EMPLOYMENT TRIBUNALS

Claimant: **Mr D Baxter**

Respondents: **Dr Lemmens, Dr Tan, Dr Whitear, Dr Omosini and Dr Khan**

(the Hollies Surgery)

Heard at: **East London Hearing Centre**

On: **27th July 2017 and 3rd October 2017**

Before: **Employment Judge Reid**

Representation

For the Claimant: **In person**
For the Respondents: **Mr Stephens, Counsel (instructed by Giles Wilson LLP)**

JUDGMENT (RESERVED)

1. The Claimant was not unfairly dismissed by the Respondents. This claim is therefore dismissed.

2. The Claimant was not wrongfully dismissed by the Respondents. This claim is therefore dismissed.

3. The Claimant is not entitled to any further payment for accrued but untaken holiday at the date of his dismissal. The Claimant's claim for holiday pay is therefore dismissed.

The remedy hearing booked for 1st February 2018 will not now be required and is cancelled.

REASONS

Background

1. The Claimant was employed by the Respondents' GP practice as Practice Manager until his dismissal with immediate effect on 31st January 2017. His employment commenced on 1st March 1999. His dismissal arose out of Quality Care Commission (CQC) visits and reports in January 2016 and September 2016 after which second visit the Respondents received a warning notice from the CQC dated 3rd November 2016 under the Health and Social Care Act 2008. The Claimant brought claims for unfair dismissal, wrongful dismissal and for unpaid holiday pay. As regards his unfair dismissal claim he claimed (page 7) that his dismissal was unfair because no action was taken against other staff and he was made a scapegoat, if he made a mistake as to what he said about DBS checks having been done it was a mistake, there was no evidence he had acted in a way in gross disrespect of the partners, he had no prior warning of the emergency practice meeting, his health issues were raised by him at the time but ignored, the decision to dismiss was pre-determined and he was the highest earner and another employee blamed for the first CQC report was managed out. He also said that he had 18 years service, his mistakes were honest and he had apologised; it was leadership of the practice which was at fault (page 12). He sought reinstatement. As regards the wrongful dismissal claim he claimed that there was no evidence of gross misconduct (page 7). In relation to holiday pay he claimed (page 8) that he was due a further payment in lieu on termination because the wrong holiday entitlement had been applied; in his witness statement (para 1.18) he said his annual entitlement was 7 weeks per year by agreement with Dr Lemmens with effect from 2014 or 2015. The Respondents resisted all the claims on the basis that the Claimant's dismissal was fair for either conduct or some other substantial reason and that it was entitled to dismiss him without notice; they said that there was no entitlement to further holiday pay because there was no evidence of a contractual entitlement to the two extra weeks holiday per year claimed to exist.

2. Both parties attended the hearing. I identified with the parties that the hearing would deal with issues of liability only, with a remedy hearing if necessary if the Claimant won any of his claims. The Claimant was not represented. There was a one file bundle plus an additional supplemental bundle provided by the Claimant. The Respondent's three witnesses (Dr Khan (investigation), Dr Tan (decision to dismiss) and Dr Whitear (appeal)) gave evidence on the first day. Dr Khan also gave some additional evidence about some new documents on the second day and the Claimant gave evidence on the second day, after which I heard submissions on both sides. The Claimant had prepared written submissions which he supplemented with some oral submissions and oral submissions were made on behalf of the Respondent.

Findings of Fact

The Claimant's employment and duties/responsibilities

3. The Claimant was employed by the Respondents from 1st March 1999 as its Practice Manager (page 217). He had a job description (page 214) which he drafted setting out his duties and responsibilities. His role was described as providing full management and administrative support to the partnership. His duties included acting as partnership secretary (including the preparation and administration of reports), providing personnel services (including the provision of all necessary documentation to employees and running an appraisal system), practice organisation (including preparation or reports and ensuring compliance with statutory and legal requirements) and ensuring compliance with health and safety and developing health and safety policies and procedures. The job description also noted that a special requirement was the ability to plan strategically. As regards doing actual appraisals, the Claimant's responsibility was for appraisals of non-clinical staff though in terms of actually doing the appraisals he shared them between himself and the Deputy Practice Manager, Clair Batrick.

4. I find that whilst the partners (the doctors) were ultimately responsible for the leadership of the practice, the Claimant was being delegated important management responsibilities and the partners were entitled to rely on the Claimant to undertake these responsibilities and to support them. Although the Claimant was not a partner, he was nonetheless part of the management team and played an important role in the way the practice was managed. The partners (the doctors) were entitled to expect that the Claimant was fulfilling his duties, particularly taking into account that by the time of his dismissal he had been employed for around 17 years and was very familiar with the practice and an experienced Practice Manager.

The January 2016 CQC report

5. In January 2016 the practice had an assessment by the CQC which rated the practice as overall requiring improvement and identified three areas in particular which required improvement (page 37). The report identified areas which 'must' be improved (page 46). Those within the Claimant's remit were (1) ensuring that non-clinical staff acting as chaperones received a Disclosure and Barring Service (DBS) check or that a formal risk assessment be carried out and (2) undertaking a health and safety risk assessment and three specified risk assessments. The other matter about clinical audits in the 'must' category was a matter for the partners. The third matter within the Claimant's remit was action the practice 'should' take to ensure all staff received appraisals. I find these three areas to be a relatively short and clear list of matters to be addressed by the Claimant in his role as Practice Manager. Whilst he might delegate some tasks within this to his colleague Clair Batrick, he remained ultimately responsible for these three areas being addressed.

6. I find that the Claimant planned to deal with the DBS checks issue raised in the January CQC report by obtaining DBS checks rather than the other option suggested (doing a formal risk assessment instead) because he told the partners before the next CQC visit that that DBS checks had been done (page 59T - although they had not been – see below) and then told Annabelle Stigwood of the CQC that DBS checks would be obtained (page 73B). If he had originally intended to deal with the issue via the formal risk assessment route instead, he only reviewed the existing policy on 1st September 2016 (page 73B) when the next visit was already underway, some 9 months after the January 2016 report. I find that on the one hand the Claimant was telling the partners on 26th August 2016 that the DBS checks had been done but on the 1st September 2016 was telling the CQC that they had not, but that they would be for two Health Care Assistants (HCAs) who acted in both clinical roles and as chaperones (Bettina Keating and Christine Farrow). These contradictory statements in two directions suggested a significant lack of grip on what was ultimately his responsibility. His assertions prior to dismissal and at the hearing that the matters within his remit did not, like other matters, affect patient safety also showed a lack of understanding that the point of such checks is to protect patients from possible harm and that an old CRB check done in 2002 or 2005 for these two HCAs (which he could not in any event find, page 73B) does not mean that a person has not offended in the following 14/11 years and is therefore no risk to patients.

7. The report identified other areas beyond the Claimant's remit which also required improvement and which also contributed to the rating such as failures as regards clinical audits (page 39). The report also found that leadership required improvement (page 37,41). The partners therefore also had work to do before the next audit was carried out. The Claimant had also reminded the partners earlier in 2016 (page 73A) that the practice had not completed the removal of Dr Lester as Registered Manager (who had retired in April 2016) and registered Dr Whitear as the new one.

8. No-one within the practice knew when the next CQC inspection would be but I find based on the oral evidence of Dr Whitear that if a practice has had a negative review, the practice would normally expect the next CQC visit after around a further 6 months. I find that the Claimant was therefore aware he had to deal with his three areas of improvement in around this timescale.

<u>Next CQC visit 1st September 2016</u>

9. The Claimant emailed the partners and other colleagues when the next CQC visit had been notified to the practice (page 59T). He referred them to relevant documents on the shared drive so they knew what the inspectors would want to see. He stated that all changes to policies, DBS checks and risk assessments had been carried out and that there should be no problems with these areas. In relation to DBS checks for the two HCA chaperones this was incorrect as they were not in fact carried out until November 2016 – see below. He noted that an important area not yet dealt with was the Registered Manager issue. There was nothing to alert the partners to any problems with the three areas the Claimant was responsible for improving in the January 2016 CQC report in this email, in fact the opposite - he was reassuring them that his action areas had been dealt with.

10. Based on the report at page 70 I find that during the visit on 1st September 2016 the Claimant told the inspectors that a health and safety risk assessment had not been completed (page 69). He also told the inspectors that there were 6 outstanding appraisals for non-clinical staff, these outstanding appraisals had not been scheduled (page 70) and that he did not see the benefit of appraising non-clinical staff, a view he accepted at the hearing was not a view he should have aired to the CQC though it was a view he held. To say this to regulatory inspectors who had identified it as on the 'should do' list was likely to result in a distinct lack of confidence in him by those inspectors (and consequently by the partners) and showed a lack of understanding of the need to show compliance in the areas identified, rather than appearing to give the impression that their requirements were rather pointless and not important. The Respondents were also entitled to assume that the Claimant would behave professionally during such a visit and not say unnecessary things which might damage the outcome of the visit because the Respondents had to have confidence in the Claimant, particularly in this kind of process.

CQC warning notice dated 3rd November 2016 and emergency practice meeting 4th November 2016

11. The practice received a formal warning letter dated 3rd November 2016 regarding the 1st September 2016 visit (page 74). That letter identified 5 areas where the practice had failed to meet the requirements set out in the January 2016 report (paras 4.-4.2 and 5.1 – 5.3). Of these 5 areas 3 were within the Claimant's remit (4.2, 5.1 and 5.2) although an important other area affecting patient safety was identified in para 5.3 (patients with atrial fibrilation) which was a matter for the partners to address. None of these matters was the registered partner issue, a failing the Claimant maintained was at least as significant as his own issues.

12. An emergency practice meeting was called the next day and I find based on his oral evidence that the Claimant was provided with a copy of the warning notice around an hour before the meeting at 2.30pm so had time to read it as it is only 4 pages. Whilst he had been in hospital on 1-2 November 2016 with a back problem and had a day off on 3rd November 2016, he nonetheless attended for work and drove himself in and I therefore find that it was not a situation where he was being asked to deal with something when he was unwell and should have been at home. I also find that even if he did not feel his best it did not affect his ability to answer the questions he was asked; his statement to the partners at this meeting that all DBS checks had been completed was consistent with what he had told them in August and the CQC he would do in September and so was not a flustered wrong answer given when not feeling well but reassurance he had given before when not claiming to be affected by his back. In any event his back problem had flared up in October 2016 and did not affect what he had had to do on the CQC's list from January 2016 onwards.

13. At the beginning of the meeting the Claimant said that risk assessments had been seen in January 2016 and that he had the relevant documents, despite the fact that the January 2016 report had identified their absence as an action point and despite the inspectors not being provided with such risk assessments during this visit (page 75). The Claimant's statement to the inspectors that none

had been done (page 75) was inconsistent with now saying (page 80) that they had been done and were on the shared drive. He said that DBS (DRB) checks had now been carried out and would produce the documents. In fact DBS checks for both the two HCA chaperones had not been carried out by 4th November 2016 because in the case of at least Bettina Keating that was not applied for until 7th November 2016 because the Claimant's list prepared for the CQC in November 2016 in response to the warning notice (page 283) recorded it as 'approved' when it should have said applied for. I make this finding because in relation to Clair Batrick she is recorded as 'approved' on 11th November 2016 on page 283 but on page 90 she is noted in the email on 11th November 2016 as being processed ie applied for that day. In addition Louise Munday is described on page 90 as due to be processed on the following Monday (14th November 2016) and is stated on page 283 as approved on 14th November 2016. The statement the Claimant made as regards the HCAs was therefore incorrect as regards Bettina Keating who had not had a DBS check approved by 4th November 2016, though applying the same analysis to Christine Farrow an application had at least been made on 1st November 2016 (page 283). The Claimant's statement to the partners at the meeting was at least not true as at 4th November 2016 as regards Bettina Keating and the partners were to discover before they dismissed him that there were in fact four others as well (page 87,87C); if the Claimant had not been aware of the other four he should have been, knowing by now of their significance. He made this statement recklessly and negligently without a belief based on any factual knowledge that it was true.

14. I find taking into account the above findings that the Claimant had not prepared for the next CQC visit. He had not arranged the DBS checks for both of the two HCA chaperones despite having told the CQC in September that he would and there were four others who should have been applied for. As regards risk assessments he had not carried out a risk assessment and told the inspectors this (page 69, 75). Whilst he said at the hearing that the documents were all there on the system and that all he needed to do was to put them together under one template (page 87), a template he did not have, he still had not done the risk assessment and had told the inspectors so.

15. The Claimant also had not completed all the non-clinical staff appraisals which the Respondents found out after he started to work with Lorna Salmon an external project manager (page 87, 87C) Whilst he explained this as being because they were on an annual cycle and by August 2016 he had not reached the end of the appraisal (calendar) year, he had advance notice of the 1st September visit and could at the very least have scheduled in the outstanding ones (even preparing that schedule in the gap between the notification and the visit) and shown that to the inspectors, but he did not. In any event the ones outstanding had not received an appraisal in 18 months so had been due one by early 2016 in any event so should have been completed by the visit in September 2016. In any event it was now November and there were still outstanding non-clinical appraisals which had been identified in the visit on 1st September 2016.

16. In the weeks following the CQC notice the Claimant worked on the outstanding DBS checks and the outstanding appraisals. In this he worked with Lorna Salmon an external project manager. Based on Dr Whitear's oral evidence I find that Ms Salmon was brought in to help the practice deal with the adverse

inspection consequences and put in place the remedial action required, because she had experience assisting other practices who had had similar problems. I do not find she was brought in to replace the Claimant in some way as part of a pre-determined plan to dismiss him, but brought in in what was something of an emergency to deal with the CQC's requirements to remedy certain matters swiftly. She met with the Claimant (page 86) and identified what needed to be done (page 86) and the Claimant liaised with her on progress (page 87,91). Ms Salmon identified the four more outstanding DBS checks and some outstanding appraisals (page 87C). Dr Whitear was also liaising with Ms Salmon in relation to the clinical parts of the CQC notice (page 87C). Ms Salmon reported to Dr Whitear and Dr Ozturk as to progress (page 88) including her discovery that there were four other DBS checks still to be done.

17. Meanwhile Dr Lester was still struggling to ensure his removal as Registered Manager (page 102A) without input from the current partners. However this was not a matter raised in the CQC warning notice as an issue of good governance though it was in their report (page 71).

Investigation and disciplinary process

18. The Clamant was notified of his suspension on 2nd December 2016 (page 103) on the basis of three allegations (1) failing to adequately prepare for the second CQC inspection (2) dishonestly stating at the meeting on 4th November 2016 that all DBS checks had been completed and (3) acting in a manner causing a gross breach of respect of the partners. The meaning of this third allegation was subsequently explained – see below. There was no contractual right to suspend the Claimant in his contract (page 217) and the disciplinary policy made no mention of suspension (page 198-199). The Claimant complained about this (page 105). His suspension was however compliant with the ACAS Code of Practice in that it was necessary due to the seriousness of the allegations (including dishonesty) and was not unduly protracted.

19. An investigation meeting was held by Dr Khan on 8th December 2016 (page 108). The Claimant had provided a response to the suspension on 7th December 2016 (page 105). At the meeting the Claimant apologised for any mistakes he had made (page 108) and accepted he should have followed up on appraisals, that he had not been on top of risk assessments (page 109) and accepted that there had been no documentation about the two HCA chaperones' previous CRB checks on the day of the inspection and he had still not found any (page 109). He said his statement about DBS checks all having been completed at the meeting had been an honest mistake. He accepted that he should have followed up on outstanding DBS checks when raised on 1st September 2016 (page 109) but still maintained that patient safety was not affected. I therefore find that the Claimant apologised and admitted his failings though the context of this was his written statement for the meeting that it only amounted to a couple of areas where work was not satisfactorily completed (page 105) which distinctly understated what his own part had been in the CQC process and what his failings on important matters had been. He rightly pointed out in his statement (page 105) that there were other areas of underachievement affecting clinical safety but that again failed to show an understanding that DBS checks are also a patient safety

issue, though of a different type. The Claimant provided his own comments on the minutes (his extra bundle page 15) which Dr Khan incorporated (page 118).

20. As part of the investigations Dr Khan obtained a statement from Clair Batrick (page 197D-E) which recorded the Claimant telling her to forget about outstanding appraisals. The Claimant did not deny saying this and it was in any event consistent with his openly professed view to the CQC and at the hearing that they are pointless. It was a comment which when the Respondent's learned of it prior to dismissal was likely to damage their trust or confidence in him even further.

21. Dr Khan had also asked the Claimant to comment on a fire risk assessment report (page 114) and uncompleted action points from June 2016. The Claimant's response (page 122) did not address the issue of action points from June 2016. It also emerged that the last attempt to do a fire test had been in around January 2016 (page 124) which test had not gone ahead in any event. Again this was likely to further damage the Respondent's trust or confidence in him because there was an apparent failure to deal with a fire safety matter for several months and a failure to arrange to have regular fire tests carried out.

22. The Claimant was then called to a disciplinary meeting with Dr Tan on 25th January 2017 to discuss the three allegations (page 131,145). The Claimant criticised the Respondents at the hearing for Dr Tan not having the corrected version of the investigatory meeting (ie the version including his own comments, accepted by Dr Khan). I find based on Dr Tan's oral evidence that he did not also have the Claimant's additional comments. However, much of it related to matters put right by the Claimant and Ms Salmon after the CQC notice which Dr Tan was aware of and which missed the point that that one of the allegations was a failure to prepare for the second inspection in the first place. The additions regarding the picture being one of other people's failures not just his own was a point he had already made and which he made again in this meeting (page 145). The addition about his health issues was something he raised in this meeting anyway (page 146). The addition that he was denied an opportunity to discuss discriminatory behavior was already in Dr Khan's notes (page 108). Any discussion of the chaperone policy was no longer relevant as the Claimant had accepted that DBS checks should have been done sooner. I find that the Claimant was not therefore materially prejudiced by Dr Tan not having the Claimant's additions to Dr Khan's investigation meeting minutes.

23. The Claimant apologised again in this meeting and admitted he had made mistakes (page 145,146). He accepted he had not been on top of risk assessments. He said his statement to the partners at the emergency meeting had been honest but mistaken (page 146). He was aware by this meeting that the 'gross breach of respect' in allegation 3 meant a loss of confidence in him as practice manager (page 154). He said his back condition had affected what he said at the meeting on 4th November 2016 (page 109).

24. Dr Tan then wrote to the Claimant on 31st January 2016 (page 149) telling him that he was dismissed for gross misconduct. He said that allegation 2 (DBS checks) was of particular concern and that as regards allegation 3 (loss of respect) the partners needed to be given correct information. Dr Tan did not expressly state that the partners had lost confidence in the Claimant but given his

explanation at the hearing as to what loss of respect meant (recorded by the Claimant, page 149) I find that implicit in Dr Tan's reason as regards allegation 3 and referring to being provided with correct information is a lack of confidence in being given correct information by the Claimant. Whilst allegation 2 was specifically referring to what was said by the Claimant about DBS checks at the meeting on 4th November, allegation 3 was wider in that it referred to the partner's ability to have confidence in what the Claimant told them more generally. Whilst allegation 3 as explained was potentially a reason for dismissal it was not the 'gross breach of respect of any of the partners' referred to in the disciplinary policy as justifying summary dismissal. Whilst allegation 3 had been labelled as such this was not an issue of behaviour towards a partner which I construe the policy as getting at. I do not construe gross breach of respect as meaning recklessly or negligently giving the partners the wrong information or a pattern of behaviour leading to a loss of confidence.

25. The Claimant appealed the decision to dismiss (page 150) still saying that his actions did not put patients at risk. He took issue with the way another employee had he said been treated differently. He said account had not been taken of his health or of his length of service, the pressures due to partners' holidays had not been taken into account and he had been bullied by Dr Omosini. He said the decision had a devastating effect on him. He supplemented this with some key points for the meeting (page 154) which took place on 7th February 2017. Dr Whitear did not uphold his appeal (page 157) having additionally checked his personnel file for information about his back condition which she did not find in his file. Whilst the Claimant at the hearing criticised the Respondents for their lack of records saying that proper records were not kept anyway, the keeping of such records was his responsibility as Practice Manager and he could have provided further medical evidence of his hospital admission right up to the time of the appeal if he thought it was relevant to how he performed at the emergency practice meeting. She made the point that the Claimant had admitted to the mistakes he was being dismissed for.

<u>The decision to dismiss – unfair dismissal</u>

26. Taking into account the above findings I find that the extent of the investigation undertaken by the Respondents was reasonable, given the Claimant was admitting to a number of failings. It had investigated what he had raised at the investigation meeting about Clair Batrick not having done her share of the appraisals (page 108). There was not reasonably a need to investigate what he said about gaps in his knowledge about risk assessments (page 109) because he was an experienced practice manager making this unlikely and the Respondents did not need to investigate whether he had asked for help or training because he said he had not asked for it. He referred to his hospitalisation on 2nd November 2016 but that did not affect his performance in the months from January to September 2016 and he had been well enough to attend work on 4th November after a day off at home.

27. As at the date of dismissal the Respondents were aware of the following matters.

28. The Claimant had given the wrong information to the partners about DBS checks at the meeting on 4th November 2016 because he had said they were all done but the Respondents had discovered that they had not. It had emerged via the work done with Lorna Salmon that there were four further DBS checks outstanding. This was a serious matter and the Claimant lacked an awareness of the importance of these checks. I find that the Respondents reasonably concluded that it could not rely on the Claimant to give them correct information on this important matter. However I find that the Respondents did not have reasonable grounds for believing that the Claimant was dishonest in making the statement at the 4th November 2016 meeting (allegation 2) though it had reasonable grounds for believing and did believe that he did not have a grip on the issue, was disorganised and tended to say the first thing that came into his head based on his own disorganised perception of what the situation was or should be which did not match the reality if he checked the detail. The Respondents therefore did not have reasonable grounds for concluding he was dishonest in what he said about DBS checks at the meeting. However the Respondents had reasonably lost confidence in the Claimant on being able to trust the information he gave them.

29. As regards allegation 1 (failure to prepare adequately for the CQC inspection) the Respondents had reasonable grounds for believing and did believe that the Claimant had not prepared properly for the second CQC visit in the light of the CQC finding that three of the areas it had previously identified (the three which fell within the Claimant's remit) had not been addressed by the time of the September 2016 visit. The Respondents reasonably concluded that the Claimant had not prepared properly on these areas taking into account that the Claimant had admitted that he had made mistakes and accepted his share in any unpreparedness (page 108,145). Although he subsequently attributed not being prepared to having too much work (witness statement para 1.22) he had had between January and the end of August 2016 to complete the action points from the January 2016 visit. I find that he did not raise overwork with the Respondents in any way which alerted the Respondents that this was the reason he was not addressing the CQC requirements, taking into account his email to the partners on 26th August 2016 (page 59T) which reassured the partners that all changes to policies, DBS checks and risk assessments had been carried out and noting his view that the only area of vulnerability was the registered manager issue. In addition whilst he had raised a lack of knowledge about risk assessments at the investigation meeting (page 109) this was inconsistent with having told the partners they were all done in August 2016. The August 2016 email is also consistent with it not being an issue of the Claimant saying he was struggling with the task. Although the Claimant referred to a pay rise in July 2016 (witness statement para 1.20) this was awarded before the partners were aware that that the Claimant was not dealing with the matters from the January 2016 CQC audit.

30. As regards allegation 3 (acting in a manner in gross breach of respect of the partners, explained as a loss of confidence in him) the Respondents had reasonable grounds for believing and did believe that the Claimant could not be relied on, taking into account his statements at the emergency practice meeting that things had been done when they hadn't (DBS checks, health and safety risk assessment) and his failure to prepare for the second CQC visit (see above). The statements at the meeting were not reasonably construed as dishonest but it was reasonable to conclude that they demonstrated a careless lack of grip on the

reality of the situation which he should have been on top of. The Respondents had also reasonably lost confidence in the Claimant because he had told the inspectors on the one hand that no health and safety risk assessment had been done but said in the emergency practice meeting that the documents were on the shared drive. They had also reasonably lost confidence in him because he had made very ill-advised comments to the inspectors about whether appraisals were necessary and had told Clair Batrick that she shouldn't bother with appraisals and to ignore the CQC requirement (page 197E). The Claimant had also been unable for that visit or subsequently to have evidence that even the previous CRB checks on the two HCAs existed. They had reasonably lost confidence in him as further required DBS checks had emerged during the work done with Lorna Salmon and because some appraisals still had to be completed. He was also giving contradictory information to Lorna Salmon (page 94). I find that the partners needed to be able to rely on him as their Practice Manager which included relying on what he told them had been done and now had reasonably concluded that they could not.

31. I find that the Claimant did not raise his back problem as being a condition meaning he could not participate in the meeting on 4th November 2016 because if that had been the case and he felt unwell he would have asked to go home instead and not attend the meeting, given he knew in advance what it was about (ie he knew it was important) and had had time to read the CQC warning notice. If he had been concerned he wasn't able to participate properly he would have said so and the Respondents were entitled to assume he was able to attend if he had come in to work that day. I find that whilst he mentioned his back at the meeting it was not in a way such that the Respondents should reasonably have postponed the meeting to another day, taking into account the meeting was an emergency practice meeting and they needed the Claimant's input. If he made a wrong statement about DBS checks it was because he did not have a grip on the issue and not because he felt unwell. His statement that they were done was exactly what he had told the partners in August 2016. The Claimant also claimed (page 7) that the possible effects of absence due to future back surgery were raised by the partners but I find based on Dr Whitear's oral evidence that the Claimant did not tell her that he might need time off for surgery during 2017.

32. I find that there was no predetermination to dismiss the Claimant before the start of the disciplinary process. The Claimant (page 7) supported this allegation by saying a practice nurse had been said to be needed to be 'managed out' after the first report but then said the same nurse left after being accused of bullying, going off sick with stress and then resigning which does not support their two situations being comparable or that she was in fact managed out at all.

33. I find that whilst the Claimant was dismissed, he was not made a 'scapegoat' for the warning notice from the CQC because the Respondents were not blaming everything on him but had reasonably simply lost all confidence in him and could not rely on what he said or what he said he had done. Although the Claimant said that it was on 'Leadership' that the Respondents were rated as inadequate following the 1st September 2016 inspection (page 60) and that it was the partners who were responsible for that, the Respondents reasonably concluded that the Claimant had not by the time of the second CQC visit done the matters within his remit which the CQC identified clearly in January 2016 needed

to be done and which he had still not done to a significant extent by the time of the warning notice in November 2016. His explanations and conflicting accounts reasonably led the Respondents to believe he could not be relied upon and there was a sense of chaos particularly around the DBS checks. The fact that he had admitted mistakes were made and apologised was relevant but ultimately apologising for past failures does not make the Respondents unreasonable in dismissing given that confidence had been lost and more matters emerged during the investigation which increased rather than decreased their lack of confidence in him. I therefore find that he was not made a scapegoat for the CQC findings but dismissed for these reasons which were significant reasons. The fact that he says other people in other practices are not dismissed for the results of a CQC inspection (witness statement para 2.63) misses the point; he was not dismissed because of the audit outcome but because he had failed to do what had clearly been identified as required by the CQC in January 2016, as a result of which failure by him the Respondents reasonably lost confidence in him.

34. As to whether his dismissal was unfair because other matters which other people were responsible for did not lead to disciplinary action, the person the Claimant referred to who was not disciplined was Dr Tan who had as a matter of urgency to complete an audit of stroke patients (page 76). This was a matter affecting patient safety. However I find that any disparity in treatment does not render the dismissal unfair because by the time of his dismissal the Respondents had reasonably lost all confidence in the Claimant, the problems identified in the CQC warning notice compounded by what was discovered in the investigation. The Claimant had given conflicting and contradictory accounts to the partners, made at best very ill -advised comments to the inspectors about appraisals and had told Clair Batrick not to bother with them. Whilst Dr Tan also had important remedial work to do too, the Respondents had not lost confidence in him in the same way as it had with the Claimant. The Claimant also said that there was a culture of not doing appraisals (clinical as well as non-clinical) but this was a culture he was an advocate of and which he knew was a view not shared by the CQC; in any event the warning notice only referred to non-clinical appraisals being the problem (page 75) so that if there was also a problem with clinical appraisals, it was not significant enough to form part of the warning notice. The registered manager issue said by the Claimant to be attributable to failings by Dr Whitear was also not referred to in the warning notice. The situations of Dr Tan and Dr Whitear were not directly comparable to the Claimant's and there was not in any event an obligation on the Respondents to discipline others just because other kinds of failings by others were identified.

35. As to his length of service with the Respondents this was a relevant consideration but I find that the Respondents acted reasonably in still dismissing the Claimant. In fact his length of service and experience was such that it was more reasonable for the Respondents to dismiss, given he should have been able to deal with the January 2016 CQC requirements in good time and to behave professionally during their visit. Additionally his length of service did not reasonably outweigh the Respondent's loss of confidence in him, given the seriousness of the issues and his senior position.

36. Taking these findings into account I conclude that the Claimant's dismissal was fair for some other substantial reason (with a conduct element)

namely the Respondent's loss of confidence in the Claimant in his failure to prepare for the CQC audit and because of what emerged during the emergency practice meeting and in the investigation including his various statements to the partners (in effect a combination of allegations 1 and 3). To the extent that it was also a conduct only matter (allegation 1) this was not the principal reason for dismissal, the principal reason being the loss of confidence in the Claimant, though the conduct matter fed into the loss of confidence. I find that the loss of confidence and being able to rely on the Claimant in important matters affecting the practice is the thrust of the dismissal letter at page 149. This loss of confidence was a substantial reason and justified the dismissal of the Claimant because he was the Practice Manager.

37. Taking into account the above findings as to the process followed by the Respondent, I find that the Respondents conducted a reasonable investigation into the three allegations. There had then followed a disciplinary process in which the Claimant had been able to participate fully and make any points or produce any documents he wished. The third allegation had been clarified by the time of the disciplinary meeting so any initial confusion at what was being referred to had been dissipated. The procedure had not been done in a hasty manner and he had exercised his right of appeal against dismissal. The procedure complied with the ACAS Code of Practice (2015).

38. The dismissal of the Claimant was therefore within the band or range of reasonable responses.

Breach of contract by the Claimant – wrongful dismissal

39. I find that the Claimant had failed to prepare for the second CQC audit and complete the matters clearly within his remit in the January 2016 report. He had reassured the partners in August 2016 that everything was in place as regards his areas for the next inspection (page 59T). A few days later he told the CQC (page 73B) that he would apply for new DBS checks immediately for the two HCAs which he did not then do for a further two months. He was negligent and careless in giving reassurance to the partners in August 2016 and then again in the emergency practice meeting. He also did not do what he had told the CQC he would do about getting the two DBS checks (for clinical staff) in September 2016.

40. The Claimant made very ill-advised comments about appraisals to the CQC inspectors (carrying out a very important regulatory function) who had already identified them as an area for improvement. The Claimant told Clair Batrick not to bother with appraisals because of his own personal views about them even though they were on the CQC list to do list from January 2016. The statements obtained subsequent to dismissal at page 264-266 (relevant to the wrongful dismissal claim only) were consistent with him rating his own person views about appraisals as more important the CQC's requirements to hold them, showing an arrogance and lack of awareness of complying with a regulator's requirements whether or not you agree with the requirement.

41. The Claimant was not dishonest about what he said to the partners about DBS checks specifically at the emergency practice meeting (allegation 2) but he was misleading in the list he then produced at page 283 for the CQC follow-up

action after receipt of the warning notice (see para 13 above) because he was representing that DBS checks were approved on dates when what he was actually referring to was the date they were applied for, in at least some cases. The Respondent's document at page 369 produced for the second day of the hearing (which was based on information about application dates provided to the Respondents after the first day of the hearing from the Disclosure and Barring Service) also shows that the 'approved' dates on page 283 mean the applied for dates because the dates for application for the first four names are the dates the Claimant had given as the applied for dates. I find this was to make it look on page 283 as if he had obtained at least some of the DBS certificates earlier than he had; whilst at the emergency practice meeting he had recklessly or carelessly said they had all been done, by now he was under some pressure to show that approvals had in fact been obtained and I find that his actions had shifted from reckless or careless to deliberate. The extent of the discrepancy between the Claimant's list and the reality did not emerge until after he was dismissed and the Respondents looked into the issue (page 369) and found after establishing the applied for dates direct with the Disclosure and Barring Service that what the Claimant had said in November 2016 for the purposes of the CQC follow up action were approved dates were in fact applied for dates. This was particularly significant as regards Bettina Keating, one of the two HCAs both in a clinical role and acting as chaperone who had an old CRB check which the Claimant could not find. (It is possible for an employer to rely on something in a wrongful dismissal claim as justifying dismissal which is only found out after the dismissal.)

42. I find that in relation to these matters and taking into account the new matters discovered after the dismissal that the Claimant's actions amounted to gross misconduct. These were not minor errors or short term lapses of judgement but significant negligent or careless actions and, in the case of the list at page 283, deliberate. Trust and confidence was broken down by his own actions at the time of his dismissal. The Claimant's behavior was not the 'gross breach of respect of any of the partners' referred to in the disciplinary policy (page 199) because I find that was getting at disrespectful or rude behavior but it nonetheless amounted to gross misconduct so as to justify dismissal of the Claimant without notice, taking into account his senior management role.

Holiday pay

43. The Claimant's claim (page 404, updated schedule of loss) was for 13 days unpaid holiday (13.5 days from the 2016 holiday year). His claim was based on the agreement he said he had with Dr.Lemmens in 2014 or 2015 (witness statement para 1.18) which was to the effect that his annual entitlement would be 7 weeks. He said he should be paid for outstanding 2016 holiday that he had been unable to take because he had absences due to sick leave in 2016 and was suspended in December 2016.

44. Under the Claimant's contract (page 218) he was entitled to 5 weeks holiday from 2000 and an additional ½ week after 10 years service. The contract did not specify an entitlement to bank holidays in addition. It allowed carry forward of unused holiday only by agreement. Under the written contract his entitlement as at the time he was dismissed was therefore 5 ½ weeks including bank holidays. It

was explained on behalf of the Respondent at the hearing as an entitlement of 5 weeks plus 6 Bank Holidays and that the Claimant was paid pro-rata for January 2017 ie 2.08 days plus the one January 2017 bank holiday resulting in a payment of 3.5 days (rounded up).

45. The Respondent's said something different at the time outstanding holiday pay was paid - that the entitlement used to calculate the amount was 6 weeks (page 169). According to page 169 a payment of one day was paid for 2016 (ie in practice allowing a carry over) and 2.5 days for 2016 (ie 1/12th of 30 days). I therefore find that the 3.5 days payment included a carried over day from 2016 (based on a 6 weeks entitlement) which the Respondents were now agreeing could be carried over. This means that the amount paid for what accrued in January 2017 was 2.5 days. Whether his entitlement was 5 weeks (plus Bank Holidays) or 6 weeks (plus Bank Holidays) the payment of 2.5 days meant that the Respondent had paid the Claimant in full for outstanding holiday accrued in January 2017. The Respondents had also agreed to the carry over of an untaken day from 2016 based on a 6 week entitlement.

46. Turning to whether the Claimant was entitled to 7 weeks holiday as claimed, he relied on an oral agreement with Dr Lemmens as amending the written terms set out above. The Claimant's case was that by the time of the agreement with Dr Lemmens he was in fact entitled to 9 weeks holiday but I find there was no basis for that assertion given the terms of the written contract and the absence of an explanation as to why or how the Claimant's holiday had increased to 9 weeks. If he took more than his entitlement in practice (page 246, in relation to 2013) this was not on the basis that he had a contractual entitlement to more. Turning to whether there was an agreement with Dr Lemmens, the Claimant said this was in 2014 or 2015 but neither party had any documents about any agreement. The Claimant's oral evidence was that Dr Lemmens was a bully, made no secret that he wanted the Claimant to leave and that he had made an unjustified complaint about the Clamant after which the police took no action but advised the Claimant to steer clear of him. This makes it unlikely that Dr Lemmens did agree any arrangement in 2014 or 2015 as a favour to the Claimant taking into account it was said to arise because the Claimant was then entitled to 9 weeks holiday, the basis for which is not explained by his written contract of employment or any other explanation or documents. I therefore find that Dr Lemmens did not agree to a 7 week entitlement.

Relevant law

47. The relevant law for unfair dismissal is s98 Employment Rights Act 1996 (fair reason and fairness of dismissal) and the test in *BHS v Burchell [1978] IRLR 379* for conduct dismissals (to the extent that conduct fed into the dismissal).

48. The range of reasonable responses test in *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 applied whether the dismissal was for conduct or for some other substantial reason.

49. I also considered *Huggins v Micrel Semiconductor UK Limited* (EATS 009/2004) as regards a some other substantial reason dismissal based on a breakdown of trust and confidence caused by the employee's conduct.

50. As regards the wrongful dismissal claim, the relevant law is the Extension of Jurisdiction (England and Wales) Order 1994. I considered *Boston Deep Sea Fishing v Ansell* 1888 39ChD 339 CA as regards matters discovered after the dismissal potentially justifying summary dismissal.

51. I was also directed to *London Ambulance Service NHS Trust v Small* [2009] EWCA Civ 220 on behalf of the Respondent.

52. As regards the claim for holiday pay the relevant law is Regulation 14 of the Working Time Regulations 1998.

Reasons

53. Taking into account the above findings as to the fairness of the decision to dismiss, I conclude that the Claimant was not unfairly dismissed by the Respondent. He was dismissed fairly because of a loss of confidence in him caused by his conduct (applying the analysis in *Huggins v Micrel Semiconductor UK Limited*) which was a substantial reason for dismissal and which justified dismissal of someone in his position as Practice Manager. The Respondents genuinely and reasonably believed that they could not rely him because of his actions, following a reasonable investigation. His dismissal was within the band or range of reasonable responses as set out in *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 and was fair under s98(4) Employment Rights Act 1996. His claim for unfair dismissal is therefore dismissed.

54. Taking into account the above findings as to the Claimant's conduct, I conclude that the Respondents did not wrongfully dismiss the Claimant and his claim for wrongful dismissal is therefore dismissed.

55. The Claimant is not entitled to any payment for holiday pay accrued but untaken at the date of dismissal. His claim for holiday pay is therefore dismissed.

Employment Judge Reid

16th October 2017