that this was not a normal case of self-population. Mr Reece did not know when Mr Akinosho had been given the full documentation accompanying investigatory report. What is clear is that Mr Akinosho was shown the IT situation on screen at the disciplinary hearing. That appears to be the first time he fully understood that his assumption that the report had self-populated was incorrect. Mr Akinosho's behaviour was not consistent with someone who is being dishonest. At the first meeting with Mr Rigby in July 2016, Mr Akinosho admitted he had failed to verify the information.

103 It was not possible for Mr Reece to assess when Mr Akinosho first had sufficient information to make him realise he needed to re-evaluate the explanation he had given about the self-population system. The assumption that he had been dishonest and maintained that dishonesty for ten months was unreasonable. Moreover, much of that ten months was due to the Respondent's delay in progressing the investigation and the disciplinary hearing. Mr Stone discovered that there was clear evidence that Mr Akinosho had entered the old information on the system, but did not arrange a further meeting with Mr Akinosho to put that to him and Mr Reece did not know what information relating to the investigation was supplied to Mr Akinosho or when.

104 When presented with a clear explanation at the disciplinary hearing, although he was puzzled, Mr Akinosho had admitted his guilt. Moreover, the guilt lay not so much in entering incorrect information. The information was clearly correct at one point in time and Mr Akinosho had sought to update it. What he had failed to do, which everyone conceded to the Tribunal would have been perfectly acceptable, was to record the fact that this information was historic,

taken from an earlier document and needed to be checked. There was nothing inherently false in the information. It did however, have the possibility of being misleading in so far as it had not been recorded as being taken from an earlier record.

Had the Respondent carried out as much investigation as was reasonable in the circumstances?

105 No issues were raised about the investigation.

Was the dismissal procedurally unfair?

106 In terms of procedure, Mr Akinosho's grievance did relate to matters which were significant in terms of the Disciplinary Hearing. He raised a grievance about the determination of his line manager to dismiss him. His line manager had raised this issue. His line manager appeared to be present at some of the investigation meetings. Moreover, the grievance also implicated Debbie May as having possibly been complicit in the decision that his line manager had formed that he should be dismissed. She was central in the collection of evidence in relation to the disciplinary hearing. That element of Mr Akinosho's grievance was never considered at all. The outcome of the grievance demonstrated that there was a real problem with Mr Rigby's relationship with Mr Akinosho and the failure to consider whether it could have impacted upon the dismissal process is a concern.

107 I note that both Mr Stone and Mr Reece came from different areas of the organisation and would both have held themselves to be unaware of any concerns about Mr Akinosho's historic relationship with his line manager. They were, however, both closely involved with the HR team who themselves had clearly had interaction with the line manager. Additionally, there is an absence of any record with regard to Mr Rigby's involvement which is of concern. There is no note of the face to face meeting between Mr Stone and Mr Rigby which took place on 8 September. Also, Mr Rigby appeared to be present at a meeting between Mr Stone and Ms May and his comments had been recorded, but his name was not included in the head note and the other names simply did not bear initials which could have been confused with his. In the light of this, it is not possible to be confident that Mr Rigby did not influence the investigation and thus the disciplinary decision.

108 Initially there was almost no disclosure of any communications with the HR team, only one letter could be identified. On questioning this, the Respondent checked over the lunchtime break and found very little but I was told that the communications were often by WhatsApp or direct meetings of which there was no record. In short, it was impossible to tell from the very limited disclosure, which had been made, to what extent the Respondent's HR team had been

involved with the line manager. However, the HR team did write the invitation letter and discuss the sanction with Mr Reece before he made his decision.

109 Various other procedural matters are of concern. Importantly, there were very lengthy delays at every stage. The assessment was written on 16 July 2016. Mr Rigby learned of it in July and he questioned Mr Akinosho about it that month. Then Ms Douglas wrote her statement about it on 2 August. HR asked Mr Stone to investigate in or about late August or early September and he met with Mr Rigby on 8 September 2016. He did not meet with Mr Akinosho until 14 October and did not issue his report until 10 March 2017. The disciplinary hearing did not take place till May 2017, and Mr Akinosho was dismissed on 12 May 2017, some ten months after the events were known to the Respondent. The appeal took even longer and there was a delay of over one year.

110 The letter convening the Disciplinary Hearing pursued three allegations against Mr Akinosho despite the fact that the Investigating Officer had clearly reported that allegations one and three could not form the basis of any disciplinary action, either because the evidence was not there or because other members of staff also followed similar conduct in taking the car home in those circumstances. No reasonable employer would pursue allegations already found to be unsubstantiated, to a disciplinary hearing. When I asked who wrote the invitation to the Disciplinary Hearing and identified the allegations. It was thought it was HR. It was not the Dismissing Officer or the investigating officer as far as I was able to elicit.

111 The decision to dismiss was based on Mr Akinosho's dishonesty. This was confirmed by the Disciplinary Officer, Mr Reece in his witness evidence and also in various contemporaneous documents, including his explanation to the appeal hearing. Dishonesty was not an issue that was a charge before the Disciplinary Hearing. Mr Akinosho had not attended in the expectation that he would be charged with misleading the Investigating Officer or his management over a long period of time. In consequence, although some questions were asked about this, Mr Akinosho did not have a realistic opportunity of answering the allegation or defending himself.

112 Additionally, when deciding on the sanction, the Investigating Officer reported having questioned whether dismissal was appropriate. In the course of his evidence, he confirmed that he had spoken to HR and HR had told him that any outcome less than dismissal was not appropriate where the charge was gross misconduct. It therefore appeared that any sanction less than dismissal was not really considered, even though there were relevant circumstances such as Mr Akinosho's long service record and his lack of any previous warnings. Although the report indicated these had been taken into account, they were completely disregarded in the light of the HR instruction that there must be a dismissal if the actions were thought to be gross misconduct.

113 Finally, the delay in holding the appeal was so long as to render that worthless. There was no effective appeal.

114 The accumulation of procedural defects is so serious as to render the dismissal unfair.

Was the dismissal within the range of reasonable responses?

115 In practice the facts showed Mr Akinosho was found to have recorded information about Mr X parents' occupations and background, from a letter into a new assessment, which he had made an effort to update without reflecting in his report that it was taken from that earlier letter and needed further checking. There was no indication he had intended to introduce incorrect information, or made it up. There was a valid source for the information, albeit a very old one.

116 In failing to record the source of the information, Mr Akinosho had clearly not followed through good practice, which required him to record where it came from. He had also failed to check that information was still correct at the time of the meeting. He did not update it when he did find out it was incorrect, although at that stage he told the Tribunal he was frightened of being regarded as tampering with evidence.

117 In short, what Mr Akinosho did was an error which was pointed out quickly by another member of staff who also had a clear responsibility for updating the record, but did not do so. Indeed, none of the senior managers involved, being Dr Douglas, Mr Rigby and Ms May, took steps to update the record notwithstanding their awareness that it was incorrect. Given the fact that they all chose not to do so, so that it remained as it had been left by Mr Akinosho for at least the ten months up to his disciplinary hearing, it cannot have been a serious matter. While the Respondent clearly wanted evidence for any disciplinary process, once there were printed versions of the record available, no one could have been in any doubt about what had happened. The decision not to update the record was not explained at any point, either to the Investigating Officer or to the Disciplinary Officer. The fact that it was not updated suggests there was little risk associated with the record. This was raised by Mr Akinosho, but despite the wording suggesting this was taken into account, it is difficult to see how it could have been properly considered.

118 Additionally, the Disciplinary Officer, Mr Reece, appears to have considered that this misconduct was not comparable with other officers who failed to produce a record at all. However, it is difficult to see how that can be the case. Balancing the one employee who tries to update the record but omits to record the fact that he has taken information from an old document as source material, as against other employees who record nothing at all should have raised some issues. The risk of no record has to be equally, if not more dangerous, than a record which

had out-dated information that was not identified in terms of its source so that it could be evaluated with the limited relevance that it held to the present situation.

119 Overall, the dismissal fell well outside the range of reasonable responses. I am well aware that the test of range of reasonable responses is not a question of a perversity test, but rather more a general test. I am also aware that I must not substitute my own view for that of the Respondent. However, the range of reasonable responses would not include dismissal for a first offence for what is a matter which, at best, requires a first warning.

120 To summarise, there are numerous matters that made this dismissal unfair including the following.

- 120.1 There were problems in the procedure and extraordinary lengthy delays.
- 120.2 The appeal process was hugely delayed and could not be regarded as having any validity at all. Even if, at the appeal, the Respondent had decided that the dismissal was unfair, it is difficult to see how it could rectify the matter after such a very long delay
- 120.3 The eventual reason for dismissal was not the reason given on the disciplinary charge.
- 120.4 The Dismissing Officer did not know what record keeping protocol and arrangements were in place and clearly there were other records so it is impossible for him to have identified where in practice this record fitted or what the actual implications were even with the benefit of Ms May's comments.
- 120.5 The dismissal was tainted by the determination of Mr Akinosho's line manager to have him dismissed and there remain questions about Ms May's involvement in that determination, which were never investigated.
- 120.6 It is not clear when Mr Akinosho was given the information that he needed to make him understand the need to re-assess his position. He assumed that it was the self-population issue until he was given proper information which enabled him to understand that this was not the usual situation, but something slightly different. There is no indication of when that information was first provided to him. The assumption that he had lied was not borne out by any evidence.

120.7 The treatment of Mr Akinosho was very different from the treatment of other staff who had no disciplinary action taken when they did not produce any records at all, despite the fact that everybody should have made records and indeed the management team around Mr Akinosho should have updated Mr X's record when they realised it was wrong. Ms May reported it was everybody's responsibility to update the records. It seems there was a generally lax attitude towards the record keeping within the organisation. Indeed, Mr Reece referred to that in his outcome report.

In all the circumstances the dismissal was unfair.

Breach of Contract

121 The test for breach of contract, when there has been a dismissal for gross misconduct, is not whether the employer had reasonable grounds for the decision to dismiss without notice, but whether in fact the employee had acted in such a manner as to entitle the Respondent employer to do so.

122 It is not clear that there was any basis for the decision that Mr Akinosho had breached his contract to the extent which would have entitled the Respondent to dismiss Mr Akinosho for gross misconduct. It was argued that the dishonesty was such as to breach the required relationship of trust and confidence between employer and employee and that this entitled the Respondent to dismiss him without notice.

123 This required the Respondent to know that Mr Akinosho had knowingly falsified the records and deliberately withheld that from his managers. This was an assumption. Moreover, Mr Akinosho had admitted immediately to his line manager on 29 July 2016, that he had not checked if the history of the patient was still relevant. His behaviour showed no dishonesty as such. In terms of the record keeping that was a minor matter and not a significant breach of contract. The outcome therefore is that there was no gross misconduct and as a result the Respondent is in breach of contract.

124 Additionally, even if there was, the very long delay in taking action is such that any breach was waived. The Respondent allowed Mr Akinosho to carry on with his duties for ten months. That is not the action of an employer who considered the employee is so untrustworthy as to need to be dismissed. Mr Akinosho was not suspended. His appraisal was good and his manager who undertook that was largely happy with his performance. While that process would be separate from the disciplinary procedure, this was nevertheless a clear indication that there was no breakdown of trust.

Contributory Fault finding

125 I had asked for submissions about the extent to which there was contributory fault on the part of Mr Akinosho. The Respondent submitted that it should be 100% on the basis Mr Akinosho had committed a serious act of misconduct, whereas Mr Akinosho submitted it should be 5%.

126 I do accept Mr Akinosho had failed to record on his record keeping that he had taken this information from, and attempted to update, a letter from 2001. To do so would have been the proper process. I also note Mr Akinosho accepted in the course of the Hearing that would have been his normal practice and he could not explain why he did not do this.

127 In the circumstances Mr Akinosho's failure to do that was the matter that led to this dismissal. Had he recorded that fact it would have not been a disciplinary matter at all, even if it had been clear the father had died since it would have been clear that that record was some fifteen years old and needed verification.

128 However, that is the sort of matter that can be rectified with training and a first warning. There was no other history of Mr Akinosho having failed to keep records correctly and it cannot be said that he is not capable of keeping records. There was no other disciplinary warning, which suggests this was a single lapse. In circumstances while I do consider Mr Akinosho had contributed to his dismissal, I do not consider that his contributory fault amounted to more than 5%.

Employment Judge Walker

Dated this 17 day of January 2019

Judgment and Reasons sent to the parties on:

23 January 2019

For the Tribunal Office