EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE FRANCES SPENCER**

BETWEEN: **DR. S NOVAK** **CLAIMANT**

AND

SUSSEX COMMUNITY NHS TRUST **RESPONDENT**

ON: **28TH November – 2nd December 2016**

Appearances

For the Claimant: **Mr A Gloag, counsel**
For the Respondent: **Mr B Cooper, counsel**

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

(i) The Claimant was not dismissed for making protected interest disclosures;

(ii) The Claimant was unfairly dismissed.

(iii) It would be just and equitable to reduce the compensatory award by 20% to reflect the chance that he might have been fairly dismissed after 6 months in any event.

(iv) The Claimant contributed to his dismissal and for the purpose of section 123(6) of the Employment Rights Act 1996 that contribution is assessed at 75%. It is also just and equitable under section 122(2) to reduce the basic award by 75% to reflect the conduct of the Claimant before the dismissal.

(v) A remedy hearing has been fixed for 10th March 2017.

REASONS

1. Dr Stephen Novak was employed by the Respondent Trust as a consultant in rehabilitation medicine at the Sussex Rehabilitation Service ("the SRC") from 1 July 1997 to 19 October 2015 when he was dismissed. He brings a complaint of "ordinary" unfair dismissal as well as automatically unfair dismissal for making a protected interest disclosure.

2. The issues were recorded and agreed at a case management hearing on 5 May 2016. The disclosures relied upon by the Claimant as being the principal reason for his dismissal are:

    a. Complaints made between 2007 and 2010 about understaffing issues (included in his 2010 appraisal and in letters to various members of management at the Respondent). It is the Claimant's case that these complaints tended to show that the Respondent was failing to protect the health and safety of those within its care country to section 43B (1) of the ERA and as such was failing to comply with a legal obligation and was putting the health and safety of patients at risk.
    b. A collective grievance raised by a number of doctors about understaffing and/ or poor management. These amounted to a disclosure that the Respondent's implied acceptance of understaffing and, or, poor management/governance placed the health and safety of patients at risk.
    c. A complaint that Richard Quirk, the medical director, had provided false information (namely a forged Job Plan) within a witness statement for a magistrates' court trial. This was a disclosure that the Claimant reasonably believed that Dr. Quirk had committed a criminal act.

3. The Respondent accepts that the first 2 matters identified above amount to protected disclosures but deny that they were the principal reason for the Claimant's dismissal. As to (c) the Respondent's case is that the Claimant did not reasonably believe that the information disclosed tended to show that Dr. Quirk had committed a criminal act. In any event, such disclosures were not the principal reason for the Claimant's dismissal. It is their case that the Claimant was fairly dismissed for conduct, namely failing to demonstrate reliable attendance at work.

4. At the hearing I had 3 lever arch files of documents, as well as a number of additional documents produced during the hearing itself. For the Respondent I heard evidence from Ms S Marshall, the chair of the disciplinary panel which decided to dismiss the Claimant and from Mr R Curtin who was on the Claimant's appeal panel. For the Claimant I heard evidence from Mr Allen Brown, and from the Claimant's wife, Mrs. Alexandra Rowley. In addition, further 3 statements (from Dr Khan, Dr Ali and Dr Bennett) were accepted into evidence.

Findings of relevant fact.

5. The Claimant is a consultant in rehabilitation medicine. He was a senior consultant, with significant management responsibilities as Clinical Director (until he was asked to step down) and very long service. He qualified from University College Hospital in 1985 and, before his dismissal, had worked for 31 years in the NHS with no disciplinary issues. He has been a consultant at the Trust (or its predecessor) since 1997. In 1998 he became the Clinical Manager reporting to the Clinical Director, Dr. Green. In 2006 Dr Green became Medical Director, followed by Dr Harrington and Dr. Quirk took over as Medical Director in April 2012.

6. The Claimant was one of 4 consultants responsible for rehabilitation. 2 of those consultants were geriatricians. The Claimant and Dr Aneetha Skinner were mainly responsible for the younger patients with brain injuries and other neurological problems and they worked closely together.

The employment contract

7. New consultant contracts were introduced in 2003. A full-time doctor would be required to work 10 PAs (programmed activities) lasting for 4 hours. Where required a consultant was allowed to work a maximum of 12 PAs (48 hours per week). Although the Claimant did not sign his new contract until 2006 (1023) it was not in dispute that he was working according to its terms from the date that the new contracts were introduced. Under these new terms the Claimant was scheduled, and was paid, to work 11.6 PAs (46.4 hours) per week.

8. The Consultant contract provides at Clause 4 that the Claimant would "*generally be expected to undertake your Programmed Activities at the principal place of work or other locations agreed in the Job Plan. Exceptions will include travelling between work sites and attending official meetings away from the work place".*

9. The Claimant's principal pace of work was at Brighton General Hospital (BGH). Prior to 2010 the Claimant also worked at Shoreham Hospital (Southlands) but this was closed in or about 2010 when the in-patient service was transferred to a different Trust— Brighton and Sussex Universities NHS Trust (BSUH) -- and the Claimant provided his services for those patients to that Trust under a Service Level Agreement and secondment arrangement with BSUH. The Claimant also worked at the Princess Royal Hospital in Hayward's Heath.

10. Clause 6.1 provides that the consultant and his "clinical director/manager" will agree a Job Plan *"that sets out your main duties and responsibilities, a schedule for carrying out your Programmed Activities, your managerial responsibility, your accountability arrangements, your objectives and supporting resources."* The job plan was to be reviewed annually.

11. Clause 7.1 provides that *"you and your clinical director/manager will agree in the schedule of your job plan the programmed activities that are*

necessary to fulfil your duties and responsibilities, and the times and locations at which these activities are scheduled to take place.

12. Clause 7.2 deals with flexibility. *"Attaching a time value to Programmed Activities is intended to provide greater transparency about the level of commitment expected of consultant by the NHS. However, you and your clinical director/manager can agree flexible arrangements for timing of work. The precise length of Programmed Activities may vary from week to week around the average assessment set out in the Job Plan and must be agreed with the clinical director/manager. You and your clinical director/manager may agree, as part of your job plan, arrangements for the annualisation of Programmed Activities. In such a case, you and your clinical director/manager will agree an annual number of Programmed Activities and your job plan will set out variations in the level and distribution of Programmed Activities."*

13. The job plan produced to the disciplinary investigation and the disciplinary panel hearing as being applicable to the Claimant in 2005/2006 (1030) was disputed by the Claimant. The Respondent now accepts that the Claimant's job plan is as set out at page 996. It was not reviewed annually as was intended. There was no agreement for annualisation of his PAs.

14. The Claimant's job plan, agreed in 2003 (996) sets out the start and finish time and the location of the various tasks that the Claimant was contracted to undertake. In general the Claimant was required to work Monday to Friday from 8.30 or 8.45 a.m., with varying finish times between 4.30 and 7 p.m. Within the timetable it allows half an hour's travel on Monday afternoon (997) for travel to Southlands and one hour's travel on Thursday afternoon for travel. A note at section E of the document states that "2 hours travelling time (for travel between sites) is included under direct clinical care". That job plan provided that on Friday he would undertake CPD, reading and occasional management meetings in the morning and patient assessment on ward rounds in the afternoon.

15. The Claimant accepted in cross examination that if his PAs showed him to be in the unit doing paperwork there would be an expectation that he would be accessible to his colleagues for advice.

16. In 2011 the Claimant's family moved to Bath. It was not disputed that by then he was no longer doing ward rounds on a Friday, (though no new job plan for that period has been produced). The Claimant had some discussions with Mr Harrington, his line manager, and Mr Boyd (of BSUH) about the possibility of working from home on a Friday. The Claimant wrote to Mr Harrington and Mr Boyd (243) setting out a formal request to work from home on Friday, which he copied to the then Chief Executive Mr Painton and the Executive Medical Director. In his letter the Claimant notes that working from home on a Friday will require some minor changes to his job plan by moving management and governance activities, including appraisal and supervision, from Friday morning to Monday afternoon.

17. The Claimant did not receive any formal response to that letter (a note at the top says Andrew/John to resolve) but it is common ground that thereafter until 1st January 2013 he worked from home on Fridays. By then it is accepted that the Claimant's hours on a Friday were 8.00a.m. – 16.00 and that his duties were "management activity, supervision, appraisal, CPD). The Claimant says that he had permission to do so, but this position was not accepted by the Respondent.

18. In October 2011 the Claimant was involved via the Local Negotiating Committee in lodging a collective grievance with the Respondent on behalf of medical staff, including many of the consultants. The grievance raised issues of poor management leadership and governance. In March 2012 the Claimant took on the role of chair of the Local Negotiating Committee. Dr Quirk suggested that the Claimant should advise the doctors to withdraw the collective grievance but the Claimant declined. The concerns were investigated by Veritas and upheld. Veritas made a number of recommendations and suggested that these needed to be addressed before the Trust sought Foundation Trust status.

19. Dr Quirk began working for the Respondent as Executive Medical Director in April 2012.

20. In October 2012 a Dr. Salam, a consultant at BSUH, submitted a formal complaint against the Claimant for bullying and racial harassment. An investigation was commissioned and undertaken by Pam Hall.

21. In November 2012 during a supervision Dr Quirk told the Claimant that there was general unhappiness that he was working from home on Fridays. He said that management could not find anything in writing about this arrangement in the Claimant's HR file and said that the executive board considered that the Claimant should be working at the Trust on Friday. The Claimant said he had asked Mr Painton, the previous Chief Executive, John Omaney and Mr Boyd (of BSUH) and it had been agreed - though he did not think there was anything in writing. Nonetheless by an email of 28th November Dr. Quirk made the Claimant aware that from 1st January 2013 he would be required to work on site (269).

22. It is clear (from a subsequent letter from Dr. Quirk to Cathy Taylor, the Claimant's representative) (282) that the Trust Board did not accept that the Claimant had ever had permission to work from home on Fridays and that Dr Boyd and Dr Harrington denied agreeing to this.

23. In February 2013 Mr Salam resigned. The Claimant met with executives at BSUH to propose that, as an interim arrangement, he would cover some of the shortfall left by that departure (with Dr Skinner covering if he was on leave). The Claimant drew up proposed timetables for himself and Dr Skinner to provide cover. This amounted to an extra 1.64 PAs plus travel to be paid out of the money saved for Mr Salam's post. He copied details of the arrangement to Dr Quirk, (but did not discuss the proposal with him).

24. On 8th March 2013 the Claimant met with Penny Bolton, the Head of Service. She said that she would not agree to the proposed interim cover arrangement until the executive board had approved it as the proposed revised job plan would take the Claimant's working time over 48 hours (and more than 12 PAs). The Claimant was aggrieved as he had sent Dr. Quirk his proposed interim job plan on 13th February. (306)

25. Dr. Quirk followed this up with an email cautioning the Claimant against starting the additional work until formal agreement had been reached.

26. On 5 April 2013 Ms Bolton wrote to the Claimant agreeing that the Respondent would support BSUH in covering the vacancy until 28th June 2013. *"If you would like to take part in this new SLA with BSUH then I would suggest that you meet with Richard Quirk and myself to review your job plan to ensure that it stays within 12 PAs. This may mean temporarily ceasing some activity to undertake this additional work for BSUH."* The Claimant was reprimanded for having started the additional work without the explicit involvement the Respondent. *"Please let me know if you wish to undertake this additional work as set out above and if you do wish to go ahead, and then we will expedite the SLA with BSUH*". The Claimant was told he would not be paid for the additional PAs.

27. It was not clear to me from the evidence if the revised job plan was in fact agreed. The Claimant's case was that he was told to work to the proposed job plan but to keep the 48 hour EWTD. The job plan produced for the disciplinary hearing (1099) showed a working week of 48.5 (rather than 46.4) hours.

28. In April or May 2013 the Claimant was informed that Dr. Salam's complaint against him had not been upheld. However he was also told that witnesses to that investigation had raised issues about the Claimant's management style. On 10 June 2013 Dr Quirk advised the Claimant that he was setting up an investigation under the Trust's disciplinary procedures to "address the concerns about your leadership, management and communication style". The Claimant was required, temporarily, to step down as Clinical Director. That investigation was carried out by Ceri Davies (341)

<u>Investigation into Fridays</u>

29. On Friday, 19 July 2013 Mr Quirk was unable to contact the Claimant when he sought him out at work and no one knew where he was. A number of staff reported to Mr Quirk that he regularly left early on a Friday. Dr Quirk asked Ms Dyson, the centre manager for a list of dates that the Claimant had left early on a Friday. In fact, Ms Bolton the Head of Service had started recording this at the beginning of June. **(359a)**

30. On 5th August 2013 Dr. Quirk wrote to the Claimant to say that a further investigation was being set up to address concerns that the Claimant had not been regularly on-site all day on Fridays and that colleagues and staff

did not know where he was. He did not provide the required support to colleagues during his SPA time.

31. The terms of reference of that investigation were sent to the Claimant on 13 August (362). That investigation was carried out by Howard Clement, Public Health and Quality Manager. He interviewed Ms Dyson (centre manager), Dr Skinner, Penny Bolton (head of service), Dr Quirk, Joy Spiers (receptionist) and the Claimant. The Claimant's PA refused to be interviewed. The Claimant acknowledged that he sometimes left early on a Friday but said that this was because he had been asked to ensure that he did not work more than 48 hours a week and that "as my current job plan is very heavily loaded with clinical commitments means that the only practicable time to show some flexibility would be during SPA time on a Friday afternoon. When it has appeared that I'm at risk of breaching the EWTD I exercise the discretion to leave perhaps 90 minutes early informing reception staff that I'm going home." He provided an account of where he was on Fridays from 7th June to 26 July (434) though this was in fairly generic terms "patient administration" or "job planning/appraisal" and acknowledged that he left early as he had completed his 46 or more hours. He said that on 19th July he had worked from his Brighton house as it was hot in the office with the agreement of Dr Skinner. He said that he was always contactable on his mobile and that doctors should have a certain amount of flexibility in their job plans.

32. Mr Clement's report of the investigation into Fridays was published on 26th November 2013. It concluded that the Claimant was not available at SRC all day on a Friday and had not agreed a different job plan or the agreement of his manager that he could leave early on a Friday. He also concluded that there was no assurance or evidence that the Claimant had been undertaking the requirements of his job plan on Friday as he did not have enough CPD credits for the period.

33. Ms Mules, case manager for the investigation sent the report to the Claimant for his comments. These were provided (475). The Claimant said it was not correct and that his CPD was not up-to-date and since January 2013 he had been ahead of CPD requirements and had made good on the previous year's shortfall. He attached his diary. He reiterated that he left early only to keep within the EWTD/

34. Ms Mules wrote to the Claimant on 17 January 2014 (480) to inform him of the outcome of the 2 ongoing investigations. She said first that the investigation into his leadership style and communication had highlighted some difficulties. However she considered that this should be addressed through a support and development programme and provided he would agree to an assessment by NCAS there would be no formal action under the disciplinary policy. However, in relation to the investigation into attendance there would be a hearing under the trust disciplinary policy to consider whether or not to issue the Claimant with the first written warning in relation to the issue as to whether or not he had demonstrated

acceptable attendance on site on Friday and had fulfilled the requirements of his work plan on Friday.

Flying in work time

35. In September 2013, during the period when the Claimant's attendance on Fridays was being investigated, an unnamed member of staff, informed Dr Quirk that in 2005 and 2006 the Claimant had taken flying lessons during work time. Dr Quirk referred this direct to the Respondent's external counter fraud service (TIAA Limited). He asked them to investigate whether the Claimant had been having flying lessons in work time without approval. (The Claimant was not informed by the Respondent of this investigation, although his flying club tipped him off in October.)

36. The Claimant raised his own grievance in November 2013 about bullying at work particularly with regard to the number of investigations that had been commissioned into him. This was referred to Capsticks to investigate.

37. In March 2014 TIAA informed the Claimant that they had conducted an investigation into allegations that he had taken unapproved time off to have flying lessons at Shoreham Airport, that he had reason to believe that the Claimant may have committed an offence and invited him the Claimant to be interviewed under caution. (517) He was asked to attend with his job plans and flying log. He attended with neither. On the advice of his solicitor the Claimant refused to answer questions and read out a prepared statement (552).

38. The NHS anti-fraud manager referred the matter to the CPS and in October 2014 the Claimant was charged with fraud. In February 2015 on counsel's advice the decision was taken not to proceed with a prosecution. In his defence to the fraud allegations the Claimant made a number of allegations against Dr Quirk and Dr Skinner, including that Dr Quirk had forged his job plan. These were referred to those doctors by the CPS for comment and resulted in a significant deterioration in working relations.

39. In May 2014 the Claimant had commenced a period of sick leave. (He was suspended subsequently and he never returned to work.) The Claimant's grievance was dismissed in June 2014 and his appeal against that outcome was also dismissed on 10 October 2014.

40. TIAA limited submitted their investigation report in April 2015. It recommended "a disciplinary investigation should be considered in conjunction with the General Medical Council. One high-priority recommendation has been raised for the trust to consider disciplinary action and redress." There was also a medium recommendation for a disciplinary investigation into Allen Brown.

41. In its executive summary TIAA Limited stated that "*investigations conducted resulted in evidence which confirmed that the subject did undertake flying lessons, examinations or pleasure frights at Shoreham airport on at least 66 occasions between July 2006 in January 2010 on*

days they were rostered into work, on one day where a trust record shows they were off sick and on 2 days when they were recorded as being on study leave.".

42. The report says that the Claimant had refused to provide his flying log as requested. As a result the date of his flights had to be obtained from a manual trawl through thousands of flight record sheet at the Sussex Flying Club Ltd. This recorded "brakes off" and "brakes on" times of the Claimant's flights but did not record what time he arrived at the Club for any pre-flight briefings. The TIAA worked on the basis that an hour was required for such briefings, which was the estimate given by the flying centre manager.

43. In his defence the Claimant provided a statement by Allen Brown, previously general manager of the Sussex Rehabilitation Centre. Mr Brown said that he had had a conversation with the Claimant in which he gave the Claimant permission to undertake flying lessons, provided that there was no detrimental impact on the service or his patients. The report notes that the permission was not recorded in writing and that staff at the Trust had confirmed that Mr Brown, as a non-clinician, would not have been qualified to decide if the Claimant's request to have private tuition during his rostered hours could have any potential clinical impact that it cast doubt on his ability to make decisions in a managerial capacity. Further, senior medical staff had indicated that any permission for such absences should have been recorded in supervision sheets.

44. Mr Brown had himself accepted that he had been a passenger in a flight piloted by the Claimant during the working day on one occasion – though records from the Flying School suggested that he had been a passenger on 3 flights.

45. At the relevant time (2006-2009) the Claimant reported to Dr. Green, until 2008 and then to Dr. Harrington as Clinical Director.

<u>Neutral evaluation</u>

46. In February 2015 the Trust wrote to the Claimant "to address concerns about your return to work." Although there had been a recommendation for mediation to repair working relationships "*since then the staff at the Sussex rehabilitation centre have raised further anxieties with us about your return to work. These issues have been heightened by the ongoing fraud case and some of the statements submitted. The trust is now concerned that the strained working relationships between you and SRC staff and you and Richard Quirk have now deteriorated to a point where we are not confident that you will be able to work effectively together again without significant intervention . We need to address this and support all those involved to avoid the situation get any worse and patient care being affected. We have therefore commissioned TCM Group Ltd to carry out a neutral investigation. The purpose of this will be to provide an independent assessment of how far working relations have deteriorated and recommend whether mediation or*

any form of conflict resolution will enable the parties to work together effectively again."(714)

47. In June 2015 TCM Group concluded that there were significant concerns in the Rehabilitation team about the Claimant's attitude and behaviour and there was *"an entrenched anxiety and lack of trust amongst team members at the prospect of [the Claimant] returning to work".* Staff had said that morale and the service had improved since he had been away and that if he returned they would resign or consider resigning, that mediation would not remedy the lack of trust. The report noted that there were no internal roles within the Trust to which the Claimant could readily be transferred and recommended that a settlement agreement be reached with the Claimant.(765)

Disciplinary process

48. In July the Claimant was invited to attend a disciplinary hearing (820) to consider the single allegation that the Claimant "failed to demonstrate reliable attendance at work." The Claimant was advised that the sanctions could include dismissal. The Claimant was sent the management report prepared by the deputy Chief Operating Officer, Jane Mules. (793) and all the relevant appendices and statements. He was informed that Dr Quirk, Mr Leadley of TIAA limited, Dr Skinner and Ms Dyson would be called as management witnesses

49. In preparation for his defence the Claimant sent the Respondent 8 emails each attaching a significant number of documents including some 12 statements from colleagues. In particular he provided a lengthy statement of defence (861 -881).

50. After a number of postponements the disciplinary hearing took place on 13 October 2015". The panel consisted of Ms Susan Marshall, Chief Nurse who was employed by the Respondent in April 2014, Dr. Maskell, Medical Director at a different Trust and Mr Kildare a non-executive director of the BSUH and Claire Webster, Head of human resources at the Respondent.

51. The Claimant's written defence provided to the panel (861 to 881) is not a model of clarity. It is hard to read and it is often difficult to see clearly what point the Claimant is seeking to make. Rather than focusing on defending the allegation regarding flying and Fridays, the Claimant focuses on other matters including the unfairness of the investigation into his management style, the validity of the neutral evaluation report and the credibility of Dr Skinner and Dr Quirk. He criticises the grievance investigation and individual pieces of correspondence. He complains that the 2003 job plan provided by Dr Quirk to the TIAA investigation was not the job plan that he agreed to and was a forgery. The difficulty with this approach is that his principal points may have got lost in the wealth of information provided to the disciplinary panel.

52. In his summary however the key points that the Claimant made were:

a. As to attendance on Fridays in 2013 he had been instructed not to breach the EWTD and that Friday afternoons were the only practical opportunity to claw back time without impacting on patient care. No issue would have been arisen if concerns had been raised with him as they occurred rather than subjecting the Claimant to covert monitoring by Mr Bolton. The Claimant worked across 3 sites and did not necessarily work from his base. He had provided his CPD diary for January to August 2013 and was up to date.

b. As to flying, the Claimant placed considerable weight on his entitlement to work flexibly. Further, the timings of when he left work had been overstated. The TIAA report assumed that he needed an hour for pre-and post flight briefings so that each lesson lasted 3 hours. This was incorrect. Most lessons required no briefing at all and if one was required it would be no more than a few minutes. He referred to a defence statement by one of his flying instructors (in defence to the criminal fraud allegations) that initially briefings were about 30 minutes and as the pilot got more proficient they could only take 5 minutes.

c. His own estimate was that he went flying on 25 occasions with a total of 58 ½ hours, mainly on Fridays over a period of 4 years. *"The best I can do working from my personal diary, acknowledging that I am unlikely to have captured all annual leave, is calculated that I may have flown 28 times on 25 days, mainly Fridays, using CPD or management time flexibly. I estimate that most and likely less, I work flexibly 58.5 hours over a four-year period (about 17 minutes a week).*

d. On Thursday afternoon he had times which had been annualised to include college meetings in London his supervision in Brighton, supervising SHO and SPR at Southlands or attending meetings at Hurstwood Park. On Fridays he assessed patients at the RSCH leaving at 5.

e. the job plan was incorrect;

f. Dr Skinner was not credible;

g. Records relating to annual leave and study provided by the Trust from the BEST system to the TIAA were not accurate. He had not been aware till 2013 that his annual leave was recorded on a central database so that he could not reconcile them with his own records to ensure that the record was accurate. He could not recall with accuracy 8 years on when he had been on leave;

h. The date he was flying on a day that was supposed to be study leave day was because the booked training had been cancelled at short notice

53. He also provided numerous statements from colleagues in support. Most simply attested to his character but of note was one from the former Clinical Director of the rehabilitation service, Dr Green, who was Dr Novak's appraiser until she retired in April 2008. In her statement she describes the Claimant as a diligent, competent doctor who put direct patient care above other requirements and who worked over and above his job plan. She said that she was aware that he was having flying lessons but had no detailed knowledge of when he took them. However she said that as far as she was aware no patients were put at risk and that she had always found him easy to contact on his mobile phone. Dr. Novak was not expected to attend patients in an emergency and consultants were encouraged to take a short break from duties during the day rather than working throughout the day. Shoreham airport was adjacent to Southlands Hospital.

54. Dr. Green had also provided a statement in October 2014 for the criminal allegations which stated that "*in 2005 and 2006 it was not the case that the consultants were not allowed to leave the venue allocated in their job plan without the express permission of their manager. Consultants were expected to take the appropriate decision*." She stated that when the new contract came in the contracts could be worked for a number of hours to be completed annually and that clinicians could work flexibly within the contract and that the new consultant contract was not about "clocking in and clocking out". She also said this *"in relation to Stephen Novak's flying lessons so long as nobody was adverse affected by this activity, they wouldn't have been a problem in Stephen Novak taking any time off for this. For example, if the flying lessons took place in the later afternoon, when he was in transit after all his clinics had finished, I could see no problem at all with in taking time off for this."* She confirmed that she knew about the flying lessons (though not exactly when he went flying) and had not missed any clinic commitments.

55. Dr Brown had provided a statement that the Claimant had wanted to take flying lessons to obtain a private pilot's licence. Mr Brown said that he had told the Claimant it was fine provided it had no direct impact on patient care. He said that the Claimant worked very long hours and he trusted him. He knew the Claimant worked long hours and would make up the time. No concerns had ever been brought to his attention in relation to flying times. The airfield was 5 minutes from Southlands Hospital and 30 minutes from Brighton General Hospital.

56. The day before the hearing the Claimant requested that Penny Bolton be called to the hearing as a management witness. Due to the late request, Ms Bolton was unable to attend. The panel felt that her attendance would not add any additional value as the Claimant only wished to question her about her reasons for "covertly monitoring" his hours, which was not relevant to the issues before them. That was a reasonable conclusion and did not affect the fairness of the hearing.

57. In the management case Ms Mules records that as to flying, the TIAA report found that the Claimant had been flying on 66 occasions when he should have been on duty between 2006 and 2010, on 8 occasions he was flying at times when clinics had been cancelled or truncated. She said that the Claimant had failed to provide the TIAA or the CPS access to his flying log. As to attendance on Fridays she reported that "witnesses interviewed by HC consistently reported that SN's attendance at work had not been reliable, particularly in the afternoons. He had time allocated in his job plan to focus on CPD and he had not achieved his target CPD credits for the year 2012 to 2013. As to the impact of his actions on the service, she stated that a key member of the clinical team being absent times when the service was active put additional strain on colleagues and had a detrimental impact on patient care and resulted in the working relationships between the Claimant and staff becoming strained.

58. At the start of the hearing the Claimant was told that Dr Quirk and Mr Leadley would give evidence but that Dr Skinner would only answer questions in private as she was too distressed being in a formal setting with Dr Novak. The Claimant objected and he did not accept that should feel intimidated by him. They had worked well together as colleagues and this was not a case of bullying. After an adjournment the panel agreed to Dr Skinner's request that she attend in the absence of the Claimant, but the Claimant representative, Ms Taylor was permitted to stay and ask questions on behalf of the Claimant. While my own view is that the panel should have been more robust in requiring Dr. Skinner to attend, I did not conclude that her non-attendance affected the overall fairness of the hearing.

59. At the hearing Dr Quirk said that he had questioned Dr Harrington Dr Painton and Dr Boyd about whether there had been agreement to the Claimant working at home on a Friday, all had denied the arrangement. He took the decision not to take formal disciplinary action at the time but gave him a clear instruction to be complied with from 1 January 2013. However there were comments from staff that he was leaving early. He did not raise these formally with Claimant at the time. In relation to the Claimant's account of what he was doing on Fridays from 7th June to 26 July (434) Dr Quirk said that this was insufficient information and the Claimant had not met his CPD requirement. The Claimant was given the opportunity to question Mr Quirk.

60. Mr Leadley stated that during his investigation the Claimant had not given an explanation for his absences and had not provided his flight log or job plan. On examining the data in the flight record sheets they established that the Claimant was at Shoreham airport on 66 occasions during the day that did not coincide with his annual leave dates. Although Mr Brown said that he had initially given the Claimant permission to attend flying lessons he had been shocked that he had flown so many times during work time. As to holiday and sick dates he had obtained the Claimant's green cards (in which the Claimant kept his own record of absences from his office for leave etc.) and reconciled them with the BEST system, though the green

cards for the period near to his birthday in 2006 (where their records stated he was flying when sick) were missing. The Claimant was able to question Mr Leadley.

61. Dr Skinner's evidence was to the effect that the Claimant's absences had impacted on patient care, her workload and adequate staffing. The Claimant had asked her to authorize him to go early on a Friday on a couple of occasions and she had felt pressurised into saying yes.

62. In addition to the points set out above the Claimant's case was essentially that: –

    a. The time he was away from Trust premises had been overstated, flight briefings did not take an hour as suggested by one of the witnesses but were much shorter and not always necessary.
    b. The TIAA report did not take into account the fact that travel time was allowed in his job plan. As his job plan included 30 minutes travel time when no working at BGH he was entitled to leave Southlands half an hour earlier on Mondays and Tuesdays (even if he was not travelling back to BGH) except once a month when he chaired a consultants meeting late on Tuesday. He flew on perhaps 25 occasions where he worked flexibly. He had never canceled a clinic to go flying.
    c. In relation to Fridays he had left work early from March onwards as he had been told not to work more than 48 hours. He was always contactable.

63. The panel took an hour to deliberate. They concluded that the Claimant had failed to demonstrate reliable attendance at work and it was gross misconduct and he should be dismissed.

64. The panel concluded that:

    a. There was no formal agreement to the Claimant's flying lessons. Although Mr Brown had discussed it with the Claimant on one occasion he was not a clinician and did not agree to the Claimant attending each lesson on the 66 occasions documented. Mr Brown would not have had the authority to approve flexible working in that way. It should been obvious that the Claimant would require approval from the Medical Director. A formal agreement should have been included in the supervision notes or otherwise in writing.

    b. As a clinician the Claimant should have recognised it was not in the best interests of patients for him to be unavailable during the working day "even if the times you presented as being absent were accepted are shorter than TIAA evidence".

    c. The panel remained unclear as to the Claimant's whereabouts on a number of occasions between January and August 2013 and could not

find evidence of work done commensurate with expectations for Friday afternoons during that period, such as CPD training.

d. The panel did not accept that he was entitled to self-manage his hours so that they fell below the 48-hour working time level. Ms Marshall told the tribunal that had Dr Novak needed to change his hours to come within the 48 hour requirement this should have been done properly through the job planning process to assess what he was doing and when and that as a senior consultant he knew or should have known that. She also told the Tribunal that, when challenged about this, Dr Novak turned to the Medical Director from Kent Community NHS Foundation Trust to suggest that "he knew how it was" and that there was some sort of informal practice among consultants that they could work when they liked. The panel were of the clear view that that this was not the case and that in any event Dr Novak had been instructed to work at the trust on a Friday.

e. The panel disagreed that the job plan was the key document. The issue was the Claimant's absence during working hours.

f. The panel did not accept that there was any fraud, deliberate lies or adjusting the evidence by Dr. Quirk or Dr. Skinner or others as part of a campaign to end his employment.

65. As to the sanction the panel concluded that *"issues with his non-attendance were significant and sustained over a long period even after a direct instruction had been given to him about his attendance. At the hearing the Claimant showed a complete disregard as to how his behaviour might impact on the service to patients, colleagues."* It was apparent form the evidence that a significant factor in the decision to dismiss the Claimant was the way he had conducted his defence and in particular the fact that the Claimant refused to recognise that he had done anything wrong. He had not accepted that his absence increased Dr. Skinner's workload who would have to step in and see the Claimant's patients if he was not there. The Trust had had difficulty recruiting junior doctors which meant that the Consultants had to be quite "hands on". The Claimant's attitude led them to conclude that there was likely to be a recurrence of his behaviour. They felt that summary dismissal was appropriate in all circumstances.

66. The day after the disciplinary hearing the Claimant emailed further information and submissions. (881a-f). Among the information that was sent at this stage was a detailed breakdown of his movements on the dates that he was alleged to be flying in work time and his calculation that he had only gone flying 25 times over 4 years on Fridays. Ms Marshall responded that the hearing had concluded and that no further information would be considered. I do not criticise that decision. The Claimant had had ample time to prepare and present this information prior to the hearing.

67. The Claimant appealed. The ground of his appeal were that (a) the process was unfair; (b) the decision was wrong; and (c) the sanction was too harsh. His grounds contained serious accusations about Dr. Quirk and D.r Skinner accusing them of malicious falsehoods.

68. His appeal was heard on 14 December 2015. The appeal was heard by Mr Curtin, Chief Operating Officer of the Respondent, Dr. Slater, (Chief Clinical Information Officer and Director of Strategy at East Sussex Healthcare NHS Trust) and Ms Woodman a non-executive director of the Respondent. It was not a rehearing. Rather it was a hearing to determine if there had been any procedural irregularities or failures to follow process. At the appeal the Claimant again focused on the job plan and his belief that the job plan relied on by management was a forgery.

69. The appeal panel concluded that the original panel had heard sufficient evidence to determine that the Claimant had demonstrated poor attendance at work. While the disciplinary hearing could have pursued much greater triangulation of the evidence, had they done so they would have come to the same conclusion. Although there had been ambiguity about which job plan was appropriate, the start and finish times were the same. In relation to the flying the panel looked at his job plans and log. Mr Curtin noted it was difficult to arrive at a definitive number of non-attendances but nonetheless a clear pattern was established. On its own the flying would charge would not have been dismissible – what tipped the balance was the Fridays in 2013 because after that a clear expectation had been set and disregarded. In relation to the sanction Mr Curtin gave evidence that had the Claimant demonstrated some insight then dismissal may not have been appropriate.

70. The outcome of the appeal was that the Claimant's dismissal was upheld. However the panel concluded that this was not gross misconduct but simple misconduct and the Claimant was paid his notice period.

71. Ms Marshall gave evidence that she had no prior knowledge of any collective grievance which had been presented by the Claimant and other medical staff. In the hearing the Claimant did suggest that a collective grievance had been raised by him and that he was being penalised. The there was no evidence before the tribunal that any members of the panel had been aware of the collective grievance or any previous complaints about staffing until mentioned to them by the Claimant.

Relevant law

72. Section 103A of the ERA provides that: -

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

73. It is not necessary to consider in detail the statutory definition of what amounts to a "qualifying disclosure" (which changed on 25th June 2013 for disclosures made on or after that date). Suffice to say that the Respondent

accepts that the Claimant made protected disclosures in relation to the first 2 categories set out in paragraph 2 above. It is not necessary to consider whether the 3rd category of disclosure amounted to a protected disclosure since issue in this case was really one of causation. Were the disclosures relied on (or any of them) the principal reason for the Claimant's dismissal?

74. As to the burden of proof in Kuzel v Roche Products Limited 2008 IRLR 530 the Court of Appeal said this.

> *I agree that when an employee positively asserts that there was a different and inadmissible reason his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that in order to succeed in an unfair dismissal claim the employee has to discharge the burden of proving that dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.*
>
> *It will then be for the Employment Tribunal to consider the evidence as a whole and to make findings of primary facts on the basis of direct evidence or by reasonable inferences ... the Employment Tribunal must then decide what was the reason, or principal reason, for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the Tribunal that the reason was what he asserted it was, then it is open to the Tribunal to say that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the tribunal must find that, if the reason was not that asserted by the employer, then it must have Been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.*

75. Following Kuzel therefore the following analysis of the burden of proof applies:-

    a. Has the Claimant shown that there is a real issue as to whether the reason put forward by the employer was not the true reason?

    b. If so, has the employer proved his reason for dismissal?

    c. If not has the employer disproved the section103A reason advanced by the Claimant?

    d. If not the dismissal is for the 103A reason.

76. If the principal reason for dismissal is not the section 103A reason, such that the dismissal becomes automatically unfair, then it is for the Respondent to show that the reason for the Claimant's dismissal is a potentially fair reason for dismissal within the terms of section 98(1). Misconduct is reason which may be found to be a potentially fair reason for

dismissal.

77. If the Respondent can establish that the principal reason for the Claimant's dismissal was a genuine belief in the Claimant's misconduct, then the Tribunal will go on to consider whether the dismissal was fair or unfair within the terms of section 98(4). The answer to this question "depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and shall be determined in accordance with equity and the substantial merits of the case."

78. It is trite law that in cases of misconduct employers are not required to ascertain beyond reasonable doubt that the employee is guilty of the misconduct charged. However the employer must establish its belief in that misconduct on reasonable grounds and after reasonable investigation and conclude on the basis of that investigation that dismissal is justified (*British Home Stores v Burchell* [1980] ICR 303.)

79. The Claimant must also be given a fair hearing and a chance to state his case. The ACAS Code of Practice on disciplinary and grievance procedures provides guidance which tribunals must take into account in deciding whether a dismissal is fair or unfair.

80. In *London Ambulance Service NHS Trust v Small* [2009] EWCA Civ 220, [2009] IRLR 563, [2009] ALL ER (D) 179 the Court of Appeal reaffirmed that in unfair dismissal claims, the function of a tribunal is to review the fairness of the employer's decision, not to substitute its own view for that of the employer. The function of the Tribunal is to consider is whether the decision to dismiss fell within the band of reasonable responses for an employer to take with regard to the misconduct in question. That is the test and the fact that another employer might have been more lenient is not the point. However, it is not the case that nothing short of a perverse decision to dismiss can be unfair within the section, simply that the process of considering the reasonableness of the decision to dismiss must be considered by reference to the objective standards of the hypothetical reasonable employer and not by reference to the tribunal's own subjective views. The band of reasonable responses test applies as much when considering the reasonableness of the employer's investigation as it does to the decision to dismiss (*Sainsbury's Supermarkets Ltd v Hitt* 2003 IRLR 23).

81. In assessing the sufficiency of investigation, the gravity of the charges and the effect on the employee will be relevant in assessing what is required for a reasonable investigation. In this case, given the Claimant's length of service and seniority, reasonableness would require a thorough and conscientious enquiry.

82. If an employee has been unfairly dismissed then the relevant statutory provisions as to remedy are set out in sections 118 to 124 of the Employment Rights Act 1996 ("the ERA"). Tribunals are required to make

an award consisting of a basic award (calculated in accordance with sections 119 to 122 and 126) and a compensatory award calculated in accordance with sections 123, 124, 126 and 127. The compensatory award is such an amount that the Tribunal considers just and equitable, having regard to the loss sustained by the Claimant in consequence of the dismissal, insofar as the loss is attributable to action taken by the employer.

83. In assessing compensation a Tribunal has to assess the loss flowing from the dismissal. In a normal case that requires it to assess for how long an employee would have been employed but for the dismissal. If the employer seeks to contend that the employee would have ceased to have been employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, then it is for it to adduce any relevant evidence on which it wishes to rely.

Conclusions

What was the principal reason for dismissal?

84. The Respondent accepts that the Claimant had raised complaints with the management of the Respondent concerning understaffing issues within the rehabilitation service and that he was party to a collective grievance submitted by many consultants. The Respondent also accepts that these amount to protected disclosures.

85. The Claimant also relies on allegations, which he had made during the disciplinary process, that Dr. Quirk had forged the Job Plan which he had provided as evidence to TIAA Limited. Mr Cooper submits that the Claimant could not reasonably have believed that Mr Quirk was committing a criminal act by providing this Job Plan to the investigation.

86. In any event, the Respondent does not accept that any of the disclosures and/or allegations made by the Claimant were the principal reason for his dismissal. Mr Gloag submits that the general unfairness of what happened to the Claimant, including the number of investigations launched against the Claimant in a relatively short period, the process and the conclusions of the panel suggests that the Respondent was “closing ranks” against the Claimant.

87. I accept that Ms Marshall had no prior knowledge of any of the Claimant’s complaints about understaffing or his role in the collective grievance until the Claimant himself raised it as part of his defence to the disciplinary charges against him. There was no evidence that any of the other members of the disciplinary panel had such knowledge. Ms Marshall commenced her employment with the Trust in April 2014 and 2 members of the panel were external. She and the other members of the panel were aware of the Claimant’s allegation that Dr. Quirk had “forged” the job plan he provided to TIAA, as that was a key part of the Claimant’s defence. However, there was no evidence to suggest that this allegation was considered by the panel otherwise than as something to consider in

defence of the charge. The panel had before it allegations that the Claimant had not attended work during hours when he should have been at work and the focus of their attention and decision making was on those allegations. The fact that the Claimant had been the subject of three investigations in short order as well as a neutral evaluation exercise does not suggest that the panel were acting for an improper purpose in dismissing the Claimant. There was a significant amount of evidence to suggest that the Claimant had been taking an impermissibly relaxed view about the requirement for attendance at work and that this was the reason why the panel concluded that he should be dismissed.

88. I am satisfied that the principal reason for the disciplinary panel's decision to dismiss the Claimant was that they genuinely believed that he was regularly not at work when he should have been. While the Claimant genuinely believed Dr Quirk was "gunning for him" to use a colloquial phrase, I am satisfied that during the disciplinary process the panel sought to, and did, focus on the allegations before it. There is no evidence before me which showed, or from which I could infer, that the panel were out to get him because of any complaints or disclosures which he had made.

Did the panel reached their conclusion on reasonable grounds and after reasonable investigation?

89. In relation to the flying lessons, the report prepared by TIAA limited concluded that the Claimant undertook flying lessons on "at least 66 occasions" when he was rostered to work, one day when Trust records showed he was on study leave and on two days on which he was on leave. The report was extensive and included numerous witness statements taken for the purpose of the criminal investigation. I do not accept that the Respondent should have commissioned a further internal investigation, beyond that provided by TIAA as submitted by Mr Gloag.

90. Given the Claimant's seniority and length of service, a reasonable investigation required the panel to consider carefully the Claimant's defence (summarized at paragraphs 52 and 62 above).

91. Much of that defence was unfortunately focused on the job plans and the Claimant's contention that the one produced to the TIAA by Dr. Quirk was forged. The charge that it was forged seemed unlikely given that the start and finish times were the same and the panel decided that there was no need to consider which was correct. This was reasonable. The only relevance was the Claimant's contention that he was allowed to leave half an hour earlier on Mondays and Tuesdays.

92. The panel did not undertake any significant analysis of the Claimant's defence that the TIAA report had exaggerated the number of times he was flying. In evidence Ms Marshall said that they do did not do so because even on the Claimant own case he had been flying on a significant number of occasions. They did not decide definitively whether the Claimant had

been on leave on the dates that he stated or if he had in fact missed any clinical commitments because they felt that he was still flying an unacceptable number of times, some of them in the middle of the day. Even if they knocked off half an hour travel times on Mondays and Tuesdays, the Claimant was still flying, and uncontactable, when he should have been at work.

93. However, I did not accept Ms Marshall's evidence that they took the decision to dismiss "on the Claimant's own case" as to the number of times that he was flying in work hours. In the dismissal letter Ms Marshall says that the Claimant did not have permission for his flying lessons and that although he had discussed it with Mr Brown he had not agreed to the Claimant attending "each lesson on the 66 occasions documented" and later says that the Claimant should have recognized that he should not be unavailable during the working day "even if the times you presented as being absent were accepted as shorter than the TIAA evidence". This is not the same as saying that the panel proceeded as though the Claimant had only been flying on 25 occasions. In her witness statement Ms Marshall also refers to the Claimant flying on 66 occasions and it was apparent that the panel considered that he had been flying on significantly more occasions than he had admitted to.

94. Given this, I was troubled by the panel's approach. The panel reasonably concluded that the Claimant did not have proper permission to go flying in work hours. However, the number of times that the Claimant had been absent from work to go flying, and when --- (whether he had simply left work a little earlier than his stated finish times, whether it was in the middle of the day, on sick leave, if he had missed any clinical commitments, how long he was away) was relevant to the sanction that they would impose. A reasonable enquiry should have sought to establish how much of the Claimant's case was accepted.

95. The panel clearly rejected the Claimant's claim that the conversation that he had had with Mr Brown was sufficient to enable him to take flying lessons over a significant number of occasions. This was a reasonable conclusion. The Claimant did not report to Mr Brown who was not his Clinical Director or Clinical Manager and there was no reference to flying in the notes of his supervisions.

96. It is, perhaps, unfortunate that the Claimant's defence was overcomplicated by his conviction that there was a conspiracy against him. As I have said his defence document makes difficult reading and many of his good points are overshadowed by bad ones.

97. What is striking however, in reading the notes of the disciplinary hearing, is how few questions the panel put to the Claimant about flying. The dismissal letter setting out the reasons for the decision to dismiss the Claimant is short on reasoning. What the panel does not do is deal with the Claimant's various arguments systematically and consider and then accept or reject the Claimant's explanation. There is no evidence that the

panel considered the Claimant's explanation that the Respondent's BEST system did not accurately reflect his annual or study leave. It is not clear if they found that he had missed clinical commitments or to what extent the panel considered the statement by Dr. Green (822) given in support of the Claimant. It was important to do so particularly as the Claimant's first flying lessons had begun a considerable time ago—in 2005 when Dr. Green was in charge. It may have been that expectations of what was required (and the degree of flexibility allowed) had changed in the Trust since then. It was of course open to the panel to reject that evidence or simply to discount it but I was not satisfied that the panel had properly considered it, but had simply accepted the Leadley report.

98. In relation to Friday working the report prepared by Howard Clement concluded that the Claimant (a) did not work the set hours in his job plan or seek agreement that he could work outside his job plan and (b) had not gained enough CPD credits for the period under review. It also concluded that "SN is not available at SRC all day on a Friday and that "there is a perception from A.D., PB, AS, JS and RQ that SN is not on site regularly all day on a Friday". However the report does not state (a) whether the Claimant's explanation for leaving early on a Friday (to ensure that he does not work over 48 hours per week was accepted) and/or (b) whether the perception of the staff was justified. Those issues were before the disciplinary panel. Ms Marshall said that she accepted that the Claimant may have worked over and above 48 hours a week when leaving early on a Friday but that he was not able to decide unilaterally that he would work different hours. Again the extent to which the Claimant had in fact worked over his usual hours would have been relevant to the sanction imposed. The dismissal letter simply records that the Claimant had not offered an acceptable response to the allegations about Friday working.

99. Instead, as Mr Cooper rightly submitted, the panel adopted a "broad-brush approach". The panel concluded that that the Claimant was deciding for himself and his own convenience when to attend for work and that he remained of the view that this was his prerogative as he had "flexibility" in his contract. They took the view that he did not have this flexibility. However, the fact was that the flying allegations were old. The first flights occurred in 2005 and there was no real evidence that the panel considered whether expectations as to Consultant commitments had changed over time, particularly given Dr. Green's evidence.

100. I considered whether this made the dismissal unfair. I concluded that it did. While the evidence that the Claimant had taken liberties with his hours was clear, it was important for the panel to be clear as to their conclusions about the extent of his non-attendance in order to arrive at a decision as to sanction. Without taking a clear view as to what explanations were accepted, and which were not and why, the extent of the misconduct remained in issue.

101. This unfairness was not remedied on appeal. The appeal panel concluded that the disciplinary panel had sufficient evidence to conclude that the

management case had demonstrated poor attendance at work –but took the view that their decision not to triangulate the occasions flying made no difference to the outcome, simply saying it was clear that he had a pattern of nonattendance on a Friday.

102. (On the other hand I did not accept that the panel acted unfairly in refusing to investigate the many allegations raised by the Claimant about Dr. Quirk and Dr. Skinner. The hearing had been convened to deal with the allegations against the Claimant and the matters raised were further iterations of the Claimant's grievance which had been determined. Nor was there any unfairness in failing to call Dr. Green. The Claimant was at liberty to call her if he wanted to.)

103. I concluded that the dismissal was unfair for the reasons set out above but that there had been substantial contributory conduct. Further Mr Cooper submitted that even if the dismissal was unfair, the there was a high likelihood that the Claimant would have been dismissed in any event within 2 or 3 months in the light of the conclusions of the neutral evaluation report.

104. I do accept that returning the Claimant to the work place given the breakdown in the relationships within the department would have been difficult. As well as the evidence of the Neutral Evaluation Report the Claimant had continued, throughout the disciplinary process, to accuse Dr Quirk and Dr. Skinner of telling malicious falsehoods and Dr Quirk of forgery. The Claimant had taken advice as to the chances of bringing a private prosecution against them. Significant attempts would have had to have been made to restore relationships before there could have been any fair dismissal for some other substantial reason. I therefore consider that there was a significant chance, 20%, that the Claimant would have been fairly dismissed for that reason within 6 months.

105. I do also however consider that the Claimant contributed to his dismissal. He had been flying in work time without permission and chose not to make it clear to, and obtain the agreement of, management that he proposed to leave early on a Friday if he was to cover the extra PAs at BSUH. Moreover I accept that his attitude during the disciplinary process was unapologetic and that he showed no insight as to the expectations of him and the impact that his absence had on other members of the department.

106. Section 122(2)of the Employment Rights Act 1996 provides that:

> "Where the tribunal considers that any conduct of the complainant before the dismissal (or, whether 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."

Section 123 (6) provides that:

> "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 inequitable having regard to the findings."

107. The tests in these 2 sections are different in that section 122 (2) gives the tribunal a discretion to reduce the basic award on the grounds of any kind of (blameworthy) conduct on the employee's part that occurred prior to dismissal, whereas under section 123 (6) the conduct must cause or contribute to the dismissal.

108. In Nelson v BBC (No 2) 1980 ICR 110, the Court of Appeal said that 3 factors must be satisfied if the tribunal is reduce the compensatory award by a factor to represent the Claimant's contributory conduct. The relevant action must be culpable or blameworthy, secondly the conduct must have actually caused or contributed to the dismissal and thirdly it must be just and equitable to reduce the award by the proportion specified.

109. I find that the Claimant's conduct in taking flying lessons during working hours, without referring specifically to those flying lessons (and their extent) during supervisions or obtaining permission in writing, his failure to establish that he could leave early on Fridays, his total failure to accept that he required permission of management for variations to his hours and his failure to show "insight" into the effect that his absence could have on the service was culpable conduct which caused or contributed to his dismissal. I note that Mr Leadley was critical of the Claimant for failing to provide his flying log—and that had he done so the exact extent of the time spent away from work could have been more easily established. I consider that contribution to be very significant and I assess it at 75%. Equally I find that his conduct was such that that it would be just and equitable to reduce the basic award by the same percentage. In considering this percentage deduction I have taken into account the "Polkey" reduction already made above.

110. A remedy hearing has been fixed for 10th March 2017. However I am hopeful that with the benefit of the findings made above the parties should be able to arrive at appropriate terms as to remedy. The parties are encouraged to engage in the earliest possible talks and to notify the Tribunal if they have arrived at terms as to remedy so that the date can be vacated.

_____

Employment Judge F Spencer
14th February 2017