THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr T Chimhini	**v**	**Imperial College Healthcare NHS Trust**

Heard at: London Central

On: 24 – 26 January, and in chambers on 27 January 2017

Before: Employment Judge Auerbach

Members: Mr T Robinson
Ms J Collins

Representation:

Claimant: Mr E Carey, Trade Union representative

Respondent: Mr B Cooper, Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

1. The claim of unfair dismissal fails and is dismissed.

2. All of the claims of direct sex and race discrimination fail and are dismissed.

3. The claim of wrongful dismissal fails and is dismissed.

REASONS

Introduction

1. The Claim Form was presented on 30 August 2015. The claims were all defended on their merits. There were Preliminary Hearings on 25 October and 25 November 2016, at the latter of which some amendment to the claims was permitted.

2. The claims are of unfair dismissal, wrongful dismissal and direct sex and race discrimination. At the start of the hearing both representatives agreed that the amended agreed list of issues fairly captured the live claims and the issues which we had to decide. In the course of the opening discussion Mr Carey indicated that the claims referred to at paragraph 9 of that List of Issues were no longer pursued. During the course of day two he and the Claimant confirmed that those referred to at paragraphs 6(a) to (c) were also no longer pursued and in closing submissions Mr Carey also withdrew the claim referred to at paragraph 6(d). In light of those claims having been withdrawn, Mr Cooper during the course of closing submissions confirmed that there was no longer any time issue.

3. In opening discussion Mr Cooper also indicated that, should the claims succeed, the Respondent did not seek to argue that the Claimant had failed to make reasonable efforts to mitigate his loss. Both representatives also confirmed that neither took any ACAS Code point. However, it was the Respondent's case, should the unfair dismissal claim be upheld, there was contributory conduct on the Claimant's part. It was agreed that, should we find in his favour on liability, we could also, as part of the present decision, address that issue as well. Depending on our findings, should the unfair dismissal claim succeed, we might also address any point arising of the type that lawyers refer to as a *Polkey* issue, unless it appeared to us that we ought to invite further submissions before doing so.

4. On day one of the hearing, we also determined the following applications. Firstly, during the course of his employment the Claimant had made a covert recording of a telephone conversation with a colleague who we will refer to as CD. Mr Carey applied for the transcript of that conversation to be admitted into evidence before us. Mr Cooper opposed that. After hearing argument, and for reasons we gave orally, we admitted the transcript into evidence. We note, however, that, one of the substantive issues for our consideration concerned the Respondent's handling of the Claimant's wish to introduce that same recording into the disciplinary process. We will address that later in this decision.

5. Secondly, Mr Cooper applied for orders in respect of the four fellow employees who had at various times made allegations of sexual misconduct and/or what would amount to sexual offences on the part of the Claimant. He sought a direction that these four individuals should be referred to throughout our hearing by ciphers, and also a restricted reporting order preventing their identities being reported. Mr Carey, for his part, sought similar orders in respect of the

Claimant. After hearing argument, and for reasons which we gave orally, we granted Mr Cooper's applications in respect of the fellow employees, although at this stage limiting the restricted reporting order to run only until promulgation of our decision. We refused Mr Carey's applications in respect of the Claimant. The employees concerned are accordingly referred to by us as AB, CD, EF and GH.

6. At the internal disciplinary hearing, manuscript notes had been taken both by the respondent's internal HR advisor and by their note taker. Typed versions of those manuscript notes had been produced for the purposes of our hearing and it was not disputed that these were fair typescripts of the manuscript notes, as such. However, there were some issues during the course of evidence as to whether the manuscript notes themselves had fully captured everything that was said.

7. After we had completed our initial reading and determined all preliminary applications, we heard live evidence from the Claimant and then from Sinead O'Neill, Helen Truscott and Sally Heywood for the respondent. In addition, Mr Carey tabled signed statements of Valentina Sciacca, Yamuna Ale, Sok Choo Lim and Jiby Karapurackal. Their statements were not disputed as such, so they were not required to attend for cross examination. We were provided with a written submission by Mr Cooper, and, after there had been an opportunity for us and Mr Carey to read that, we then heard oral submissions from them both. We reserved our decision which we deliberated in chambers on day four of the hearing.

The Facts

8. In 1995 the Claimant qualified as a school teacher in Zimbabwe. He came to the UK in 2002. He initially worked as a health care assistant but from 2003 to 2006 he trained and qualified as a nurse. He joined the Respondent in 2006 as a newly qualified band 5 nurse, that is to say, a regular ward nurse. In due course he progressed to band 6 and then from July 2013 to a band 7 position working as a senior charge nurse managing a ward. He was required by his contract to comply with various standards of conduct, which, it was accepted before us, included those laid down by the Nursing and Midwifery Council (NMC).

9. In December 2015, following a complaint by a colleague to the police, the Claimant was contacted by the police and voluntarily attended a police station for interview on 2 December. Thereafter no charges were pursued.

10. The Claimant had needed to take time off work to attend the police station. At the time he told his manager, Sally Sweetman, that he needed the time off to deal with a family matter. However, on 14 January 2016 he told her that he had in fact seen the police on that day, and the gist of what it had been about.

11. On or around 16 February 2016, the police contacted the Respondent as, while they were taking no further action by way of criminal process, they considered that the Respondent should be aware of the matter so that it could consider any action it thought might be appropriate.

12. On 18 February 2016 the Claimant was suspended. This was confirmed in a letter of 19 February from Tim Rich, Lead Nurse Specialist Medicine at Charing Cross Hospital. In particular, he wrote that they needed to investigate the following allegations: "There was a possible abuse of power in your role as the band 7 of the Ward. You misused staff information for your personal gain. You failed to inform your manager of the Police investigation on 2 December and did not do so until 13 January." The investigation would be carried out by Sinead O'Neill "over the next few days." The associated protocol was set out. This included that he was not to approach directly anyone who might be involved in the matter, but if he wished to contact potential witnesses he should contact Mr Rich, Ms Sweetman or his Trade Union representative in the first instance.

13. On 24 February 2016 the Claimant provided a written statement giving his account of matters. He set out personal circumstances which had delayed his explaining to Ms Sweetman about the allegations and contact from the police. He then gave an account of his relations with AB. The two of them and a third colleague, all of whom originated from Zimbabwe, had had a conversation together on 18 October, and then he had had a series of further contacts with AB over succeeding weeks. This included an occasion when she invited him to her accommodation for lunch, he stayed for about 15 minutes and they hugged. Then, on 11 November 2016, he had again gone to her accommodation at lunch time and consensual intercourse had taken place. AB's sister had subsequently contacted his wife, and her boyfriend had made more than one drunk and angry visit to the ward looking for him. The Claimant wrote that AB had been pressurised by them to make a false allegation of rape to the police. He wrote that the officer who interviewed him was quite convinced that he was not abusing his position, and had said it was up to him whether he wished to report the matter to his manager. The Claimant maintained that he had never abused or taken advantage of his position as a band 7.

14. A statement was also provided by Mr Rich. During the course of this, he referred to an episode in March 2015 involving another colleague, CD. He wrote that she had told him that the Claimant had made inappropriate comments of a sexual nature to her on the ward, and had also telephoned her at home. She had wanted Mr Rich to speak to the Claimant, but did not wish formally to complain. Mr Rich's account was that he spoke to the Claimant, who told him that he had only been joking and had not meant to make her feel uncomfortable. Mr Rich had informally cautioned the Claimant as to his future behaviour on the ward.

15. We found that it was the mention of this incident by Mr Rich that led Ms O'Neill subsequently to interview CD.

16. A statement was also provided by Ms Sweetman. This included her account of the Claimant's report to her, in January 2016, of his relations with AB, which he had described as a romantic involvement involving consensual sexual contact. He had also given her an account of his visit to the police and the subsequent activities of AB's boyfriend and sister. She also gave an account of her own discussions with DC Fall. She wrote that the police were concerned that the Claimant was using his position to take advantage of vulnerable, junior or

significantly younger or ethnic or religious background colleagues, to instigate a sexual relationship; although they did not suggest that there had been grooming.

17. Ms O'Neill had also hoped to obtain a written statement from Ian Taylor, the General Manager for Specialist Medicine covering the Claimant's ward. However, his commitments meant that he could not prepare one, so she provided him with a list of questions and then met with him on 29 February, making a record of his answers to those questions. He said that he had been informed by Mr Rich in March 2015 of the matters that had been raised by CD.

18. On 1 March 2016 Ms O'Neill interviewed the Claimant and a typed note was made. The Claimant was content to proceed without his union representative present. The interview went over his account of matters to do with AB and the police. Towards the end he was asked whether there had been any similar formal or informal discussions or complaints about his working relationships with colleagues. The Claimant then referred to an incident in 2010 when he had been working on ICU, which he described as involving a formal complaint of a sexual nature and formal investigation; but he said that there had been no case and no action or warning issued.

19. We found that the Claimant's reference to that episode led in due course to Brian Dorman, who had been the matron in ICU at the time, being interviewed.

20. On 1 March 2016 Ms O'Neill also interviewed Ms Sweetman and went through her account, and on 2 March Mr Rich in relation to his account; and notes were made. Also on 2 March she interviewed DC Fall. He explained that the police had not pursued the matter further as, on the account given to them by AB, the sexual encounter on 11 November did not amount to rape. However, the note recorded the concerns of the police that she was a student nurse and "very much his junior at approx. 20 years of age"; and that the Claimant had been in a position of trust and authority, and that the Respondent might need to explore whether there was any safeguarding issue. DC Fall told Ms O'Neill that he had suggested to the Claimant that it may be advisable to let his line manager know about the matter. After speaking to his Detective Inspector they had considered that they should themselves contact the Respondent.

21. We interpose that we did not have definitive evidence before us as to AB's precise age but she was referred to before us variously as being in her early or mid-twenties. Also it was agreed that, at the time of the incident, she had been a student, but had in fact just completed her training, although she was still awaiting formal registration. The Claimant was 44 years old at the time.

22. On 3 March 2016 Ms O'Neill interviewed AB. She gave an account of her relations with the Claimant. She said that during their first discussion, together with a colleague, the Claimant had requested her number so that he could send her a video they had been discussing. In the course of her account, she mentioned that a colleague called Joseph had on one occasion advised her to be careful about getting involved with anyone. He had not named the Claimant but

she believed he had the Claimant in mind. We interpose that this remark led Ms O'Neill in due course to interview Joseph Matibenga.

23. AB gave her account of her subsequent interactions with the Claimant including regular conversations and texts. She had told him at one point to stop contacting her, as he had a wife, but he had said they were estranged. She had declined a request to stay over at her flat and on another occasion a suggestion that they go to a hotel. She had however agreed to meet him for dinner socially. Afterwards they walked back to the station and he suggested that they go into a park, which she had declined. On that occasion he had tried to touch her inappropriately, but she had refused. He had subsequently tried to come to her flat, and had a way of talking her round and persuading her. On the occasion when he came for tea he had tried to touch her inappropriately and she had asked him to stop and to leave, which he then did. AB gave her account of the Claimant's visit on 11 November 2015, stating that he had started to touch her inappropriately and she had then requested he leave; but then they had hugged and he had become more intimate with her and this had ultimately led to intercourse. She gave her account of the subsequent involvement of her sister, mother and boyfriend, and her visit to the police.

24. According to Ms O'Neill's note of the interview AB was visibly upset by the end of their discussion and "self-blaming"; and Ms O'Neill had referred her to supportive agencies and counselling services. AB told her that she had changed her number and had also lost her previous phone.

25. On 8 March 2016 Mr Matibenga was interviewed. He said that he gave all students and newly qualified nurses the same advice along the lines of setting their goals and not getting involved too quickly with someone, as they have a career ahead of them. He denied that he had in mind anyone in particular.

26. Also on 8 March 2016 Ms O'Neill interviewed CD. She gave an account of an incident in February 2015 when the Claimant had commented in the ward corridor that she looked sexy in her dress and had asked to take a photo. She gave an account of an episode in March 2015 when there had been a discussion of the need to give a throat swab to a patient. She said that the Claimant had said that if had been taking the swab from her he would have used his tongue. She also gave an account of an incident on 4 March 2015 when they were alone in the changing room, in which the Claimant had requested a hug. She had declined, but he repeated the request, stating "it's only a hug". She said this had made her feel upset, uncomfortable and disrespected.

27. CD referred, in her interview, to an email she had sent on 13 March 2015 to Mr Rich. We had a copy of that email in our bundle. It was headed "Harassment" and it read: "I just want to bring to your attention a problem I have been experiencing with Richard. I have tried to solve it myself but he does not seem to take me seriously. I respect him as a manager and all I am asking is for him to respect me. Unfortunately, I cannot take his sexual advances and comments any more and it has to stop."

28. CD said she had only mentioned the flu swab allegation to Mr Rich and not the other two (the dress comment and the changing room hug). She went on to say that, following the changing room incident, she had not felt comfortable to use the changing room in case the Claimant might come in. She said they spoke on the phone about appropriate and work-related matters. She had left the ward in April 2015, although she had undertaken some bank shifts on the ward since; and there had never been any further inappropriate or sexual advances after the Claimant had been spoken to by Mr Rich.

29. During the course of her investigation, Ms O'Neill kept in touch with an HR colleague, Ms Raleigh. In light of the further alleged incidents that had emerged, Ms Raleigh suggested that Ms O'Neill conduct a randomised survey by interviewing whoever happened to be on the ward on the day when she visited, asking if any of them had ever observed any untoward incidents. This was to be done without referring to or otherwise identifying the Claimant. Ms Raleigh emailed Ms O'Neill with the wording for some suggested neutral questions.

30. On 10 March 2016 Mr Rich wrote to the Claimant that the investigation was not yet completed, and his suspension would continue, but Ms O'Neill hoped to complete her work by 25 March.

31. On 11 March 2016 Ms O'Neill visited the ward, carried out the survey and recorded the comments received, and who from, in a short document. This included comment from Andrew Gibbs that he had been informed by another staff member – EF – that she had experienced inappropriate behaviour from the Claimant a number of years before. Other interviewees said they had never heard or witnessed any inappropriate behaviour by anyone on the ward (save for one who raised a matter entirely unrelated to the Claimant).

32. The feedback from Mr Gibbs prompted Ms O'Neill to interview EF on 16 March 2016. She gave an account of an incident which she placed in winter 2008/2009 on the nightshift at around 4am when other staff were on a break. The Claimant had commented that she looked tired and needed a massage, and had proceeded to perform a shoulder massage on her. She requested him to stop and said 'no thank you' and he then stopped. The note continues: "[EF] recalls that TC turned her chair around towards him and picked up her left leg stating that her calves looked tense. [EF] recalls asking TC 'what are you doing' and requested him to stop. [EF] recalls she was wearing her nurse dress uniform with tights underneath. [EF] recalls that TC placed his hands on her leg and continued up onto her thigh. [EF] stated that she pushed TC away and told him to stop. [EF] recalls that TC replied saying sorry but he thought she needed relaxing." She then got up from the desk and they never spoke again about the incident

33. The note records EF saying that at the time she was a band 6 and he was a band 5. She only told her husband at the time but then Mr Gibbs a few months later. Thereafter she actively ensured that she was never on a break with the Claimant or alone with him at any time. She had then left to work in the ICU but had now returned as a band 7 on the ward. There had not been any other similar incidents subsequently. She then said that she was aware of another staff

member who had experienced inappropriate behaviour of a sexual nature towards them by the Claimant, who she named, and we will refer to as GH. She also said she had witnessed inappropriate comments by the Claimant in February 2016 towards Valentina Sciacca. She was going for lunch with her boyfriend and the Claimant said: "Don't come back with any love bites".

34. EF's reference to an incident involving GH led Ms O'Neill to interview her on 17 March 2016. She gave an account of an occasion when, during morning handover, the Claimant had commented that she looked stiff, and had begun to massage her shoulders and her back. She had told him she was OK, and to stop massaging her back and shoulders as it made her feel uncomfortable, and he had then stopped. She actively ensured that she was never alone with the Claimant. She had only told her husband about this episode and another staff nurse called Joyce – a reference to Joyce Tayad. She also said she felt the claimant had become more friendly with Ms Sciacca and another colleague, Erin Rebute, and she had advised Ms Rebute to keep her distance from the Claimant. EF said that when the incident had occurred, she was young, new, quiet and fragile. She did not believe that senior staff would have believed her.

35. On 18 March 2016 Ms O'Neill interviewed Mr Dorman. He confirmed that he had undertaken an investigation when he was matron in ICU in 2011/2012. A staff member had raised concerns in relation to inappropriate behaviour of a sexual nature by the Claimant "such as subjective commands, exchanging of text messages and requesting the person to go to another area for breaks and have time alone together." The conclusion was that the matter was resolved informally by requiring both parties to attend mediation. Mr Dorman recalled that he had written a letter confirming the outcome at the time.

36. Ms O'Neill convened a second investigation interview with the Claimant on 5 April 2016 to discuss the further allegations that had come to light. He was accompanied by his then union representative, Karen Buonaiuto of Unison. A note was made.

37. In relation to CD and the dress, the Claimant said she had been on her way to church. He had said she looked smart and asked if he could take a group photo. She had responded that she was married and showed him her wedding ring. In relation to the swab incident, the Claimant said there had been a jokey discussion involving several members of staff around CD's concern that she might herself become infected with swine flu. In the course of this they had said they would between them administer various tests to her, and he would do the swab. He denied saying he would use his tongue. He denied having asked CD for a hug in the changing room. This alleged incident occurred prior to them going together in her car to inspect a possible venue for a leaving party. He recalled a previous difference of opinion with CD regarding a shortage of staff on the night shift. He described Mr Rich as mentioning the flu swab incident to him in passing. He recalled that in December 2015 CD had called to apologise for going to Mr Rich about that incident, and she had wanted to come back and work on the ward.

38. The Claimant denied the whole of the alleged incident involving EF and the alleged incident involving GH. He commented that they were both senior to him. He denied exchanging inappropriate text messages of a sexual nature with any colleague. Regarding Ms Sciacca and the love bites comment, he said he recalled that someone had said this, but it was not him. At the conclusion of the interview the Claimant commented that he felt that there was a conspiracy.

39. On 8 April 2016 Ms O'Neill produced her investigation report. This attached as appendices all of the interview notes and statements that she had gathered, the Respondent's disciplinary policy, the staff survey and the email from CD to Mr Rich in March 2015, as well as the suspension letter.

40. The data protection concern had related to the possibility that the Claimant might have inappropriately obtained AB's mobile number from staff records. However, Ms O'Neill regarded that as resolved by AB's confirmation that they had exchanged numbers. Her report referred to the allegation by AB of a serious sexual assault which led to a concern that the Claimant had abused his position as a band 7 Ward Manager by inappropriate behaviour with a junior colleague. It continued: "Additionally it is alleged that between 2006 and 2015 [the Claimant] displayed inappropriate and unprofessional behaviour of a sexual nature against fellow members of staff." She described this as falling under the section of the disciplinary policy dealing with gross misconduct – serious breach of professional code of conduct and breach of trust. The report included a spreadsheet identifying the particular allegations. It then set out over several pages a summary of the accounts of the various witnesses, including the Claimant, of the various disputed episodes. Her conclusion was that she found that there was evidence to support the two allegations and "therefore my investigation raises enough concerns to warrant the case be heard at a formal disciplinary hearing."

41. On 8 April 2016 Helen Truscott, Deputy Divisional Director of Nursing for Medicine and Integrated Care, wrote to the Claimant inviting him to a disciplinary hearing. She attached two copies of Ms O'Neill's investigatory report (with all appendixes) and referred to the allegations in equivalent wording. The Claimant was told the date of the disciplinary hearing, that the sanctions could include dismissal, and of his right to be accompanied. He was told that Ms O'Neill would present the case as investigating officer and intended to call witnesses, the names of whom were to be confirmed. She continued: "If you believe there are any witnesses who have a significant contribution to make to your case, then please confirm with me who they are by no later than 14 April 2016." He was also asked to provide her with any additional documents by that date.

42. The Claimant obtained some statements from colleagues. Felicity Yeboah-Fordjour gave an account of the dress episode. She said the Claimant had described CD as looking nice and asked for a group picture, causing CD to get angry and flash her wedding ring. She had not heard the Claimant describe her as sexy. He also obtained a testimonial from Elvira Del Valle Cenizo. Ms Sciacca gave a statement that she had always found the Claimant to act professionally and appropriately and that she had never been offended by any comments he had made to her. Reggies Dete – the other colleague who participated in the

Claimant's first conversation with AB – gave a statement about that. He wrote that she had given the Claimant her number so that he could send her the video they were discussing or other materials of a similar nature.

43. On 12 April 2016 the Claimant emailed Ms Truscott that he wanted AB, CD, EF and GH invited to the disciplinary hearing and indicated that he would be contacting Ms Sciacca, Ms Rebute, Anish Gopalan, Mr Dete, Ms Del Valle Cenizo and Ms Yeboah-Fordjour.

44. On 13 April 2016, using her son's mobile, CD telephoned the Claimant and he then returned the call. This was the call which the Claimant clandestinely recorded. The gist of what CD said was that she had sought to explain to Ms O'Neill that the matter between her and the Claimant had been dealt with informally, he had apologised, and she had moved on and regarded it as resolved. She wanted to explain to the Claimant why she would be coming to the disciplinary hearing. She told him that she had not been forced to come to the hearing, but Ms O'Neill had encouraged her to do so, indicating that her testimony might in fact assist him – although she, CD, was not clear how Ms O'Neill thought it might. During the course of the conversation CD referred to the Claimant as "my dear", encouraged him to keep praying, described him as "a pillar for me", and encouraged him to keep strong. At the end she said "Ok baby take care."

45. The Claimant sought to persuade Ms Tayad to give a statement in his support. At one point he texted her saying: "You just have to make it a short statement, explaining as you said to me that [GH] never told you about the incident." However, Ms Tayad was not forthcoming with a statement.

46. On 14 April 2016 Ms Truscott emailed the Claimant that the investigator would be calling the four complainants and Mr Rich as witnesses. Two of them had said that they were willing to attend but would not be willing to give evidence with the Claimant present in the same room. Ms Truscott would therefore ask him to step out when they gave evidence, but his union representative would be able to remain in the room; and she suggested that he and his rep formulate questions to be put to them on his behalf. She noted that the Claimant was planning to send her statements he had gathered, but expressed concern that he had not followed the protocol of going through Mr Rich, Ms Sweetman or his union representative. She also indicated that she needed to understand whether the witnesses would have any significant contribution to make. If they were important, then she was happy for him to contact them in conjunction with his union rep.

47. On 15 April 2016 the Claimant wrote expressing his concern that he would be denied the opportunity to cross examine witnesses, setting out legal argument that this would be unfair to him, and also stating that she seemed to be questioning the significance of his witnesses. Ms Truscott replied that there was no suggestion that he could not call witnesses to support his case and that she merely needed to establish whether they had relevant evidence to give. She said that she was not denying him the right to cross examine, as he could put questions through his rep, but given the sensitive nature of the allegations and the

witnesses not wishing to be in the same room, it needed to be handled that way. The Claimant had also asked to have a legal representative, which she declined.

48. There were further email exchanges on 18 April 2016. The Claimant expressed a concern that the allegations against him were not sufficiently particularised. He raised again the requirement that he leave the room during the evidence of two of the witnesses. Ms Truscott confirmed that the witnesses in question were AB and CD and that he could formulate questions with his union representative for the rep to put to the witnesses. She also involved Ms O'Neill in the exchanges, who confirmed that the first allegation related to AB, and the second related to the alleged incident of a shoulder massage administered to GH, a shoulder and leg massage administered to EF, and two incidents not previously reported by CD, being the dress and the hug. It was also agreed by Ms Truscott that the Claimant could bring a relative to the hearing, David Chimhini. He could not have both Mr Chimhini and his union official act as his representative. But Mr Chimhini would be allowed to stay in the room while the Claimant was outside.

49. The Claimant tabled three statements in his support, being those he had obtained from Ms Sciacca, Ms Yeboah-Fordjour and Mr Dete. He did not ask to bring any of them in person to the hearing.

50. The disciplinary hearing took place on 19 April 2016 before Ms Truscott. She had with her an HR Advisor, who took her own note, as well as a note taker. The Claimant was accompanied by Ms Buonaiuto of Unison and Ms O'Neill presented the management case. At the start of the hearing the Claimant said he had a recording of a phone conversation with CD which he wished to introduce. He confirmed that she had not known she was being recorded. He said that it showed that she had been coerced to attend the hearing. However, he also confirmed in discussion that she had not said in the recording that any of her evidence was incorrect. Ms Truscott declined to listen to the recording. As well as his own statement, the Claimant introduced some supporting WhatsApp messages and emails.

51. After the various allegations had been reviewed, the Claimant left the room and AB was brought in. The Claimant's cousin and union representative remained present. AB confirmed that she stood by the statement she had previously given. She was questioned about her account by the Claimant's representative. In referring to the episode of 11 November, she said that she felt that the Claimant had had no feelings towards her and had been using her. After her evidence was completed, AB left and the Claimant came back in. Ms Truscott then took the Claimant item by item through the evidence that AB had given, and the Claimant's representative and his cousin confirmed that she had given an accurate rendition of this.

52. EF then gave evidence. She gave her account along the lines of her previous statement. She was questioned by the Claimant's representative and the Claimant himself. At one point the Claimant asked her why she had not screamed for help when he lifted up her leg. One note recorded: "Didn't want to escalate. Didn't believe what was happening. When asked to stop you stop. Didn't feel

threatened when you stop." The other note recorded: "I didn't feel threatened because you stopped when I told you to stop. Felt threatened when you put hands up my skirt but you stopped when I asked you." At one point the Claimant put it to EF that she and GH had collaborated on their accounts, which she absolutely denied. In further questioning she described herself as having felt confused and shaken at the time.

53. CD gave evidence with the Claimant out of the room. She confirmed her original statement. She said that she had told Mr Rich about the flu swab incident but not the dress or hugging incidents. She said that her working relationship with the Claimant was otherwise good. She said that the changing room incident had made her feel like she had lost trust in all men. Once again, when she had gone and the Claimant came back into the room, Ms Truscott went through the evidence that had been given by CD, and the Claimant's representative and cousin confirmed that they were satisfied with that account of it.

54. Mr Rich then gave evidence. The Claimant asked if, when Mr Rich had spoken to him, he, the Claimant, had agreed about saying he would administer a swab to CD with his tongue. Mr Rich replied that he remembered that the Claimant had said it had been a joke. GH then gave her evidence and stood by her account of the massage administered to her. She said she had reported this to Joyce, who had commented that the Claimant was "probably just like that" and she had not informed anyone else. The Claimant asked when she had last spoken to Joyce and she said the previous week.

55. During the course of presenting her case, Ms O'Neill highlighted the particular paragraphs of the Nursing and Midwifery Council's Code of Conduct that she considered were pertinent to the allegations. The meeting continued with the Claimant developing and presenting his case along previous lines. Ms Truscott then adjourned to consider her decision.

56. Ms Truscott told us, in evidence, that she discussed the matter with her HR Advisor but that the decision was hers alone. We accepted that.

57. On 26 April 2016 Ms Truscott wrote to the Claimant. She set out the allegations, described the course of the disciplinary hearing and identified all the documents that she had considered. She referred to the Claimant's application to introduce the covert recording of the telephone conversation and said that she had refused to admit this because the Claimant had taped the conversation without the witness's agreement. She noted that an email had confirmed the particulars of the incidents relied upon. She cited paragraph 20 of the NMC Code concerning the duty to "[u]phold the reputation of your profession at all times." It identified what must be done to achieve this. Of these sub-paragraphs, she cited the following:

> 20.1 keep to and uphold the standards and values set out in the Code.
>
> 20.2 act with honesty and integrity at all times, treating people fairly and without discrimination, bullying or harassment.

> 20.3 be aware at all times of how your behaviour can affect and influence the behaviour of other people.
>
> 20.5 treat people in a way that does not take advantage of their vulnerability or cause them upset or distress.
>
> 20.6 stay objective and have clear professional boundaries at all times for people in your care (including those who have been in your care in the past), their families and carers.
>
> 20.8 act as a role model of professional behaviour for students and newly qualified nurses and midwives to aspire to.

58. Ms Truscott continued that she had considered the case presented by Ms O'Neill, the Claimant's response to the allegations, his previous work record and mitigating circumstances put forward. She had upheld both allegations. She set out the matters she had taken into account. In relation to the first allegation this included the following passage:

> It was clear that [AB] was distressed by the nature of the relationship that took place and at the hearing she described herself as naive. You did not deny that you had sexual intercourse with her on this occasion during your lunch break. You said yourself at the hearing that you were saddened by the events that took place and that you went overboard and that you should have stopped things before they developed further. Whilst I stated that it was not the purpose of the hearing to consider the nature of the sexual intercourse that took place, it is clear to me that in undertaking this conduct you failed to uphold the standards of the profession both in your management capacity and in your role as a qualified nurse. Whilst I accept that staff relationships outside of work are not the business of the employer, it became clear from the investigation and during the hearing that you pursued this relationship in a way which made the member of staff feel uncomfortable. … I accept that she could have stopped the relationship at any time and did not do so. It was the choice that both you and [AB] took to continue to pursue a relationship including the specific behaviour which took place during your lunch break, which I now turn to.

59. Ms Truscott went on to set out the Claimant's account of that particular encounter. She commented: "As a professional nurse it is expected that you are a role model for junior members of staff and lead by example at all times. As a role model you would be someone who a junior member of staff looks up to and aspires to be. You failed to consider your NMC Code in relation to your visit." She concluded that the Claimant's behaviour had fallen "well short of the required professionalism." He had undermined confidence in his professional behaviour and integrity in a significant way. "You acted in a way which made a more junior member of staff feel vulnerable and used by you. You have therefore undermined confidence in your ability to be in charge of staff and the confidence of the trust that you will act with openness and integrity at all times. I therefore find that allegation one that you abused your position as a band 7 ward manager to be found. I further find that you breached your professional code of conduct …". She concluded that this amounted to gross misconduct.

60. Ms Truscott went on to give an account of the incidents as described by EF and GH. She noted that CD had described three incidents, one of which had been informally resolved earlier. She said that she would not be taking forward the dress incident, referring to the statement of Ms Yeboah-Fordjour "which did call into question whether this took place in the manner recorded by [CD]." The third incident was the hug. She noted that the Claimant denied all of these incidents. She referred to Mr Rich's evidence, and the Claimant's account that they had discussed it only in a passing manner, but Mr Rich's account differing from this and indicating that he had reported it to his manager, Mr Taylor.

61. Ms Truscott continued: "On reviewing the statements and the information provided by the witnesses on the day describing a similar pattern of your behaviour towards them, I have concluded that on the balance of probability these incidents did occur." She took into account that they were isolated incidents which on their own might not have been sufficient to undermine confidence, but there was a pattern of behaviour. "I am concerned that despite being told in no uncertain terms by the staff involved that this type of conduct is unwelcome you have pursued a line of conduct which undermines confidence in your professional conduct and trustworthiness." She considered that the behaviour amounted to a breach of the Respondent's Dignity and Respect at Work policy and amounted to sexual harassment, and she referred to the ACAS definition of this. She referred also to the Claimant's failure at the time to be candid about his visit to the police, although she noted that this was not part of the specific allegations.

62. Ms Truscott's conclusion was that allegations one and two were well founded and that the Claimant was dismissed with immediate effect for gross misconduct. She wrote that she would have no alternative but to report the matter to the Nursing and Midwifery Council. The Claimant was informed of his right of appeal and how to exercise it.

63. Having received the dismissal letter, later the same day the Claimant exchanged emails with Ms Tayad. He told her that by refusing to tell the truth that GH had never mentioned to her the massage incident he had now lost his job and was being referred to the NMC. Ms Tayad replied: "This message is actually quite sad. Sad in the sense that you are blaming me for how your life is now. Life is what you make it…EVERY decision and action you do has a ripple effect. My decision not to make a statement was made before even [GH] has spoken to me. [GH's] accusation was just a tip of an iceberg. My statement would NOT make a difference on the outcome. I do hope you will reflect on this." In a further exchange the Claimant invited her to consider her conscience and she replied that he forgot that she did not have a conscience and it would not make a difference.

64. The Claimant appealed to Sally Haywood, Divisional Director, in a long letter of 9 May 2016. He complained that the sanction was disproportionate and the investigation biased. He referred to witnesses, including Andrew, Anish, Rita and Joseph, who he said were not interviewed. He complained about not being able to question two witnesses directly and being sent out of the room. It was unfair that he was required to obtain permission to speak with staff or witnesses and for the relevance of his witnesses to have been queried. He suggested that

matters could have been better resolved by action falling short of dismissal. He had reflected on matters and changed his working practices and would not enter into any relationships outside of working hours in the future. It had been acknowledged that relationships outside of work were not the business of the employer. He complained about allegations being relied upon dating back ten years. He was concerned that two staff had admitted speaking to each other, which, he said, was clear evidence of collusion. He questioned the credibility of Mr Rich, who had been covering his back.

65. Further on, the Claimant gave sincere apologies "should my colleagues be concerned by my behaviour and I would have expected such matters to be highlighted sooner…". He suggested that matters could have been dealt with by a final written warning together with training and support or supervision. He submitted, citing authority, that it should not be assumed from a finding of gross misconduct that the appropriate response was dismissal. He concluded: "My understanding and insight into the allegations demonstrate that such an incident is unlikely to occur again in the future, thus the matters would have been better resolved with action falling short of a dismissal as the dismissal is devastating and I have honestly learnt from these matters and would like the opportunity to demonstrate this to the Trust. I am also pursuing a claim for unfair dismissal with the Employment Tribunal lodged but if the panel considers the reinstatement this would obviously go no further."

66. Ms O'Neill prepared a management response to the Claimant's appeal. In the course of this she noted that he had not asked for any of the witnesses he mentioned to be interviewed. Witnesses who could only deal with the flu swab incident were not interviewed, as this had been resolved by Mr Rich. Mr Matibenga in fact *had* been interviewed. She noted that other statements had been submitted by the Claimant. Regarding the two witnesses for whose evidence he had been sent out of the room, she defended the arrangements in view of the reluctance of those witnesses to give evidence while he was in the room, and noted that there had been no application to recall either of them.

67. The appeal hearing took place before Ms Heywood on 23 June 2016. The claimant was now represented by Mr Carey of the Independent Democratic Union. Ms Heywood was supported by an HR Manager. The hearing was also attended by Ms Truscott. During the course of the hearing the Claimant and his representative developed his appeal case.

68. On 29 June 2016 Ms Heywood wrote to the Claimant with her decision. She noted that at the outset they had identified to the particular grounds of appeal. In the remainder of her letter she cited each of the grounds set out in the Claimant's document and then, in relation to each, set out her conclusions. She concluded that the Claimant had been able to call all the witnesses he might wish to the disciplinary hearing. He had been provided with clarification of the detailed allegations prior to the hearing. She considered that the requirement for him to go through Mr Rich, his union representative or Ms Sweetman to contact witnesses was a reasonable arrangement. As to his querying why disparate incidents going back ten years had been relied upon, she considered that they did demonstrate a

pattern of similar behaviour. She noted that Ms Truscott had declined to listen to the tape of the telephone conversation with CD, as CD was still unaware of, and had not consented to, it being recorded. She was satisfied that the staff survey had been carried out randomly and without leading questions. She accepted that Ms Truscott was satisfied that there had been no collusion between EF and GH and that it was only when they had spoken to each other that they had discovered that they had had similar experiences. She concluded that there was no link between how Mr Rich had managed CD's concerns and his credibility; and no evidence that the Claimant had requested a postponement of the disciplinary hearing. Regarding the arrangements for questioning of two witnesses with the Claimant out of the room, she described these as exceptional circumstances. She considered that Ms Truscott had gone above and beyond what a reasonable chair would do to facilitate a hearing for all parties, and did not believe the Claimant had been disadvantaged by the method of questioning.

69. The Claimant had complained of three females (Ms O'Neill, Ms Truscott and herself) being involved in the process and lacking objectivity, but Ms Heywood rejected this. Regarding sanction, she considered that AB had been distressed by the nature of her relationship with the Claimant. He had made unreasonable assumptions about her based on her qualifications and age, and did not fully appreciate her vulnerability. There had been a pattern of inappropriate behaviour contrary to the Trust's dignity and respect policy. At the appeal hearing he had not demonstrated his understanding of the impact that his actions could have. He had said that he would speak to the male staff to tell them to not get involved in any joking about anything with sexual connotations. She did not have confidence that his reflections had altered the way he would behave in the future. She did not consider that mediation with GH would provide adequate assurance to enable him to return to managing a ward of 27 nurses. She did not have trust or confidence that he would not continue to display similar behaviour in future and this was why the option of a final written warning had been rejected. She had reviewed the testimonials and text messages, but did not consider that they demonstrated either way whether staff did or did not want him to return to work. The Claimant was still not demonstrating an understanding of his professional accountability or responsibility. She therefore declined to uphold his appeal.

The Law

Unfair Dismissal

70. Section 98(1) **Employment Rights Act 1996** provides that it is for the employer to show the reason or principal reason for dismissal, and that it falls within section 98(2) or is some other substantial and potentially fair reason. A reason falls within section 98(2) if, among other possibilities, it relates to the conduct of the employee.

71. Section 98(4) provides:

> 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.

72. Where the employer has shown that the dismissal was for conduct then, in considering whether it was fair pursuant to section 98(4) **British Home Stores v Burchell** [1978] IRLR 379 indicates that the Tribunal should consider whether the employer had a genuine belief that the employee had committed the misconduct, whether there was a reasonable investigation, and whether, in light of the fruits of that investigation, that belief was reasonably held. The Tribunal must also consider whether the sanction of dismissal for the conduct found to have occurred was a reasonable one. In approaching all of these questions the Tribunal applies a "band of reasonable responses" test. The Tribunal must not substitute its own view for that of the employer, but must consider whether the employer's approach to all of these matters was within the band of responses or approaches that it was reasonably open to it to take, even if some employers might have taken a different approach. See: **Post Office v Foley** [2000] ICR 1283 and **Sainsbury's Supermarkets Limited v Hitt** [2003] IRLR 23.

73. There may be other particular issues said to impact upon the fairness of the particular dismissal in all the circumstances of the given case. A number of authorities provide guidance on the approach to take to particular types of issue that may arise in a given case. Ultimately the fairness of the dismissal must be judged by applying the words of the statute to the overall "end to end" process including the appeal stage. See: **Taylor v OCS Group Limited** [2006] ICR 1602.

74. Section 122(2) of the 1996 Act, provides as follows.

> Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

75. Section 123(6) provides:

> Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

76. The Tribunal must decide, drawing on the evidence available to it, and its findings of fact, whether or not, in its own view, there has been conduct of this sort. **Nelson v BBC (No 2)** [1980] ICR indicates that this will encompass conduct

which the Tribunal considers to be "culpable or blameworthy." That need not involve a breach of contract, or a tort, and may include conduct which the Tribunal considers was perverse, foolish, bloody-minded, or though not warranting any of those epithets, was nevertheless sufficiently unreasonable in all the circumstances to be viewed as culpable or blameworthy.

77. By virtue of section 116 the Tribunal is also required to take into account any finding of contributory conduct in deciding whether or not to grant an application for a reinstatement or re-engagement order.

Discrimination

78. Section 39 **Equality Act 2010** makes it unlawful for an employer to discriminate against an employee, among other things, by dismissing him or subjecting him to any other detriment. Section 13(1) provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. Section 23(1) provides that on a comparison for these purposes there must be no material difference between the circumstances relating to each case. Protected characteristics for these purposes include sex and race. "Race" is defined by section 9 as including colour, nationality and ethnic or national origins.

79. Section 136 provides for the shifting of the burden of proof to the respondent in certain cases. There is guidance in a number of authorities, including **Hewage v Grampian Health Board** [2012] ICR 1054 and the earlier cases there cited.

Wrongful Dismissal

80. The **Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994** give the Tribunal jurisdiction to consider certain breach of contract damages claims by ex-employees, including for wrongful dismissal or notice monies. A dismissed employee is entitled to the appropriate period of contractual or statutory minimum notice, or payment in lieu, unless he is himself in fundamental breach of contract.

The Tribunal's Further Findings and Conclusions

Unfair Dismissal

81. What was the reason for dismissal?

82. We were satisfied by the Respondent that the decision to dismiss the Claimant was taken by Ms Truscott; and that the reason why she dismissed him was because she genuinely believed that he was guilty of conduct which merited dismissal, as set out in her dismissal letter. We were also satisfied that the decision in relation to the Claimant's appeal was taken by Ms Heywood, and that

the appeal was unsuccessful for the reasons that she gave in her letter setting out its outcome. These included that she did not believe that any of the grounds for appeal ultimately had merit and, on the basis of the material available to her, she too believed that the Claimant had indeed been guilty of conduct that in all the circumstances merited the sanction of dismissal.

83. We were entirely satisfied of these matters, having regard, in particular, to the fact that both decision-makers had evidential material before them which supported their decisions, our conclusion that both clearly subjected that material to careful and detailed analysis, as set out in their decision letters, and the way in which both cogently defended their respective decisions in live evidence and under cross-examination before us. In particular, the Claimant was required in his role to comply with the Nursing and Midwifery Council's Standards of Conduct; and it was clear to us that both of these decision-makers regarded those standards, which we have extracted earlier in this decision, as their touchstone when evaluating the conduct of the Claimant which they found had occurred.

84. Accordingly, the Respondent had satisfied us that this dismissal was for a potentially fair reason relating to conduct.

85. Was this a fair dismissal in all the circumstances of the case, applying the test in section 98(4)? We consider, first, a number of particular issues of fairness that were raised in relation to the conduct of the investigation in this case, as summarised at paragraph 6 of the list of issues. As already noted sub-issues (a) to (d) were ultimately not pursued. At 6(e) the list referred to "the methods used to collect evidence in the investigation". Under that general banner Mr Carey advanced a number of more particular points in closing submissions.

86. First, he said that the choice of Ms O'Neill to conduct the investigation was unfair. She was approached by Yvonne Goddard, Deputy Divisional Director of Nursing, but Ms Heywood confirmed in evidence that it was she who had suggested that Ms O'Neill might be suitable for this role. Mr Carey's criticism focused on the fact that Ms O'Neill is employed as Directorate Lead Nurse for HIV Sexual Health and Infection based at St Mary's Hospital. She accepted in evidence that, insofar as her work brings her into contact with issues of sexual misconduct, she tends predominately to deal with those who have been the victims rather than the perpetrators of such conduct. Mr Carey submitted that this meant that she would, consciously or not, be more disposed to adopt the alleged victim's perspective in such a case. It is fair to note that Ms O'Neill did not accept that when put to her in cross-examination; but at this stage our focus is on the fairness or not of the *choice* of her act as investigating officer.

87. Ms Heywood, in evidence, did not accept that this aspect of Ms O'Neill's work meant that she could not carry out the task objectively; and we saw no reason why Ms Heywood ought, merely because of the nature of Ms O'Neill's job, reasonably to have doubted that. In any event, Ms Heywood said that this was only part of her reason for suggesting Ms O'Neill, who she also considered would be suitable, given that she was based at a different hospital, and that she had experience in dealing with matters arising under the Respondent's disciplinary

procedures. Mr Carey also pointed to the fact that paragraph 4.1.2 of the Respondent's disciplinary procedure contemplates that a line manager will carry out such an investigation; but we could not see that that made it *unfair* in this case that the individual who did so was *not* the Claimant's line manager.

88. So, we did not find that the choice of Ms O'Neill as investigator was unfair.

89. Mr Carey's second line of argument under this heading was to the effect that Ms O'Neill should have been more proactive in seeking out and interviewing potential witnesses who might have relevant evidence to give to her investigation. In this sense she had terminated the investigation prematurely. Ms O'Neill accepted in cross-examination that at least some of the individuals raised by Mr Carey might have had some relevant evidence to give, but she was mindful that the investigation had already gone on for some weeks, and that at his second interview the Claimant and his representative were pressing her to bring it to a conclusion, and she considered that sufficient evidence had been gathered to enable her to make a recommendation at that point.

90. When considering the section 98(4) test, as elaborated in **Burchell**, the concern of the Tribunal is with whether the matter has been sufficiently fairly investigated up to the point when the decision to dismiss is taken. We will return later in this decision to the particular individuals who it was argued should have been approached or investigated more than they were, up to that point. At this stage we note that when the Claimant was first suspended he was given to understand that the investigation would take a few days. On 10 March he was told that it was hoped to complete it by 25 March but the second interview did not take place until the 5 April. It was also correct that he and his representative did, at the second meeting, express some impatience with who long the process was taking. Further, by that time all of the witnesses who had first hand evidence to give about the alleged misconduct had been interviewed. In all those circumstances, we did not find Ms O'Neill's decision to complete her report, without conducting further interviews, as such, to render the dismissal unfair.

91. Next Mr Carey pointed to the fact that the records created by Ms O'Neill in respect of each witness interview were in the form of typed summaries of what each witness had told her in response to her questions. With one exception, the notes did not, however, record the questions that were asked, nor had they been signed by the witnesses concerned. The exception was the record of Mr Taylor's interview, which included the questions that he had been asked, as well as the answers, for reasons noted in our earlier findings.

92. As to this, many employers conducting an investigation of this sort will send the witness a draft statement or record of matters coming out of their interview, so that the witness can confirm or correct the content, or otherwise sign off on it. It might have been better if Ms O'Neill had done that. However, as the authorities indicate, there is no legal principle to the effect that an employer who does not take that approach is necessarily not acting fairly. It all depends on the circumstances of the case. In this case, the records created of what the witnesses had told Ms O'Neill were clear, they were provided to the Claimant, and they were

the same records that were available to Ms Truscott. He also had the opportunity to make his submissions to her at the disciplinary hearing about their content; and the complainants all gave evidence at the hearing itself. We did not consider in all the circumstances that the handling of this aspect of matters was unfair.

93. A further point raised by Mr Carey in similar vein was that the record of the random staff survey was limited in form. He also particularly submitted that there was no sign that any probing questions had been put to Mr Gibbs about what he said he had been told by EF. However, Mr Gibbs was only an indirect witness, the detailed account of what she said had occurred coming from EF herself. Further, the record, as far as it went, was made available to the Claimant and was the same record that was put before Ms Truscott; and he had the opportunity to make any submissions he wanted, at the disciplinary hearing, about its limitations. In all these circumstances we did not find any unfairness in this regard.

94. Next, submitted Mr Carey, Ms Truscott was wrong to make "findings" in her investigation report; and, bearing in mind the amount of time that had passed since some of the alleged episodes, did not have a sufficient basis for doing so. As to that, Mr Cooper submitted that it was clear, reading her report as a whole that Ms O'Neill was not making findings of *fact* drawing on the evidence she had gathered. Rather, she was setting out what *evidence* she had found, and her conclusion that this evidence was sufficient to support a case for the Claimant to answer in formal disciplinary process.

95. We agreed with Mr Cooper that this was indeed plainly the general approach and methodology of Ms O'Neill's report. It exhibited the records of all the evidence that she had gathered and, on the various potential issues, summarised what she found was the Claimant's evidence as well as that of other witnesses. It is clear, and was we think inevitable, that she to some extent formed her own judgment of the material in deciding whether there was a sufficient case to answer; and this is reflected at points for example in her references to "inappropriate sexual behaviour". However, it is also clear from reading the report that Ms O'Neill plainly ultimately was concerned with that threshold test; and given that Ms Truscott had available to her not only the report itself but all of the appendices, the way in which this material was presented, and the contents of the report, did not in any way restrict her ability to come to her own independent view.

96. As to the fact that some of the allegations related to episodes occurring some years before, Ms O'Neill in cross-examination indicated that she had taken this into account in terms in particular of its impact on the reliability of recollections. Given the content of the accounts that she was given, and the fact that we were satisfied that the particular allegations that were pursued and relied upon had not previously come to management's attention, we did not find any unfairness in this regard.

97. Next, Mr Carey argued that Ms O'Neill's approach to the material was unfair, given that lack of corroborative evidence for the complainants' accounts. However, Ms O'Neill was reasonably entitled to take a view, given the content of their accounts, that they were credible and serious enough to warrant further

consideration in disciplinary process. She was also reasonably entitled to take the view that the fact that complainants had continued subsequently to have contact with the Claimant did not mean that they were necessarily not to be believed.

98. Next, Mr Carey pointed to the fact that the processes followed by Mr Dorman in 2011 or 2012 and by Mr Rich in 2015 were entirely informal, and neither resulted in any finding of misconduct or sanction against the Claimant. That is correct, but the Respondent did not rely on them as demonstrating prior misconduct. To the extent that they were relied upon at all it was by way of background to the effect that, in light of these episodes, the Claimant would have been well aware of the importance of appropriate conduct in this general area; but in any event the Claimant never disputed that he did fully appreciate the relevant standards of conduct. There was therefore no unfairness in this regard.

99. Finally, under this general sub-heading, Mr Carey submitted that the evidence before us suggested that CD had been unfairly put under pressure by Ms O'Neill to appear as a witness at the Claimant's disciplinary hearing. As to that, it was plain to us that Ms O'Neill did want all four of the complainants to attend and give evidence in person at the disciplinary hearing. The Tribunal did not find that surprising, as such. They were clearly the four key witnesses in support of the management case. We also accepted Ms O'Neill's evidence that she considered it fair to the Claimant that there be an opportunity for them to be cross-examined in person at that hearing. It was also plain to us that, although they had all given their accounts in interview, Ms O'Neill was concerned that one or more of these complainants might be reluctant to come to the disciplinary hearing itself. As we have recorded, two of them indeed indicated that they would not be prepared to give evidence with the Claimant in the room.

100. Against that background, and having taken account also of the transcript of the recorded telephone call with CD, we accepted that Ms O'Neill did, when she rang CD to confirm the date of the disciplinary hearing, offer CD words of encouragement to attend, including saying something along the lines that it might in fact assist the Claimant if she did. However, it was also clear from that evidence that CD was *not* told that she was required or instructed to attend or that she would suffer, or risk, any kind of detriment if she did not. We found no basis to conclude that Ms O'Neill unfairly crossed a line in this regard.

101. The next point raised in the list of issues, at paragraph 6(f), concerned "the selection of witnesses by the investigating manager." This to some extent traverses again ground that we have already covered and/or will return to further later in this decision. At this point, however, we note in light of our findings of fact, that it is clear that Ms O'Neill followed a logical line of investigation, starting with interviewing the Claimant and the original complainant (AB), and the key managers, and that it was as those statements or interviews brought to light other alleged incidents, and other potential key witnesses, that she followed the evidence trail effectively where it led. Further, as we have found, her focus was on interviewing the individuals who appeared to her to be the direct witnesses. Certainly we found no reason to conclude that her methodology or approach to who she interviewed was intended to be skewed against the Claimant.

102. The next matter relied upon (at paragraph 6(g)) was "preparation time from when the allegations were confirmed." This was a reference to the fact that the exchange of emails regarding the specific details of the charges took place only a day before the disciplinary hearing itself. We considered that it would have been better if the letter inviting the Claimant to the disciplinary hearing had, when setting out the disciplinary charges, set out in the same place the specific episodes relied upon. However, the Claimant knew the particular allegations that the Respondent was concerned about as a result of his two investigatory interviews; and if he might have been unsure, reading the letter summoning him to the disciplinary hearing, by itself, which of these was now being relied upon to support the disciplinary charges, then the investigation report and its appendices which he got with it, made that entirely clear.

103. Further (and consistently with the foregoing), there was no sign that, when he got the reply to his later email, the Claimant was in any way surprised by the confirmation given; nor did he indicate at the disciplinary hearing that he had been taken by surprise or required more time to prepare in light of that reply. In all the circumstances, we did not find any unfairness in this regard.

104. The next matter (paragraph 6(h)) was "the decision not to admit a covert recording obtained by the Claimant purporting to demonstrate witness coercion". As we have noted, there was a dispute before us as to whether that same recording should be admitted into evidence before the Tribunal, which we resolved in the Claimant's favour. However, we are now considering a different question, namely whether the Respondent's approach to this matter in the internal disciplinary process, was out with the band of reasonable responses.

105. In this regard, we considered the following factual points to be significant. Firstly, when the Claimant raised the matter of the recording at the disciplinary hearing, he was asked some questions about it. He specifically confirmed that nothing CD had said in the phone call cast doubt on her interview evidence. Secondly, while he alleged that CD had been coerced to attend, Ms O'Neill disputed that. Further, CD was going to give evidence at the disciplinary hearing herself, so there would be an opportunity for the question of coercion to be raised with her and indeed further with Ms O'Neill. Thirdly, while Ms Truscott did not spell this out during the disciplinary hearing itself, we accepted that she (in conjunction with her HR advisor) had a genuine concern not to be seen to condone members of staff clandestinely recording one another, particularly in such a context. That was a legitimate consideration for her to have taken into account. More generally, when applying the section 98(4) test, the Tribunal will not hold the employer to the same approach which the Tribunal would take when deciding questions of whether to admit evidence of this sort.

106. Ultimately, bearing in mind all these particular considerations, we considered that Ms Truscott's approach (also confirmed by Ms Heywood on appeal) was within the band of reasonable responses on this aspect.

107. The next matter raised in the list of issues (6(l)) was the "admissibility and reliability of the evidence of two witnesses raising complaints eight years (or more) old after having spoken with each other." This was a reference to EF and GH.

108. As to the length of time which had elapsed since the alleged incidents, we have already partly addressed this. Their allegations were investigated as soon as they came to management's attention. Management were reasonably entitled to take a view that they were sufficiently serious to warrant consideration, and that the credibility or reliability of their accounts could be tested and evaluated in the disciplinary process, as indeed they were. It was not disputed that EF and GH had spoken to each other, but we were satisfied from all the evidence we had, that both Ms O'Neill and in particular Ms Truscott gave careful consideration to the possibility of collusion or contamination. EF in particular, when asked, denied collusion; and her evidence was to the effect that it was only when she and GH spoke to each other that they discovered that they had had similar experiences, which gave her confidence that she ought to pursue the matter in a way that she had not done previously. The similarities between their accounts, by themselves, could potentially cut both ways. They could equally point to collusion or contamination, or merely to veracity. We were satisfied that the managers concerned evaluated this aspect of the evidence before them, and drew conclusions about it, in a way that was reasonably open to them.

109. The next matter raised, at paragraph 6(j), was the limitations placed on the Claimant's ability to challenge the evidence of the two witnesses who requested that he not be present. This therefore related to AB and CD.

110. There were a number of factors to be considered here. Firstly, these were two of the four complainants, the allegations against the Claimant were serious, and in the case of CD the specific factual conduct alleged was entirely disputed and denied. In those circumstances we considered, as a starting point, that fairness in this case dictated that the Claimant should have some fair opportunity to test and challenge their accounts by questions being put to them directly. However, we did not think that the *only* way that this could fairly be done would be if they were asked questions, and answered, with him present in the room at the same time. We accepted that both of these witnesses had told Ms O'Neill that they would not be prepared to give live evidence with him in the room. Given the nature of the allegations, Ms O'Neill was wholly entitled to take those assertions at face value, and to be concerned that they needed to be addressed by finding some other solution in fairness to the Claimant, and having regard to the Respondent's duties to the witnesses.

111. Where such difficulties arise, there are potentially a number of solutions that might in theory be adopted. In the criminal courts for example, solutions commonly adopted are the use of screens for a witness giving live testimony, or the use of pre-recorded interviews which a defendant is able to see and hear. However, our specific concern was with whether the particular solution actually adopted by the Respondent in this case was a reasonably sufficient one.

112. In evidence, Ms Truscott maintained that the solution adopted placed the Claimant at no disadvantage whatsoever when compared with how matters would have stood had he been able to see or at least hear the witnesses answering questions as they were put. We did not entirely agree with that. He did lose the benefit of being able, if not to see the witnesses' demeanours, to hear the particular precise way in which they framed and expressed their answers. However, in light of our findings, we were satisfied that he was, when he returned to the room, after each witness had completed her evidence, given an account, step by step, of all of the evidence which that witness had given. Further, his representative and his cousin had, immediately before, heard the evidence being given, so would have been in position to say if they thought the accounts given to the Claimant were in any material way misleading, inaccurate or incomplete. They could have raised with Ms Truscott any such concerns, but none were expressed.

113. A further point of concern raised by Mr Carey, however, was that both witnesses went on their way before the Claimant came back in the room. This meant that if he was concerned that follow up questions needed to be put (or, as he said in evidence, that not all the questions he had discussed with his representative had in fact been put) he lost the opportunity to have this addressed. We considered it would have been better had both witnesses been told to wait somewhere, so that this contingency could be addressed, if necessary by recalling them. However, we were also satisfied that in the event, having heard what evidence these two witnesses had given, and his union rep and cousin having approved that account, the Claimant did not in fact give any indication of concern that any questions he expected to be put had not been put, or that there was a need for any follow up questions. So even if there could have been a difficulty in getting the witnesses back, had he done so, that did not, in the event, arise.

114. Whilst management might therefore potentially have found themselves in difficulty, that *could* have led to some unfairness, in all the circumstances as they in fact unfolded, we concluded ultimately that the approach taken to this aspect of matters was within the band of reasonable responses. In short, there was a sufficient opportunity for the evidence of these witnesses to be challenged directly on the Claimant's behalf, and for him to react to their testimony, such that the handling of this aspect did not, ultimately, render the dismissal unfair.

115. The next matter raised in the list of issues (at 6(k)) was Ms Heywood having acted as the manager hearing the appeal. Mr Carey said this was not fair given that she had originally suggested Ms O'Neill, that she had been made aware of the original allegation at the outset, and that she line managed Ms Truscott.

116. Clearly, if a manager has had some direct involvement in the matters that are the subject of the disciplinary charges, they would not be an appropriate choice to hear the appeal. They would also not be an appropriate choice if their independence has been contaminated by some involvement in the disciplinary decision that is the subject of the appeal. However, Ms Heywood's prior involvement was limited to the matters identified by Mr Carey. She knew of the original allegation and had suggested Ms O'Neill, but she had not in any way been involved in Ms O'Neill's investigation nor in Ms Truscott's disciplinary process. We

accepted her specific evidence that Ms Truscott did not talk to her at all about the matter prior to Ms Truscott reaching her decision to dismiss, and that, after her initial involvement, at the start of the investigation, she only became involved again once the appeal was under way.

117. Nor did the fact that Ms Heywood was earmarked to hear any potential appeal demonstrate prejudgment or inappropriate involvement on her part. This is, in the Tribunal's experience, a common and indeed sensible precaution, where it is known that the disciplinary process provides for a right of appeal, given that a lay manager has to be found who would be available to fit such a task around their ordinary work commitments, and indeed so that the person who may in due course hear any appeal can be alert to avoid contamination by substantive exposure to the process in the meantime.

118. Nor do the standards of fairness necessarily dictate that an appeal must in all cases be heard by someone who forms part of an entirely different line management chain from those involved in earlier stages of the process. Such an approach might help to reassure the employee concerned that there is no possibility of bias. But it is in the nature of internal disciplinary processes, that employees subject to them may harbour suspicions that any manager from the same organisation may be influenced by conscious or unconscious bias in favour of the case put forward by a fellow manager. However, the standards of fairness do not dictate that such tasks must therefore always be given to outsiders.

119. In all these circumstances we did not consider that the choice of Ms Heywood to be the manager who determined the Claimant's appeal fell outside of the band of reasonable responses.

120. We return now to the issues raised regarding whether, at some point prior to the disciplinary decision being taken, more should have been done to obtain witness evidence from a number of particular individual employees. In relation to this aspect, we were referred to the guidance given in **Roldan** [2010] ICR 1457 (CA) and **A v B** [2003] IRLR 405 (EAT).

121. The decision in **A v B** includes the following passage

> 58. We accept the submission of Mr Galbraith-Marten, for the Appellant, that the relevant circumstances do in fact include a consideration of the gravity of the charges and their potential effect upon the employee. As we have said, that was not in fact his principal submission to the Tribunal on this point.
>
> 59. The lay members of this Tribunal have no doubt from their own industrial experience that what would be expected of a reasonable employer carrying out, say, an investigation into a disciplinary matter leading at worst to a warning would not be as rigorous as would be expected where the consequences could be dismissal.
>
> 60. Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the

investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.

61. This is particularly the case where, as is frequently the situation and was indeed the position here, the employee himself is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field, as in this case. In such circumstances anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances.

62. The Tribunal appear to have considered that the fact that there was a real possibility that the Appellant would never work again in his chosen field was irrelevant to the standard of the investigation. In our view the Tribunal was strictly in error in saying that it has no significance. However, it seems to us that it is only one of the very many circumstances which go to the question of reasonableness.

63. We accept the observations of Mr Pepperall, for the Respondent, that the standard of reasonableness required will always be high where the employee faces loss of his employment. The wider effect upon future employment, and the fact that charges which are criminal in nature have been made, all reinforce the need for a careful and conscientious enquiry but in practice they will not be likely to alter that standard.

122. The Court of Appeal in **Roldan** endorsed the guidance in **A v B**.

123. Mr Carey highlighted two, potentially interacting, features of this guidance: that where, for example, in a regulated field – such as applied to the Claimant as a nurse – the ramifications of dismissal for the employee's career may be particularly great, this is a relevant consideration in judging the fairness of the dismissal; and that where the charge is of particularly grave conduct, this may dictate a higher standard of investigation, including of potentially supportive evidence to the employee's case, as well as the management case.

124. However, we note two other considerations which may need also to feature in the Tribunal's overall assessment of the fairness of the process in a given case. Firstly, even in cases of this type, standards of fairness do not mean that an employer is necessarily bound to investigate every last line of enquiry, or to interview or seek to track down every last witness, that the employee raises or argues ought to be spoken to. Management is not necessarily bound, in fairness, to comply with the employee's every wish in this regard. It is entitled to exert *some* control over the scope of the investigation, and the amount of time and resource devoted to it, and make *some* judgment about the potential significance of a suggested witness' potential input, or line of enquiry, the safeguard, as always, being that its approach must fall within the band of reasonable responses.

125. Secondly, as **A v B** highlights, a potentially relevant consideration in such cases is the extent to which the employee has (which may occur for good reasons, as such) been restricted from directly or indirectly approaching, or gathering evidence, from potential witnesses himself. The greater such restrictions are, the greater may be the duty on management to be proactive itself in this regard. In the present case, however, whilst the Claimant was prohibited from approaching witnesses directly himself, he *was* told of the channels (including his own representatives) through which arrangements could be made to approach and interview any witness, and he was told that he could, in principle, bring witnesses to the hearing to give evidence in person. Further, in light of these principles, it was not unfair, as such, for Ms Truscott to ask to be told what, in principle, the relevance of a proposed witness' evidence was said to be.

126. Against that background we turn to consider the position in relation to the particular individuals whose names were raised in evidence or submissions, under this heading of potential unfairness.

127. The first was Reggies Dete. The evidence that it was suggested that he could give was in relation to the very first encounter between the Claimant and AB when he was also present. At the very start of the investigation there was a concern as to whether the Claimant had got hold of AB's number in a way that breached data protection principles. However, Ms O'Neill's investigation quickly established that, one way or another, he had got it from AB herself. This led to the abandonment of the potential issue to do with data protection. Mr Dete might have given some context to support the Claimant's description of the very first encounter, but the focus of the allegations was on how the relationship developed and culminated after that. Overall, we agreed with Mr Cooper that the potential relevance of his evidence was so limited, that the failure to seek out and interview Mr Dete was not unreasonable.

128. Secondly, Ms Yeboah-Fourdjour was raised. However, the Claimant himself obtained a statement from her placed it before Ms Truscott. In light of it, the "sexy dress" allegation was not upheld. A subsidiary submission by Mr Carey was that in light of Ms Yeboah-Fordjour's evidence on *that* matter CD should have been regarded as not a credible witness in relation to the alleged attempted hug incident. However, that was essentially a matter for the appreciation of Ms Truscott. She did not specifically find that CD had lied about the sexy dress incident; and in any event the fact that a witness may be unreliable on one allegation does not mean that her evidence necessarily falls to be discounted on other matters. This was all reasonably for the appreciation of Ms Truscott.

129. Next, reference was made to Valentina Sciacca. The Claimant also did obtain an account from her, and placed it before Ms Truscott. She was not said to have witnessed any conduct complained of, but only to have been on the receiving end of the alleged "love bites" remark. Her statement said that he had never said anything that offended her. The Claimant also had the opportunity to ask her specifically to address whether he had made that remark. What Ms Truscott made of this statement was, within reasonable bounds, for her

appreciation; but, again, this witness was not so important to the issues that no reasonable employer would have failed to seek to interview her further.

130. Next, reference was made to Erin Rebute. The Claimant said she was a potentially relevant witness, as GH claimed to have advised Ms Rebute to keep her distance from the Claimant. Whether Ms Rebute confirmed that, might, potentially, bear on the credibility of GH. However, Ms Rebute was not said to be a direct witness to the Claimant's alleged misconduct, nor to have experienced any bad behaviour herself, or to have any other insight to offer. Given, also, that GH would be available to be directly challenged, herself, we did not think that the failure to attempt to interview Ms Rebute was unfair.

131. Next, reference was made to Joyce Tayad. The potential relevance here was that GH said in interview that she had told Ms Tayad about the Claimant's behaviour towards her. Once again, Ms Tayad was not a potential source of *independent* corroboration, but whether she confirmed or denied GH having made such a report, could be said to have a potential bearing on GH's credibility.

132. As we have found, the Claimant wanted Ms Tayad to be a witness for him, but it is clear that she was unwilling to do so. The Claimant told Ms Truscott that he had attempted to contact her. She was also mentioned in the disciplinary hearing. But at no stage did the Claimant indicate that he wanted management to contact Ms Tayad or interview her or bring her as a witness. Nor did the Claimant indicate at the appeal stage that he considered that it was unfair that management had failed to attempt to get evidence from her. In all the circumstances, we do not think management's failure to seek evidence from Ms Tayad was unfair.

133. Before leaving the subject of Ms Tayad, and though we stress that it is not relevant to *liability* for unfair dismissal to consider the text exchanges on the date of dismissal (as they were not seen by managers at the time), we note that we did not agree with Mr Carey or the Claimant's suggestion that those exchanges plainly demonstrated that she knew that GH was lying. They might, rather, be read as suggesting that Ms Tayad thought that there was general merit in GH's complaints. The reference to Ms Tayad having no conscience was also not obviously an admission that she was letting him down; it could equally be read as a sarcastic throwing back at him of something he had previously said about her.

134. Next it was said that there should have been a more thorough interview of Mr Gibbs. However, as we have noted, the detail of EF's allegations came not from Mr Gibbs, but direct from her; and the note of his interview was something on which it was open to the Claimant to comment to Ms Truscott. In these circumstances it was not unreasonable that Mr Gibbs was not further interviewed.

135. Next reference was made to two individuals, Anish Gopalan and Rita. However, the only matter on which it was suggested they might be able to comment was the swab incident. It is clear that this was not relied upon in the disciplinary process. Their evidence was, therefore, at best, a possible

makeweight on credibility issues. In the circumstances it was not unreasonable that management did not seek proactively to get statements from them.

136. Joseph Matibenga's name was raised, but, as we have recorded, he was, in fact, interviewed.

137. Pausing there, we have, inevitably, worked through a number of particular fairness issues, each in turn. Standing back, and looking at the bigger picture, we concluded that, in **Burchell** terms, there was, overall, a reasonably sufficient investigation; and we did not think that any of the Claimant's criticisms of the process, viewed separately or cumulatively, led to the conclusion that it was unfair.

138. We turn then to consider whether the findings made by Ms Truscott and upheld by Ms Haywood, as to the Claimant's conduct, were within the band of reasonable responses in light of the fruits of that investigation. We also have to consider whether dismissal as a sanction was within the band of reasonable responses. These questions are, as often, somewhat interlinked in this case. Where there were factual disputes, managers had to decide what they thought happened; but they also had to assess the gravity of what they considered had occurred, which in turn had a potential bearing on sanction.

139. The list of issues (paragraph 7) also posed some more particular questions: whether there was sufficient evidence to conclude that (in relation to AB) the Claimant had abused his position by a sexual relationship with a more junior colleague; whether it was reasonable to conclude that there had been a pattern of inappropriate behaviour of a sexual nature, whether reasonable consideration was given to the Claimant's record and length of service; and whether reasonable consideration was given to options short of dismissal.

140. In relation to the alleged incidents involving CD, EF and GH, it was the Claimant's case that none of these had occurred. Ms Truscott gave a reasoned decision, which she articulately defended in cross-examination before us, as to why she accepted the accounts of all three of these complainants as true. This included her consideration that there was evidence of similarities or what she called a pattern of behaviour on the part of the Claimant, albeit that the incidents were spread out over a number of years, her acceptance of the credibility of the witnesses when tested in cross-examination before her, her rejection of the Claimant's suggestions as to why all of these witnesses would have lied as implausible, and her rejection of the suggestion of collusion between EF and GH. These were all matters that were entirely reasonably within her appreciation.

141. Having accepted these complainants' factual accounts, she then had to consider whether the Claimant's conduct on each of these occasions was to be viewed as sexual. In particular, the Claimant argued that the giving of a hug or a shoulder massage is not overtly or necessarily a sexual form of touching. However, this is something that plainly has to be judged in context, and whether the Claimant's conduct on each occasion was sexual, was, within the reasonable

band, again for Ms Truscott's appreciation. The evidence in relation to the massages was that the Claimant embarked on the touching before he had verified whether the complainant actually wanted a message. In relation to the attempted hug of CD, the evidence was that the Claimant persisted in his request, when first declined. In relation to EF the evidence was that the Claimant followed up the shoulder massage with the touching of her ankle and then moved his hand up and under her clothing to her thigh.

142. Given all these features of the evidence, Ms Truscott's conclusion that all of these incidents not only occurred but involved actual, or attempted, sexual touching, was entirely within the band of reasonable responses.

143. In relation to AB there was no hard factual dispute, and it was accepted that the core incident involved consensual sexual intercourse. Here, Ms Truscott had a difficult task of evaluation of the Claimant's overall course of behaviour. It was accepted that the mere fact that AB was a fellow employee did not necessarily point to the conclusion that this relationship involved inappropriate conduct, nor did the mere fact of the difference between their bands. What Ms Truscott had to decide was whether, in all the circumstances of the case, the Claimant had not conformed to the NMC principles on which reliance was placed by crossing a line and taking undue advantage of AB.

144. We were satisfied by the evidence of Ms Truscott's written decision, and her evidence before us, that she appreciated at the time, the difficult and important nature of her task, and that she gave it most careful consideration. In particular, she gave careful consideration not only to their relative seniority, but to the potential impact of the difference between their ages, to the early stage in her career at which AB was (even if she had technically recently ceased to be a student) and her appreciation of the sequence of interactions between the two of them which led ultimately to the intimacy of what was not disputed to be consensual sexual intercourse.

145. Ms Truscott had both the Claimant and AB present before her and she heard them both tested. We did not accept that she was bound to view the evidence about the behaviour of AB's boyfriend and sister in the aftermath as supporting the Claimant's case. Indeed, that evidence could reasonably be viewed as casting no light on the propriety of the Claimant's conduct, in terms of NMC standards, either way. Nor did we think that her approach to the fact that the claimant was not AB's direct line manager was unreasonable. Whilst she accepted in evidence that being the direct line manager might provide greater opportunity for abuse of position, her concern was whether, as a matter of fact, the line had been crossed in this case.

146. Bearing in mind all of the evidence that Ms Truscott had available to her, and that she was considering this matter alongside the other allegations, we did not think that it was beyond the band of reasonable responses for her to conclude that the Claimant's conduct towards AB across the piece amounted to a breach of the standards she identified set out in the NMC's Code.

147. We turn then to whether, in light of all Ms Truscott's findings, dismissal was within the band of reasonable responses. Having regard in particular to her factual conclusions about what occurred in the cases of CD, EF and GH and the conclusion that this was sexual misconduct, Ms Truscott entirely reasonably considered that this conduct involved a pattern of behaviour and that it potentially merited dismissal. We accepted her evidence that she was aware of his length of service and record; but she was entitled to consider that this did not mean that dismissal should be ruled out. Further, we accepted that she gave genuine consideration to the alternatives, but reasonably rejected them. In particular, on all the information available to her, including the exchanges at the disciplinary hearing, she was reasonably entitled to take a view that the Claimant did not sufficiently appreciate or acknowledge the gravity of his misconduct, that mediation was not an adequate solution, and that she could not feel sufficiently confident that a written warning would ensure that there was no, or no appreciable, risk of a repeat of such conduct at some point in the future.

148. Ms Heywood was, we were satisfied, reasonably entitled on the material available to her to uphold Ms Truscott's decision and indeed to reach the same view.

149. For all of these reasons we concluded that this dismissal was not unfair in all the circumstances of the case. The claim of unfair dismissal therefore failed.

Wrongful Dismissal

150. The wrongful dismissal claim turned on the Tribunal's own appreciation of whether the Claimant had been guilty of conduct in respect of one or more of the four complainants that, separately or cumulatively, amounted to a fundamental breach of contract, having regard to the undisputed fact that his contract required him to comply, inter alia, with the standards of conduct laid down by the NMC Code highlighted at paragraph 57 above. This was a decision that, at this point, we had to reach for ourselves, on our evaluation of all the evidence before us, resolving disputes of fact as to what did or did not occur on the balance of probabilities, and then considering whether such conduct as we found did indeed occur amounted to a fundamental breach.

151. There was, of course, considerable overlap between the evidence before us and that available to Ms Truscott and Ms Heywood. However, there were also some material differences. We had some additional evidence available to us, of events around the time of the disciplinary process, such as the transcript of the Claimant's phone call with CD and his exchanges of text messages with Ms Tayad. We also had the benefit of his evidence in chief and cross examination before us, to add to the evidence of what he said in the course of the disciplinary process. However, we did not, as Ms Truscott did, have the benefit of hearing the complainants give evidence and be cross examined in person before us.

152. As to the disputed allegations made by CD, EF and GH, we bore in mind indeed that we had not heard these three give evidence in person before us.

However, we did have the benefit of the written accounts that they had given in the internal investigation, and the records of what they said when questioned in person during the disciplinary process. We also had the benefit of hearing the Claimant's suggestions as to why these witnesses would have lied, and indeed on his account, as to why others were for various motives involved in what he described as a conspiracy. On his account Ms Sweetman had fallen out with him and told Mr Gibbs of his suspension. Mr Gibbs hoped to get the Claimant's job if he was removed from it. Mr Gibbs and EF between them concocted EF's allegation, and she and GH then also conspired. The Claimant also, in evidence before us, questioned whether it was really just a coincidence that Mr Gibbs had been on the ward on the day that Ms O'Neill went to conduct her survey.

153. We agreed with Mr Cooper's submission that this conspiracy theory was highly fanciful and implausible.

154. Nor did we share the Claimant's view of the weaknesses or inconsistencies in these witnesses' accounts. We did not find it implausible that complainants were reluctant or lacked confidence to raise the alleged treatment at the time when it occurred, nor that EF and GH were fortified to do so when they discovered they had had similar experiences. Nor did we accept the suggestion that the fact that complainants continued to have contact with the Claimant, tended to undermine their accounts, given the evidence that they also gave about continuing to avoid contact in situations when they might be alone with him or otherwise vulnerable to his unwanted attentions.

155. We also agreed with Mr Cooper's submission regarding CD, that the overall evidence we had tended to show that she gave a very fair and balanced account of her relationship with the Claimant – that he had done something wrong but then apologised and they had moved on from it, that it had had an effect on her but that her relationship with him otherwise remained good, and she thought well of him in other respects. Given all of that, we did not find it surprising that she was reluctant to come and be a witness in relation to a matter which she regarded as past and behind her; nor that she wanted to ring the Claimant to smooth that aspect over when she did decide to go ahead and attend the disciplinary hearing.

156. Standing back, and on the balance of probabilities, we were satisfied from all the evidence available to us that the incidents related by CD, EF and GH did all in fact occur, as related by each of them.

157. We turn then to the question of whether, in the Tribunal's appreciation, the Claimant's conduct towards these three, and the conduct towards AB, separately or together, was so serious as to amount to a fundamental breach of contract on his part, having regard in particular to his obligation to observe NMC standards.

158. We would not have found the conduct towards AB to be, by itself, so serious as to amount to a fundamental breach. Here, the difference between the evidence available to us and that available to Ms Truscott was important. She had the benefit of hearing AB give evidence in person and be tested before her. We

accepted, having read her decision and heard her in cross examination, that *she* was entitled to take the view of that evidence before *her*, that she did. However, *we* did not have the benefit of hearing AB in person. Given that, in her case, the evaluation of whether the Claimant's conduct crossed the line in terms of NMC professional standards was not easy to make, without the benefit of hearing AB give evidence and be tested before us, we were not persuaded on balance to find that the Claimant's behaviour in relation to her amounted to a fundamental breach.

159. We also concluded that, viewed in isolation from the other episodes, his conduct towards CD and towards GH would not, in either case, alone, have been sufficient to amount to a fundamental breach. Having regard to all the features that we have already mentioned, we *did* consider that, in both these cases, the touching or attempted touching was sexual. However, given that in these two cases it was limited to a brief shoulder massage or an attempted hug, and though this behaviour did amount to harassment, we would not have considered either incident, alone, serious enough to amount to a *fundamental* breach.

160. However, the Tribunal also had to consider what it made of the incident with EF, and of all of these incidents viewed together. The Tribunal concluded that the conduct towards EF was particularly serious, and sufficient to amount to a fundamental breach in its own right, taking account of the fact that the Claimant persisted following the initial unwanted shoulder massage, to touch her ankle and then to move his hand under her clothing and above her knee to touch her thigh. The fact that this episode had happened some years before it came to light did not affect the position. It was a sufficiently serious act of sexual harassment to amount to a fundamental breach, and remained so at the time of dismissal. Further, viewed together, there *was* a pattern, in the incidents with EF, CD and GH, of sexual touching, and an element of persistence despite rebuff. Though the latter two incidents were less serious, the wider picture including them reinforced the conclusion that the Claimant's overall conduct put him in fundamental breach, though, to repeat, the incident with EF did so by itself in any event.

161. Accordingly, the Claimant was, by his conduct, in fundamental breach of contract when he was dismissed. His claim for wrongful dismissal therefore failed.

Sex and Race Discrimination

162. We turn to the claims of direct sex and race discrimination. The claims referred to in paragraph 9 of the list of issues having been abandoned, the live claims before us related to the following conduct. In relation to Ms O'Neill, her recommendation that there was a case to answer, her finding that the relationship with AB was inappropriate and her acceptance of the evidence of CD, EF and GH, as well as her view that there was a case to answer for inappropriate behaviour of a sexual nature, were all impugned. As for Ms Truscott, the complaints related to her findings that the Claimant had abused his position in relation to AB, that the allegations made by CD, EF and GH on the balance of probability occurred, and that there was a pattern of behaviour amounting to sexual harassment; and her decision to dismiss. Finally, Ms Heywood's decision on the appeal was impugned.

163. In relation to all of these matters, the Claimant complained of both sex and race discrimination. He contended that he would not have been treated as harshly, and the same findings or conclusions would not have been reached, had he been a woman and/or not black African. He relied on a hypothetical comparator or comparators, being a band 7 Nurse who was, as the case may be, female and/or not black African, and who was accused of sexual misconduct in circumstances that were not materially different to his.

164. In relation to both these claims we found no sufficient factual contextual or background facts or circumstances such as would have shifted the burden to the Respondent under section 136 of the 2010 Act. It seemed to us that there was no matter on which the Claimant could properly rely to that effect.

165. Mr Carey at the start of the hearing confirmed that the Claimant was abandoning an additional complaint (paragraph 9 of the list of issues) that Ms O'Neill, Ms Truscott and/or Ms Heywood had specifically been chosen because they were women, accepting that there was no evidence to support that. However, he maintained the conceptually distinct complaint that because they *were* all women, they all lacked the "male perspective" or insight in relation to the matters that they were considering; and that this created at least a potential risk of unconscious bias against the Claimant as a man.

166. We agreed with Mr Cooper that there could be no warrant for the assertion that, purely and simply because each of them were women, they therefore lacked the necessary perspective to be able to carry out their roles properly. To take such an approach would, we agreed, run contrary to the principles of the 2010 Act. Whether or not an individual has the knowledge, qualifications of experience required to perform a particular task is not to be determined by reference to their gender. Nor did we find any reason to infer, having heard all three of them give live evidence and be cross examined, that there was a risk that any of them might be biased, consciously or not, to take the woman's side in relation to the allegations that they were considering. There simply was no arguable basis to this particular challenge.

167. As to race, the Claimant referred at various points to matters of culture. It appeared to us that different things were meant by this, in different contexts. He submitted that there was evidence that he and AB and Mr Dete had discussed matters of common cultural background and interest, arising from all of them having Zimbabwean origins or connections. He said this supported the conclusion that no undue pressure of abusive behaviour was involved on his part in the development of his relationship with AB. How this informed their assessment of his overall conduct in relation to AB was a matter for the appreciation of Ms Truscott and Ms Heywood. We saw no basis to infer that either of them (or Ms O'Neill), consciously or not, evaluated this aspect of the case less favourably than they would have, because of the Claimant's race, or indeed, sex.

168. As a distinct argument, the Claimant said that as a black person, man, or black man, he was at risk of being stereotyped as a sexual predator or a wrongdoer. The Tribunal entirely accepts that, unfortunately, such forms of

stereotyping do exist, and are sometimes at work, consciously or not, in the workplace and in wider society. That is a reason for the Tribunal to be alert to the possibility that something like that could be happening in the given case. But this wider social phenomenon is not, by itself, sufficient to support a statutory shifting of the burden of proof, or common law inference, merely because the case concerns an employee who is accused of sexual misconduct and is a black man.

169. What we had to consider was whether there were any facts which might give rise to a concern that such stereotypes could be at work in this case, pointing to a case to answer, or other evidence suggesting that one or more of these particular three individuals were, or may have been, influenced by such stereotypes, consciously or not. There were, however, no such facts, and no such evidence, in relation to any of the three of them, or their conduct in this case, in relation to any of the aspects of their handling of their roles, or decisions, that were the subject of these claims.

170. Finally, as to "culture" there was some suggestion from the Claimant, although not fully articulated, that these three individuals lacked an appreciation of aspects of Zimbabwean culture or mores in relation to matters of alleged sexual misconduct, or possibly marital infidelity, which, had they had it, would have influenced their views of whether he was likely to be guilty of the alleged conduct. But, leaving aside whether or not any such views of Zimbabwean culture or mores are themselves sound, it was open to the Claimant to advance such arguments in the disciplinary process; and we saw no sign that they rejected any such argument, in a way that pointed to discriminatory treatment in that respect.

171. Furthermore, even if there had been something sufficient to cause the statutory burden to shift, we were wholly satisfied, in light of all our findings of fact about the processes followed, and why, and the decisions reached, and why, that the actions and decisions of these three individuals were entirely explained by reference to matters which were not, and not influenced at all by, the Claimant's sex and/or race, whether consciously or not. We refer to all of the findings we have already set out in this lengthy decision about those actions and decisions and the reasons for them. We accepted the evidence specifically given by all of these three witnesses in cross-examination, that their decisions and actions would have been exactly the same had the Claimant been a woman and/or not black African (and indeed regardless of the gender and/or race of the complainants).

172. The Tribunal drew attention to the provisions of section 24(1) of the 2010 Act and potentially an issue arose as to their meaning and scope and whether they would have applied to rule out certain lines of argument in a case of this sort. However, there is as yet no higher authority on the interpretation of that provision; and, even disregarding section 24(1), or assuming that it did not preclude any of the Claimant's arguments, we were satisfied that none of the discrimination claims were well founded. It is therefore not necessary for us to pronounce on how it should be interpreted.

.

173. For all of the foregoing reasons all the claims of direct sex and race discrimination all failed and are dismissed.

Employment Judge Auerbach
14 March 2017