



EMPLOYMENT TRIBUNALS

Claimant: Mr N Kavanagh

Respondent: Liverpool City Council

Heard at: Liverpool (in person) **On:** 6, 7, 8, 9, 10 June 2022
and in chambers on 20 and 21 June 2022

Before: Employment Judge Mellor (sitting alone)

Representation

Claimant: Mr B Fazakerley, (lay representative).

Respondent: Mr T Kenward (counsel).

RESERVED JUDGMENT

The complaint of unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction.

1. The claimant, Mr Kavanagh, was employed by the respondent, Liverpool City Council, as the Director of Regeneration from 1 July 2011 until his dismissal without notice on 22 March 2021.
2. On 28 July 2021 the claimant issued these proceedings claiming that his dismissal was unfair within **section 98 Employment Rights Act 1996**.
3. The respondent says the claimant was fairly dismissed for misconduct, a potentially fair reason, and that in all the circumstances the dismissal was fair within the meaning of **section 98(4) Employment Rights Act 1996**.
4. The claimant has been represented by Mr B Fazakerley, from Unite the Union, who also assisted him during the disciplinary and appeal

hearings. The claimant gave sworn evidence and called sworn evidence from Mr J Anderson, the former elected Executive Mayor of Liverpool City Council.

5. The respondent was represented by Mr T Kenward, counsel, who called sworn evidence from the following people: Mr S Goacher of Weightmans LLP who prepared the investigation and subsequently presented the management case to the disciplinary panel; Mr T Reeves, Chief Executive of Liverpool City Council; Councillor Wendy Simon, the then acting Mayor and chair of the disciplinary panel; and Councillor Murray, the chair of the appeal panel.
6. I have been provided with a bundle that runs to 1823 pages. A large section of this (some 700 pages) is the investigation report. I have been referred to very little of this during the course of this hearing. I have read the documents referred to in the statements and those in cross examination as well as the documents I had specifically been invited to read by both parties.

Preliminary Matter

7. During the course of Mr Reeves' evidence it became clear that there are ongoing investigations by Merseyside Police which extend to the claimant and the claimant's witness Joe Anderson. I therefore invited consideration as to whether either party, or the tribunal itself, sought a stay pending the outcome of those investigation.
8. Neither party sought a stay. The claimant's case rests on procedural irregularities which did not require a detailed exploration of the allegations that he faced at the disciplinary hearing. Consequently he did not feel that he would be prejudiced by this case being heard whilst there were ongoing investigations. He was aware that the case was being observed by a member of Merseyside Police and that he had a right against self-incrimination. Mr Fazakerley expressed concern over delay in this case given the passage of time that has already elapsed and the likelihood it would take a further, not insignificant, amount of time before the investigation was concluded. He was therefore content for the case to continue.
9. Mr Kenward confirmed that respondent did not seek a stay. He helpfully took the tribunal through the different issues from the perspective of each party and Merseyside Police. The fact of an ongoing investigation may mean that a witness' answer was that they were unable to comment (whether on advice from the Police or in exercise of a right) but that did not warrant a stay. Both the claimant and Mr Anderson were made aware of their right against self-incrimination.
10. I agreed with the parties taking into consideration the following: neither party sought a stay, it would cause inevitable delay, the police had not suggested that these proceedings would interfere with their investigation and the claim is brought on the basis of procedural failings so a detailed exploration of the allegations was unlikely to take place in any event.

Issues for the Tribunal to decide.

11. This case was not subject to a case management hearing prior to this final hearing. At the start of the hearing I agreed with the parties the issues for me to decide. Although the Polkey and contributory conduct issues concerned remedy and so only arise if the claim succeeds, I agreed with the parties at the beginning of the hearing that I would consider what I may do (subject to the claimant seeking reinstatement) and I invited them to deal with them in evidence and submissions.
12. What was the principal reason for the claimant's dismissal and was it a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996? The respondent asserts the reason was misconduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
13. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
 - (a) there were reasonable grounds for that belief;
 - (b) at the time the belief was formed the respondent had carried out a reasonable investigation;
 - (c) the respondent otherwise acted in a procedurally fair manner;
 - (d) dismissal was within the range of reasonable responses.
14. The claimant's case is the respondent failed to act in a procedurally fair manner and that Mr Reeves colluded with others to bring about the claimant's termination. The claimant sets this out in his grounds of complaint [17] which is echoed in his witness statement and can be summarised as follows:
 - a) Mr Reeves was out to undermine the claimant as demonstrated by:
 - i. Mr Reeves' decision to delay suspending the claimant or informing him of any alleged concerns for some 5 months and he failed to share the 'China Town' investigation report.
 - ii. Mr Reeves was dishonest when he claimed he had nothing to do with the claimant's arrest; he had in fact given the police a statement on 19/8/19.
 - iii. There was no written complaint from Mr Falkingham (Urban Splash) Mr Reeves lied about this which undermined the basis for commissioning the 'China Town' investigation.
 - b) The respondent was not clear about the author of terms of reference for the disciplinary investigation thereby lacking transparency.
 - c) Mr Goacher the investigating officer concluded his report by identifying areas of potential misconduct which oversteps his role and influenced the disciplinary panel.
 - d) There was no separate decision maker to establish whether there was a prima facie case – the panel was party to that decision.
 - e) The investigating officer, Simon Goacher, became the presenting officer at the disciplinary hearing.
 - f) The Chair of the disciplinary panel 'shut down' a point of order raised by Councillor Hanson, which is evidence of the Chair's

unwillingness to listen to issues that may be favourable to the claimant.

- g) The Chair of the disciplinary panel was the acting mayor, and so more senior to the Chair of the appeal panel.
- h) During the investigation the terms of reference were extended to include two additional allegations.

15. Although the claimant indicated his case was based on procedural unfairness he does refer to one final issue that is more properly described as substantive unfairness. That is in relation to the system of delegated authority all of which require more than one signatory. His point being none of the other signatories were subject to disciplinary procedures. Thus the claimant has, on his case, been unfairly singled out, this is further evidence of Mr Reeves' desire to get rid of the claimant as well as evidence that the decision to dismiss was unfair.
16. The claimant also claims the decision to dismiss him was outside the band of reasonable responses.
17. If I find the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair procedure been followed in accordance with the principles in **Polkey v AE Dayton Services Ltd 1987 UKHL 8**. The respondent argues that any award ought to be reduced by 100%.
18. Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct as set out in **section 122(2) Employment Rights Act 1996**?
19. Did the claimant, by his blameworthy or culpable conduct, cause or contribute towards his dismissal and if so by what proportion would it be just and equitable to reduce the amount of any compensatory award under section **123(6) Employment Rights Act 1996**.

Findings of Fact

20. The relevant facts are as follows. A lot of the primary facts were not in dispute, but where I have had to resolve a dispute of fact I have indicated how I have done so at the material point. References to page numbers are to the agreed bundle of documents. I have not referred to all the evidence, partly due to volume, but also where I did not consider it to be relevant. An example of this is the report of Max Caller CBE which although was referred to in evidence was not available at the time the panel made its decision consequently I have not referred to it, or the evidence given in relation to it, in my findings.
21. The claimant, Mr Kavanagh, was employed by the respondent, Liverpool City Council, as the Director of Regeneration from 1 July 2011 until his dismissal without notice on 22 March 2021. His terms and conditions of employment were those set by the Joint Negotiating Committee (JNC) for Local Authority Chief Officers Conditions of Service Handbook dated 8 August 2017.

22. There is no disciplinary policy or procedure applicable to the claimant or an officer at his level. Pursuant to paragraph 2.3 Part 3 of the Handbook the principles of natural justice and good management practice govern the conduct of any proceedings against a Chief Officer. The Council should have full regard to the principles and standards set out in the ACAS Code of Practice on Disciplinary and Grievance Procedures.

The 'China Town' Investigation

23. In late 2018 Jonathan Falkingham, Chief Executive of Urban Splash, contacted Tony Reeves about some concerns he had around the way Liverpool City Council had dealt with a transfer of Urban Splash's interests in the Tribeca/New China Town development to a company known as PHD1.
24. In October 2018 Mr Falkingham also had a discussion with Joe Anderson in which he complained that senior members and officers did not listen to his concerns about the suitability of PHD1. Mr Anderson met with Mr Falkingham at his house to discuss matters. At this time Mr Falkingham raised a concern that Councillor Anne O'Byrne, Deputy Mayor, had been seen hugging PHD1's Representative Peter McInnes.
25. In his oral evidence, Mr Anderson sought to distance the claimant from any criticism made by Mr Falkingham. He initially explained that the Council was concerned about the failure around that development and fractional sales. He then said that the criticism was around an elected member (meaning Anne O'Byrne) and maintained this for some time going so far as to say that Mr Falkingham had said "*he had no issues with Mr Kavanagh*" this statement, however, was absent from his note of interview [434/435] and his statement for these proceedings.
26. However, it was clear at the time that Mr Falkingham had raised issues about both members and officers. In his email Mr Anderson said "*I was hugely disappointed with your account when you explained to me that your concerns around the suitability of PHD1 weren't listened to when you met with senior members at the time and officers*" (emphasis added) [60A]. The terms of reference for the investigation into these concerns identified the subject matter of the investigation as "*the role of Members and Officers of the City Council in the process which resulted in the transfer of a leasehold interest from Urban Splash to PHD1*" (emphasis added) [414].
27. After further questioning Mr Anderson explained his understanding was that the claimant (or another officer) had said that the development in competition wouldn't receive planning permission. I therefore do not accept Mr Anderson's evidence that Mr Falkingham had said he had no issues with Mr Kavanagh. It is clear from the emails and terms of reference that Mr Falkingham's concerns related to both Members and Officers, which includes the claimant.
28. The claimant asserted that Mr Falkingham had never made a complaint. I find that he did based on the evidence above. It may be right that he did not put a complaint in writing, but he did raise a complaint or 'concerns' to both the Chief Executive and to the Mayor.

29. In any event, Mr Anderson accepted that there was a legitimate reason to commission the first report into the China Town development. Indeed he said *“I thought the investigation was necessary into Members and Officers as a member of the public was raising issues and it is right that was investigated on procedures...to look at how a company had been able to present a scheme it couldn't deliver”*.
30. Therefore on 23 November 2018 Tony Reeves, Chief Executive, and Joe Anderson jointly commissioned an investigation into the transfer of a leasehold interest from Urban Splash to PHD1. The respondent instructed Mr Goacher of Weightmans Solicitors, to undertake the investigation. The instructions read: *“recently both the Chief Executive and the Mayor have been contacted by a representative of Urban Splash expressing concern at the role played by City Council representatives, in both Officer and Member capacity, in the process which resulted in the selection of PHD1 as the developer. The Mayor and Chief Executive have taken these concerns on board and wish to have the issue independently investigated in order to establish the nature of the role played by the City Council and the appropriateness or otherwise of the actions of members and Officers in this process”*. [414].
31. On 21 May 2019 Mr Goacher produced his report. He noted that his remit was *“a fact finding exercise to establish as far as possible what happened when and the involvement of Council members and officers in the process. The purpose was not to establish fault or blame”* [404].
32. Mr Goacher made findings based on the balance of probabilities that:
- a) Liverpool City Council effectively forced Urban Splash to transfer its interest. They wrote to Urban Splash in 2015 stating it wished to terminate the agreement. This finding is consistent with the evidence given to the tribunal by Joe Anderson who explained *“I wanted progress – that site had stalled for 10-12 years and people had to leave their homes. Our interest wasn't going to be held to ransom that's why the officers engaged with Urban Splash...my clear direction was that the council pushed ahead with [PHD1]”*. In fairness to Liverpool City Council Mr Goacher noted that this needs to be seen in the context of there being very little progress in the 8-9 years that Urban Splash had the Development Agreement.
 - b) PHD1 scheme was chosen by Nick Kavanagh and Anne O'Byrne whereas Mark Kitts and Nick Puttnam felt X1 was a better scheme. This finding was not disputed by the claimant. He explained in evidence to the tribunal that the X1 scheme was uninspired and would have blocked the view of the Cathedral which was a major landmark. The PHD1 scheme was far more interesting and tailored towards the history of China Town. Mr Goacher noted that there was no clear audit trail for this decision making. Again Mr Kavanagh did not seek to challenge this indeed he told the tribunal that you could have *“driven a coach and horses”* through the processes relating to this transaction, but he sought to draw a distinction between this type of asset disposal (reassignment of a lease) and sale of an asset.

- c) Nick Kavanagh said he was aware of a developer who would be on site by May 2015. In evidence the claimant didn't recall saying this, but he did recall that there was not a developer who could have been on site at that time so it seemed unlikely.
- d) Nick Kavanagh said X1 wouldn't get planning permission, or support from the Council. The claimant in evidence confirmed saying that the X1 development would not be supported by the Council; they preferred PHD1.
- e) Liverpool City Council had dealings with PHD1 outside of the selection process.
- f) The selection of PHD1 was a done deal. This was not upheld by Mr Goacher, but he did note that Councils are required to have clear selection processes so it can demonstrate transparent and objective processes for selecting partners which are "*totally absent in this case*". As I have already indicated at (b) this isn't disputed by the claimant.

33. As a consequence of Mr Goacher's findings he made the following recommendations:

- a) Liverpool City Council considers whether investigations should be carried out in respect of the conduct of any individual officers or members; and
- b) Liverpool City Council reviews its practices and procedures in respect of any developments in which it is involved to assess whether they comply with legal requirements and good practice [412].

34. The claimant is critical of these recommendations, not because he criticises the findings, but because this was a no fault no blame report and therefore Mr Goacher is 'going beyond the scope' by making them.

35. Mr Goacher accepted that he wasn't specifically asked to offer recommendations, but that it was a natural extension of his remit, which was to establish the involvement of council officers. There seemed little point in doing one without the other. I accept Mr Goacher's evidence that this was not part of an overall scheme to target the claimant. I found Mr Goacher to be a very straight forward and clear witness. He had been instructed to do a job and he did it. I did not hear any evidence that undermined his appointment as an independent investigator and I accept that he made the recommendations genuinely as part of his conclusion.

36. On 15 May 2019 Mr Goacher emailed Jeanette McLoughlin, City Solicitor, informing her he would amend (some minor corrections) the report and send it through to her. He then asked "*Do you want me to send it to the police or will you do that*" [60C].

37. Mr Goacher had been made aware that the National Crimes Agency (although it transpired it was the Serious Fraud Office) had been investigating PHD1/Northpoint Global including their involvement in the China Town development. Mr Reeves was cautious about the Council's internal investigation cutting across any criminal investigation and so with the permission of Joe Anderson he spoke to the Chief Constable of Merseyside Police. The Chief Constable wanted to see the terms of

reference and subsequent report, Mr Anderson told the tribunal that MR Reeves did speak to him about making sure the Council's investigation did not cut across theirs and he assumed they would want to see the report. He said: "*I too was conscious that we shouldn't do anything that hindered the National Crime Agency or the Police*". At the time Mr Reeves contacted the Police their investigation was into PHD1 not the claimant. The claimant had also been fully aware of the NCA investigation into PHD1.

38. Mr Goacher was aware that the Police had asked to see the report, so when he asked 'do you want me to send it or will you?' he was simply seeking instruction on how best to provide the Police with a copy. I do not find that this question was in any way an attempt by Mr Goacher to implicate the claimant in any criminal activity. First of all I found Mr Goacher to be an honest witness; he answered questions in a straight forward and credible manner. Secondly his investigation report does not, as was pointed out on behalf of the claimant, actually implicate the claimant. Thirdly he was acting on instruction, which is clear from the tone of his email and the evidence of Mr Reeves.
39. On 16 August 2019 Mr Reeves provided a signed statement to Merseyside Police detailing how and why he became concerned about the awarding of tenders. This referenced both the 'China Town' report and an internal audit report; all of the relevant material was passed to Merseyside Police and Operation Aloft commenced [291].
40. Providing a statement (and supporting evidence) to the Police is not the same thing as having any 'involvement' in the decision to arrest Mr Kavanagh. The decision to arrest the claimant was not something that Mr Reeves could control; that was the decision of Merseyside Police. The information from the Police says "*he provided a signed statement to Merseyside Police on 16 August 2019, detailing how and why, he became concerned about the awarding of tenders for the sale of land owned by LCC*" [291]. Mr Reeves' evidence to the tribunal which was the Council "*was aware there was an ongoing investigation which we were cooperating with and providing information the police requested. They asked me to do a statement so I did*".
41. The extract at [291] does not identify who asked whom to do the statement and so it is not inconsistent with Mr Reeves' evidence. It is inherently unlikely that Mr Reeves had the power or influence over the Chief Constable of Merseyside Police or the OIC that would enable him to bring about either a full investigation (which is still ongoing) or the arrest of the claimant. I therefore do not find Mr Reeves did so, nor do I find that he misled this tribunal.
42. Mr Goacher emailed the final copy of the report to Jeanette McLoughlin, on 6 June 2019.
43. The respondent did not act on that report until 19 December 2019 which is the date that Mr Kavanagh was suspended. The reason for the delay in suspending the claimant and investigating any issues arising out of the 'China Town' report was Merseyside Police had instructed Mr Reeves not to do anything with the report because they had their own

ongoing criminal investigation and wanted Mr Reeves to “*hold back on our investigation*”. By 19 December 2019 the Police had taken the decision to arrest the claimant and confirmed to Mr Reeves that they were content for the respondent to carry out its own investigation. I accept Mr Reeves’ evidence that he was asked not to communicate this to Joe Anderson either.

Disciplinary Investigation

44. By early 2019 Mr Reeves had been made aware of significant issues, he described: “*an internal audit review gave me concerns and there were rumblings in the city about property transactions, so I became aware of potential issues... [Property transactions] were not done properly, the numbers done by private treaty seemed an inordinately high number. Together with a significant number c200 whistleblowing’s in one department*”. He therefore moved the Property & Asset Management Services (PAMS) function from the responsibility of the claimant to the Director of Finance.
45. Although Mr Reeves in his evidence referred to some complaints/issues as whistleblowing complaints, I find was an inaccurate labelling. The claimant agreed in his evidence that there is a ‘live’ spreadsheet kept by the internal audit team which logs complaints made to the Council and these are in large numbers, around 300. He said that some of them could be as straight forward as a complaint about not getting planning permission, but he equally accepted that some will include complaints about wrongdoing. These are anonymous and I understand from Mr Kenward were also part of the ongoing Police investigation, so disclosure of the log would have been fruitless because it would have to have been heavily redacted. Mr Reeves explained that these complaints are only allegations of wrongdoing.
46. As a consequence of the China Town report and the other complaints which were raised as part of the internal audit, Mr Reeves decided that a disciplinary investigation needed to be undertaken. One such complaint was made by Claire Dove the Chief Executive of Blackburne house who raised a complaint in relation to the sale of the property and the arrangements for the lease of the ground floor and subsequent sub-lease back to Blackburne House ‘Faulkner Street’ [796].
47. He therefore instructed terms of reference to be drafted. Mr Reeves did not write the terms himself, but he approved them and signed them [401]. They were written by the City Solicitor. This issue was raised by the claimant at the disciplinary hearing when there was some confusion over who wrote this document. Initially no-one confirmed authorship. At the disciplinary hearing Jeanette McLoughlin initially said they were not drafted by her but the department [1532], but she later returned and confirm she did write them. When she confirmed this the claimant and Mr Fazakerley declined to put any questions to her because, as the claimant explained in evidence, “*we didn’t find that a credible response so we did not ask any further questions of her because we didn’t trust the response we would get*”.

48. I find that it was inevitable there would be a further investigation and this was accepted by Mr Anderson who when asked about the propriety of the investigation he said *"I don't disagree with the recommendations, I'd have no issues with those recommendations to investigate"*. In his evidence the claimant when asked the same question by Mr Kenward said *"yes, they should have been actioned"* although he went on to say he felt the "process was compromised".
49. The respondent instructed Mr Goacher to conduct the investigation on 20 January 2020. The issues related to a number of transactions and concerns which have arisen as a result of reviews of some transactions in particular: China Town, Falkner Street and Percy Street.
50. Mr Goacher was instructed to *"investigate the chronology and substance of these transactions and to conclude upon their appropriateness or otherwise in the context of Procurement Law, the City Council Constitution (in particular its Contract Standing Orders) and the duties of an employee to the employing organisation"*. He commenced his investigation on the 30 January 2020.
51. On 18 May 2020 Mr Goacher wrote to Gary Wormald, Principal Solicitor, identifying two additional issues emerging from the investigation which were (1) a bullying culture in the department; and (2) irregularities in the decision making process on a small sites disposal scheme.
52. Mr Wormald wrote to Mr Reeves giving advice that the respondent is under a duty to investigate issues relating to the welfare of staff and so rather than conducting a separate investigation they be formally added to the ongoing original investigation [402]. On the same date Mr Reeves gave the authority to extend the terms of reference.
53. Mr Goacher concluded his investigation on the 7 October 2020 (a little over 8 months). During this time Mr Goacher considered all the documents provided to him by both the respondent and the other witnesses. He interviewed 24 witnesses, some of whom twice. He interviewed the claimant for four hours and 20 minutes [703]. The claimant does not take issue with the accuracy of the note of this interview, or indeed any of the written interviews. The claimant was able to amend the written note after the interview and any of his amendments can be found in italics.
54. The witnesses included the Chief Executive Tony Reeves and the Executive Mayor Joe Anderson. As a consequence of their involvement at witnesses they were both excluded from either receiving the full report or, in the case of Mr Reeves, presenting the management case (of which see further below).
55. Mr Anderson sought a copy of the report and continued to seek one after it was made clear to him that it would be improper for him to receive one. He said he wanted a copy because *"who polices the policemen. I bring no threat to this process none whatsoever. Indeed it was me that supported and approved it. Alls I want to see is fair play and me scrutinizing what others have submitted is fundamental to that. There will be no Appointments Panel unless I see it"* (sic) [R2-2]. Mr Anderson

accepted in evidence that last sentence seemed like a threat to obstruct the panel, something he agreed he shouldn't have said.

56. Mr Anderson told the tribunal he approved of the second (disciplinary investigation) other than the extended terms. He said that after a discussion with the City Solicitor he agreed, but he wanted to see the report to make sure it was accurate. He felt as Executive Mayor he was entitled to the report.
57. Although the respondent did not provide Mr Anderson with a copy of the report, it transpired that someone posted a copy through his door. He did not let the respondent know he had received it. When asked if there was anything in it that concerned him he said "*there were a couple of comments I noted, but nothing major*" although this was caveated by him explaining his reading was not thorough given its size.
58. The claimant also provided his own written response to the terms of reference in which he sets out his account of each allegation [701-718].
59. During the investigation the claimant was able to clearly express his understanding of events and the application of the rules. By way of example:
- a) In respect of China Town he clearly discussed with Mr Goacher that he drew a distinction between procurement and reassignment of a lease, only the former requiring or falling within the Standing Orders. The claimant offered this explanation in his written document [710] and interview [703].
 - b) In respect of 68 Faulkner Street he was noted as having explained he could not have encouraged the Chief Executive of Blackburne House to allow Elliott Lawless to obtain the site with a commitment that they would develop a facility for Blackburne House because Elliott Lawless had already been engaged prior to the claimant being involved and he was there to resolve a dispute about the fit out [705].
 - c) The claimant did not however, question the integrity of some of the complainants for example: Claire Dove. The origin of the complaints therefore seems to be genuine.
 - d) He gave his explanation about the mechanism of delegated authority [707].
60. The claimant questioned the role of Mr Reeves in the investigation because one of the other witnesses, Mark Kitts, who spoke to Mr Goacher a second time stated "*he had a discussion with Tony Reeves about things which were pertinent and TR had suggested he speak to Mr Goacher again*". It was put to Mr Reeves that this was an instruction and interfering with witnesses. I do not agree: there was no suggestion that Mr Reeves told Mr Kitts what to say, or that Mr Reeves made the approach. In fact the opposite is true, Mr Kitts had the discussion about pertinent matters [697] so it was quite appropriate that Mr Reeves told him he ought to speak to Mr Goacher. Indeed had he not done so, he could equally have been accused of trying to hide relevant evidence.
61. The conclusion of the investigation is contained in a 42 page report. Mr Goacher concluded that "*there are significant failings identified in the*

compliance with proper procurement processes and contract standing orders in relation to each of the transactions...the Appeals and disciplinary panel is likely to wish to progress:

- a) The processes following in respect of the China Town project;
- b) The comments made by NK about the likelihood of planning permission being granted if Urban Splash sold to X1;
- c) The process followed in respect of the disposal of Falkner Street;
- d) The reduction in price of the disposal of Falkner Street based on the section 106 contributions made by Elliot Group;
- e) The disposal of Percy Street to Elliot Group
- f) The information given by NK to the Chief Executive that Elliot Group made the highest offer for Percy Street which was incorrect;
- g) The culture of bullying and fear
- h) The disposal of the Small Sites to Flanagan Group which did not meet the statutory requirement of obtaining the best consideration reasonably obtainable or comply with the council's standing orders.

62. In addition to the full report (running to around 712 pages) Mr Goacher prepared a table of summary findings which had the following headings: element of investigation; finding; potential misconduct; recommendation and page no. Out of the eleven separate allegations Mr Goacher recommended that eight were referred to the panel. On each of those eight he had identified 'yes' to potential misconduct and identified what that misconduct might be. He did not characterise any 'potential misconduct' as either misconduct or gross misconduct and there was no reference to sanctions [1349].

63. The report was sent to the claimant by email on 23 November 2020 and by hard copy 26 November 2020.

Disciplinary Hearing

64. The respondent's evidence on how the investigation report was considered and progressed to a disciplinary hearing lacked clarity. Whilst Mr Goacher noted "*it is for the Appointments and Disciplinary Panel to consider any disciplinary issues in relation to chief officers. The Council may wish to convene a meeting of the Panel to consider the report*" [394] it is clear that did not happen until the disciplinary hearing itself.

65. Wendy Simon in evidence was unable to confirm how or when she first saw the investigation report, although her final evidence was that she saw it when it was sent to her on 5 March 2021 which is two weeks before the hearing.

66. Her recollection was that she did not see the report until after she and her fellow panel members had attended training on conducting disciplinary hearings, which took place in November 2020. She was unsure about how the decision was taken to put the case before the Appointments and Disciplinary Panel and if so which of the allegations needed to be considered.

67. What appears to have happened is the investigation report was provided to Mr Walsh, Assistant Director of Governance Audit and Assurance and Clerk to the panel, (I can see the report was emailed to him on 7 October 2020 and an updated version on 28 October 2020). When he received the report he then told the Chair that a disciplinary meeting is required and the Chair agreed. The Chair would be the Mayor, or in this case acting Mayor Wendy Simon. The claimant said of this process *“I am not suggesting that another person other than Mr Walsh would not have said this needs a disciplinary hearing. It would have been nice for someone with greater seniority to consider it.”* He therefore seemed to accept that a disciplinary hearing would have been arranged irrespective of who directed it.
68. After some discussion around the dates with the Claimant and Mr Fazakerley seeking adjournments due to Covid-19 and Mr Fazakerley not being able to attend, the disciplinary hearing took place over 5 days commencing 16 March 2021.
69. The disciplinary panel was made up of 7 Councillors. The claimant attended in person, with the assistance of his union representative, who attended remotely. Contemporaneous notes were made; these are handwritten and are in the bundle. They are roughly 300 pages and are not easy to read. I was only taken to a handful of pages in evidence.
70. Because Mr Reeves became a witness to the investigation he could no longer present the management case to the disciplinary panel. Therefore Mr Goacher acted as the presenting officer. His role therefore changed from presenting his findings of fact as an investigating officer, to presenting a case for misconduct.
71. The claimant, through Mr Fazakerley, described this decision to appoint Mr Goacher as the presenting officer as a “Surprise” and *“Mr Reeves will attend as a witness, I had assumed that it would be he who would present the case for LCC. This is however, not a decision for me, and we will proceed nevertheless”* [144]. This does not appear to be an expression of protest as was suggested by the claimant in evidence.
72. However, it is also right that the claimant raised the issue of Mr Goacher becoming the presenting officer at the beginning of the hearing. The panel considered this as a procedural issue and whether it was appropriate for Mr Goacher to present the case. It was the decision of the panel as confirmed by Ms Simon in her evidence and the dismissal letter, that they did not consider that change in role was prejudicial to the claimant. She explained that the panel were well aware that it was the role of the panel to make the decision, not Mr Goacher and *“decisions would be reached having regard to all of the evidence presented”*. The panel concluded there was no breach of the ACAS statutory code.
73. Mr Goacher prepared a written opening statement [1161-1181] and a closing statement [1193-1200] as did the claimant [1160A-F] and [1182-1192] respectively.
74. In his written opening Mr Goacher clearly set out the issues for the panel to consider. One of these was *“the extent to which Mr Kavanagh as*

Director is responsible for the way in which these transactions and the PAMS service generally operated, even if he was not personally involved" [1177]. The panel had the Standing Orders before them and the claimant agreed the relevant one was referred to.

75. Mr Goacher further referenced the responsibility of the claimant; he was the Director responsible for the service with overall responsibility for securing compliance with value for money, rules and legal obligations. In his evidence the claimant accepted that he is ultimately responsible, however, he said that he relied heavily on the Head of Finance and the Deputy Solicitor who cosigned the delegated authorities.
76. Wendy Simon was not asked about this issue in evidence. However, the claimant in his evidence was clear that they took the panel through the delegated authorities. AS an example the Faulkner Street delegated authority approval process form is at [802] and incorporated into the investigation report.
77. The Delegated Authority form includes signatures of approval from the Head of Service, Legal Services and Financial Management Service, but the decision is taken by Mr Kavanagh. The Decision is set out in full by Mr Kavanagh in a separate document and includes a signature from him confirming that *'the decision is not contrary to the Council's policy framework, is wholly in accordance with the council's budget and that I have considered the need to promote best value, to promote equality of opportunity and to combat crime and disorder* [808]. Those approving it are, as Mr Goacher described, acting in consultation. It is the claimant who is the decision maker and it is the claimant who signs the declaration. Those approving the decision act upon his decision and declaration.
78. Over the five days it convened the disciplinary panel heard live evidence from seventeen witnesses. The Claimant asked for other witnesses to attend who he felt ought to have been interviewed in the investigation. These were Mr Povall and Mr Kenworthy, but they were not willing to attend. Mr Goacher had not spoken to them as part of the investigation because they were no longer employed and the Council did not have ways of contacting them.
79. The witnesses included Mr Goacher, who gave evidence and answered questions from Mr Fazakerley and Mr Kavanagh as well as the panel over the course of 2 hours 30 minutes [1407-1426].
80. Mr Kavanagh gave evidence from 14.20 to 19.40 [1648-1686], which far exceeded the original time estimate of 1.5hours.

Dismissal

81. By letter dated 22 March 2021 [205] the Appointments and Disciplinary Panel confirmed the outcome of the hearing, which was to dismiss the claimant. The letter is signed by Wendy Simon but she confirmed in evidence that the whole panel had a discussion and agreed the wording, the letter was typed up by someone else and she then signed it.

82. Ms Simon was clear that the decision to dismiss was reached by the panel she confirmed that *“our decisions were made on the basis of the evidence we heard on that day and what others were saying, we were allowed to question the evidence too, we took account of that information in the hearing and the officer’s witness statements, the reports and questions the panel asked”*.
83. When it was suggested to her that if the panel’s decisions are only as good as the information they are given and therefore could be tainted by bad faith she said: *“I would expect someone to raise bad faith or sinister motive so we could consider it”* and she gave the example of the terms of reference and the panel allowing the claimant to recall Jeanette McLaughlin, however when she returned no questions were put to her by or on behalf of the claimant. She said *“from my recollection no sinister motive was presented to the panel”*. In respect of the terms of reference Ms McLaughlin accepted authorship and was not challenged on that so the panel accepted her evidence as credible.
84. Mr Fazakerley did not put the allegation of collusion to Ms Simon, so the tribunal asked the question. Ms Simon explained that *“the panel had a lot to say, we went through each term of reference and each bit of evidence. Some panel members had different views and people were allowed to come back, no one was stopped from putting their point of view across. When we were considering the evidence when we came to the decisions we made we went through that and the differing views and we needed to come to a consensus. We did not reach the same conclusion on the matters as the investigating officer, we made our own minds up on the evidence we heard”*.
85. She went on to explain that they did not just accept what Mr Goacher presented and gave me the example of how some of the evidence changed in relation to the bullying allegations and they did not simply take it at face value and that based on what they heard there was a cultural issue which was not simply the responsibility of the claimant.
86. She then went on to give examples of where the panel concluded that the claimant’s conduct amounted to gross misconduct in their view. This related to Percy Street and Faulkner Street. After hearing the evidence they concluded *“we needed to see how the procedures were made and the whole panel felt that here wasn’t an officer at that level with sufficient oversight to ensure that processes were followed; in some instances there was a lack of clarity in how the decisions were made particularly in respect of Faulkner Street. Initially the claimant wasn’t directly involved and then they Mayor asked him to sort it, so knowing that and given the Mayor raised it you would expect additional oversight”*. They did not feel that the claimant was doing that.
87. The claimant did not put to Ms Simon in cross examination the panel had reached an unreasonable conclusion because the mechanism of delegated authorities meant that no one individual could be responsible.
88. I accepted Ms Simon’s evidence. Whilst initially giving evidence on how the investigation was progressed to a hearing she was unclear and was not able to provide the tribunal with any cogent evidence. However, she

was very different when it came to her decision making. She was able to refer back to specific allegations with ease and spontaneity and she was confident in the panel's decision.

89. Moreover, during cross examination Mr Kenward took the claimant to his appeal submissions where he said this: "*we believe that [the disciplinary panel] were given poor advice on matters of employment law in this instance. We believe that they acted in good faith, but were misled as to the consequences of what they were asked to decide*" [265]. This was entirely consistent with what he said in oral evidence to the tribunal when he said "*the panel did their job, did they do it right? I felt that they were dismissive of my issues and the ACAS guidelines and that is why we appealed you shouldn't have the independent officer doing the presenting, I didn't say they didn't do their job*".
90. The panel set out findings in relation to each allegation in the dismissal letter [209-216]. Out of the ten allegations that were considered (one having been withdrawn) five were found to amount to gross misconduct with the appropriate sanction being summary dismissal. One was unproven and three were found to be misconduct and the appropriate sanction was therefore a written warning and one was found to be misconduct which warranted a final written warning.
91. Mr Goacher did not make the same distinctions when presenting the case [1180-1181] rather his recommendation was that dismissal would be the reasonable outcome in respect of each one.

The Appeal

92. On 24 March 2021 the claimant sent a letter appealing the decision to dismiss him. He provided four grounds:
- a) I was unfairly faced with the circumstances created when the report of the investigating officer became the management case against me, without amendment.
 - b) The report itself, which in accordance with ACAS Guidelines should be confined to a presentation of the facts, contained recommendations from the investigating officer.
 - c) The investigating officer himself has said that he weighed the evidence he received, "against the balance of probabilities" which signifies that he reached certain conclusions. This was not his responsibility.
 - d) Contrary to ACAS Guidelines, the investigating officer was appointed to present the management case against me.
93. On 29 April 2021 a further ground was added which was "*the sanctions of dismissal decided upon by the panel were too harsh*".
94. The appeal was heard over one day on the 4 May 2021. It was chaired by Councillor Barbara Murray and was accompanied by three other councillors. As with the disciplinary panel the appeal panel undertook some training in advance of the hearing, although Ms Murray confirmed this took place on 28 April 2021 not in November as her statement suggested.

95. The appeal panel was to consider the original decision by way of review, based solely on the grounds of appeal [1209].
96. There were no minutes of the appeal hearing, neither the respondent nor claimant took any. Ms Murray was very clear in her evidence that she was not influenced by the fact that the Acting Mayor was presenting the case for the employer. I accept her evidence on this as she was very forthright and clear that she would have no issue with expressing her view, as a politician she is used to standing her ground and she explained "*not open to influence*". I did not hear or see anything that would suggest otherwise.
97. The appeal panel did not accept that there was any prejudice in the investigating officer becoming the presenting officer. They noted this was a contentious issue and they looked at it "*as we looked at the appeal grounds in detail. It remains the case that I did not consider it unfair, on the day we were unanimous. We thought the whole process had been rigorous and very fair...the evidence is the evidence and the presenting officer was interrogated*". Ms Murray went on to explain that "*we looked closely at the ACAS guidance and we were of the view that it was not problematic. There is a difference between **must** and **should***".
98. Ms Murray accepted that there is not a disciplinary policy or specific procedure for Chief Officers and she was not particularly ok with that, but her understanding was that other Chief Officers had been treated in the same way and they followed the ACAS Code.
99. She denied any collusion and explained that she had no idea who would be on the panel and had never heard anyone discuss the case at all.
100. On 6 May 2021 the respondent sent the claimant the outcome of the appeal. The appeal was not upheld and the panel were satisfied the disciplinary panel was correct to conclude the relevant allegations were proven on the balance of probability [290].

Relevant Law

101. If a potentially fair reason within section 98 is shown, such as a reason relating to conduct, the general test of fairness in section 98(4) will apply. Section 98 reads as follows:
- “(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
- (a) the reason (or, if more than one, the principal reason) for the dismissal and**
 - (b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
- (2) A reason falls within this sub-section if it ... relates to the conduct of the employee ...**

(3) ...

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

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

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

102. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. Conduct dismissals can be analysed using the test which originated in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal which was subsequently approved in a number of decisions of the Court of Appeal. Since **Burchell** was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

103. The “**Burchell** test” involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?

104. If a genuine belief is established, the band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

105. The circumstances relevant to assessing whether an employer acted reasonably in its investigations include the gravity of the allegations, and the potential effect on the employee: **A v B [2003] IRLR 405**.

106. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 (the full code and practice is in the bundle).

107. Although I have described the claimant's claim as raising ‘procedural unfairness’ there is no dichotomy between that and ‘substantive’ unfairness, and I “*should consider the procedural issues*

together with the reason for the dismissal, as they have found it to be. The two impact upon each other and the employment tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss": Taylor v OCS Group Ltd [2006] IRLR 613. Equally not every procedural defect will render a dismissal unfair Sharkey v Lloyds Bank PLC EATS 0005/15 "Procedure does not sit in a vacuum to be assessed separately. It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together".

108. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee (instead of imposing a lesser sanction) was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

109. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer had reasonable grounds for treating the misconduct as gross misconduct: see paragraphs 29 and 30 of **Burdett v Aviva Employment Services Ltd UKEAT/0439/13**. Generally gross misconduct will require either deliberate wrongdoing or gross negligence. Even then the Tribunal must consider whether the employer acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854** (paragraph 38).

Discussion and Conclusions

110. I now turn to the application of the facts to the law in considering the issues I set out at the beginning of the hearing. In doing so I was assisted by both Mr Fazakerley and Mr Kenward providing me with written submissions which were then expanded on orally in the hearing. I have taken all of the points made in submission into account even if not expressly addressed below.

Did the respondent genuinely believe the claimant had committed misconduct?

111. I am satisfied the respondent did genuinely believe the claimant had committed misconduct.

112. The reason the respondent started looking into the claimant was genuine. There was a complaint (or concern) raised by Mr Falkingham in respect of the China Town development and reassignment of the lease. The evidence shows that both the Chief Executive and the Executive Mayor had been told about those issues and were also aware that there was a criminal investigation in relation to the developer PHD1 who Liverpool City Council, through the claimant and Councillor O'Byrne, had supported.

113. Mr Anderson, who gave evidence in support of the claimant, accepted that it was proper that there was an independent investigation into the way in which the lease was sold to PHD1. That included, as is

clear from the terms of reference and emails, Officers as well as Members.

114. When the investigation was initially commenced it was a 'no fault, no blame' investigation, which does not support the argument that there was collusion or a stitch up. The fact that it highlighted some practices that needed to be investigated further is a natural consequence of that investigation. I would have been surprised if, having made the findings he did, Simon Goacher did not make 'next step recommendations'. Mr Anderson and the claimant both accepted that once the recommendations had been made the inevitable next step would be a further investigation and I agree.
115. I heard nothing in evidence that undermined Mr Goacher's independence. Mr Fazakerley submits that Mr Goacher lacked credibility because he could not recall who he had spoken to about releasing his report or whether it was the NCA, Merseyside Police or some other branch. I disagree. There is no evidence to suggest that Mr Goacher himself was in contact with any branch of the Police, only that he was aware of criminal investigations and he asked the City Solicitor if she wanted him to send it to the police or will she be doing that. I have no doubt that if she had asked him to do so, he would have been directed to the correct person, but he was not asked to. How, therefore would he know and how can he be criticised for not knowing?
116. The Claimant also accepted the internal audit team keep a record of complaints which include allegations of wrongdoing. That corroborates what Mr Reeves said. At no time has the Claimant suggested that any of the people interviewed as part of the process were 'in on it' or been 'put up to it' so there is no evidence before me to undermine the basis for the respondent's need to investigate. Claire Dove for example raised a complaint that appears to be entirely independent of Mr Reeves and not questioned as being disingenuous by the claimant.
117. Therefore, there were clear reasons for the two separate investigations and those reasons came from outside the Council and Mr Reeves. I have heard no evidence to suggest that Mr Reeves or anyone else corralled or created these complaints.
118. Thereafter, the disciplinary panel was provided with a substantial amount of information including witness statements from the complainants, and from the claimant's colleagues. They had a summary of each individual allegation and an explanation of how it may amount to misconduct. I accepted Ms Simon's evidence that they carefully went through each individual allegation, and this is clear from the letter of dismissal. What is also clear is that they did not simply agree with Mr Goacher, who had recommended every allegation amounted to gross misconduct.
119. The claimant did not actually challenge Ms Simon on whether she was part of a collusion, so I gave her the opportunity to answer that point and I found her response to be credible. In any event in order to find that the dismissing panel were part of a wider conspiracy then there would

have to be some evidence that she, and the other six members of the panel, Mr Reeves and Mr Goacher, together with the witnesses who gave inculpatory evidence against Mr Kavanagh, were all somehow operating against the claimant. There simply was no evidence that would enable me to make such a finding.

120. The claimant's own evidence both at the time and in oral evidence to me was that the panel were doing their job and acting in good faith. It was clear to me from Ms Simon's evidence that, having heard evidence over a five day hearing, she was satisfied that the alleged misconduct (as found in the dismissal letter) had occurred. That belief, in my judgment, was genuine.

Mr Reeves was out to undermine the claimant.

121. Further to the conclusions I have reached above I will address the specific allegations that Mr Reeves was out to undermine the claimant, or scapegoated him.

122. In respect of the delay in progressing the investigation and share the 'China Town' report I do not find anything untoward in that. I accept, as others seemed to, that the Police had asked for there to be a delay so as to not interfere with their ongoing investigation. This is in line with the ACAS Guidance and to be expected.

123. In respect of the apparent lies told by Mr Reeves I do not accept that he did lie and I have found he gave a statement, but that is not the same thing as having any influence over the Police to cause an arrest or indeed 'having anything to do with it' giving a statement does not automatically lead to an arrest which is a decision that can only be taken by the Police.

124. Mr Fazakerley submits that there was no complaint by Mr Falkingham, but he clearly did raise an issue with both Mr Anderson and Mr Reeves as they explained in evidence and as the documentary evidence demonstrates. Mr Falkingham of course gave evidence as part of the 'China Town' investigation and at the disciplinary hearing. He would not have done so, it seems to me, unless he had raised the issue in the first place.

Were there were reasonable grounds for that belief/at the time the belief was formed the respondent had carried out a reasonable investigation?

125. The investigation was an extremely thorough piece of work: it was conducted by someone outside of the respondent; it took place over many months which is reasonable given the amount of information that Mr Goacher had to consider. Taking into consideration the seriousness of the allegations and the gravity of the potential outcome for the claimant the investigation was reasonable.

126. For the reasons I have already expressed in respect of Mr Goacher asking if he should send the China Town report to the police I do not consider that he was the wrong person to investigate. He was simply asking if a document ought to be forwarded.

127. Although the claimant did suggest to Mr Goacher he should have spoken to 2 other witnesses a reasonable explanation was given for not doing so (they were no longer employed and could not be contacted). In any event the claimant had himself asked for them to be witnesses at the disciplinary hearing and so the respondent tried to secure their attendance, both refused.
128. The claimant in his grounds of complaint identified two specific matters that could be properly considered under this issue: the terms of reference and the findings of the disciplinary investigation (see paragraph 14 (b) and (c) above). I shall consider these in turn.
129. The terms of reference were drafted by Jeanette McLoughlin on the instruction from Mr Reeves. Given his role as Chief Executive and her role as City Solicitor I find that to be reasonable given their roles and the size of the organisation. The claimant submits the fact that neither of them took ownership initially and Ms McLoughlin only recalled it was her after she gave evidence to the disciplinary panel means they were 'denied an opportunity to cross examine the author of the terms of reference'. However that is not true, they were provided with the opportunity to cross examine both Mr Reeves (who directed them) and Ms McLoughlin (who wrote them). They chose not to do so because they didn't trust the answer that would be given, but that is not being denied an opportunity to do so.
130. Neither Mr Fazakerley nor the claimant explained how this resulted in unfairness or was unreasonable in terms of the panel treating the misconduct found as a reason to dismiss. I have already explained the circumstances around the complaints which generated the remit of the terms of reference. The terms are clear and the claimant was well aware of the case against him, and given every opportunity to participate in each stage of the process.
131. It seems entirely within the band of reasonable responses that an employer, faced with such serious and significant allegations, from external sources, that these terms of reference would be drawn up. Whether they were authored by Ms McLoughlin or her deputy does not seem to me to impugn the fairness of the process. The claimant did say he would have expected the author to remember given it is so unusual for a Chief Officer to face such significant allegations. That may well be true, but it does not equate to unfairness.
132. Mr Goacher's investigation report identified findings and 'potential misconduct'. This is in respect of the 'summary of findings' [1349] the report itself does not specifically identify misconduct/gross misconduct, it simply sets out the findings made. Mr Goacher prepared the summary as a tool to help the reader due to the volume of the investigation.
133. As well as identifying 'potential misconduct' it also makes a recommendation as to whether the allegation ought to be referred to a panel or not.
134. The claimant submits that in line with the ACAS Guidance on Conducting Workplace Investigations "*an investigator **should not***

suggest a possible sanction or prejudge what the outcome to a grievance or disciplinary hearing will be” [1262]. Mr Fazakerley submitted that the column ‘potential misconduct’ is a suggestion of possible sanctions.

135. The section lifted from the Guidance needs to be read wider. Including the difference between ‘must’ and ‘should’ must being a legal requirement, ‘should’ being good practice [1232].
136. *“An investigator should endeavor to reach conclusions about what did or did not happen...an investigator will need to decide whether, on the balance or probabilities they could justifiably prefer one version of the matter over another and explain why” [1262]*
137. *“It is common for an investigator to be asked to make a recommendation. However, an investigator should restrict their recommendation to only suggesting whether any further action may be necessary or beneficial. In most circumstances an investigator should recommend formal action, information action or no further action” [1262].*
138. The terms of reference asked Mr Goacher to conclude upon the appropriateness of the transactions in the context of the Council’s legal obligations and the duties of an employee [401].
139. I do not consider there to have been a breach of the ACAS Guidance, or that what Mr Goacher did fell outside the band of reasonable responses. Firstly the guidance relied upon is good practice not a legal requirement. Secondly Mr Goacher had to reach a view on whether the allegation was found and if so conclude upon the appropriateness of it as set out above, which is what he does under the heading ‘potential misconduct’.
140. He connects how the finding could **potentially** amount to ‘lack of care to duties’ or ‘failure of fiduciary duty’ he is therefore connecting, in summary format, the finding to a potential inappropriate action/breach of duty. What this document does not say is: ‘this is gross misconduct’ or ‘warrants dismissal’. In fact this document makes no reference to sanctions at all. He therefore had not actually done the thing complained of.
141. He thereafter makes a recommendation to refer the matter to a disciplinary panel; something well within the guidance.
142. The way in which the investigation was conducted, including the report was reasonable. I was satisfied from the evidence I heard that both the dismissing panel and the appeal panel carried out their own analysis and were not influenced by the summary document but reached their own decision.

Did the respondent otherwise act in a procedurally fair manner?

143. Here the claimant complains of the following procedural irregularities:
- a) There was no clear decision maker to progress the matter to a disciplinary hearing.

- b) Mr Goacher became the presenting officer.
- c) The Chair of the dismissing panel was more senior than the appeal panel Chair.
- d) The terms of reference were extended part way through the investigation.
- e) The Chair 'shut down' a point of order.

a) No decision maker

144. It is correct to say that a decision was not taken by the Chief Executive to progress the recommendations to a disciplinary hearing. The recommendations were that the allegations were referred to a disciplinary panel and that appears to have been acted upon by Mr Walsh and/or Mr Wormald. The main complaint the claimant had about this was that given his role as a Chief Officer it would have been appropriate and providing him with more respect if the decision lay with someone above him, or at least above Mr Walsh.

145. The effect of the progression in this case is that the Appointments and Disciplinary Panel did not make a decision to escalate it, thus they were insulated from that part of the process and able to come at it 'fresh' at the hearing in March. This is not a case where the panel decided it needed to be escalated to themselves thereby potentially prejudging the outcome. That seems to me to be fair and reasonable.

146. It may well be 'good or best' practice to have a record of the decision maker approving the progression to a hearing. However, in this case, the investigation report and the recommendation was placed before Chris Walsh, the Assistant Director of Governance who arranged for a fully quorate panel to be convened. That is someone distinct from Mr Reeves, who by this time was a witness and who the claimant also seeks to suggest wanted to scapegoat the claimant. It seems entirely reasonable that the person who is able to make the necessary arrangements to convene a panel is the same person who, acting upon the investigation recommendations, does refer the matter to the panel. It certainly does not fall outside the band of reasonable responses and did not affect the substance of the hearing or the claimant's ability to engage with it.

(b) Mr Goacher as presenting officer

147. The claimant submits that Mr Goacher becoming the presenting officer is (a) in breach of the ACAS Guidance and (b) prevented the claimant from being able to cross examine him at the disciplinary hearing. Mr Fazakerley submits that there were other options available to the respondent, such as one of the other directors.

148. The ACAS Guidance states that once an investigator has concluded their report they will not usually be involved any further other than: "*Attending the disciplinary hearing: an investigator may be required to attend a subsequent hearing. However, they should only be there in a fact giving capacity. They should not be there to give their opinion or present the case against the employee*" [1263]. The reason being explained that if an investigator continues to be involved for any other reason there may be a perception of bias, although that is not what the claimant is arguing in this case.

149. The ACAS Code sets out the requirements for a fair disciplinary hearing:
- The employer should explain the complaint against the employee and go through the evidence that has been gathered.
 - The employee should be allowed to set out his or her case and answer any allegations that have been made.
 - The employee should be given a reasonable opportunity to ask question, present evidence and call witnesses.
 - The employee should be given an opportunity to raise points about any information provided by witnesses; and
 - Where an employer or employee intends to call relevant witnesses, advance notice of this should be given.
150. In this case those requirements were met. The employer did explain the complaint against the claimant and went through the evidence. The fact that was done by Mr Goacher was within the band of reasonable responses.
151. The investigation report and evidence ran to in excess of 700 pages and took place over several months. It required the marshalling of 24 witnesses, 17 of whom gave live evidence at the disciplinary hearing. Whilst it may be true to say that another director could have presented the case for the Council in reality they would have simply relied on Mr Goacher in any event.
152. Further the claimant was able to put questions to Mr Goacher, so it is not true to say they were prevented from cross examining him. I do not consider that his evidence was unfairly affected because he had gone from being the investigating officer to the presenting officer. The claimant did not point to any particular unfairness or example of this change of role having an impact on the evidence he gave. It was not submitted by the claimant that Mr Goacher being asked to present the case was evidence of bias.
153. In this case there were 7 members of the disciplinary panel who were separate decision makers. None of them had been previously involved in the investigation. Mr Reeves had been kept separate from any decision making as soon as he became a witness in the investigation. The claimant either by himself, or through Mr Fazakerley was able to present his own case and response to the allegations as well as question the witnesses. That included Mr Goacher who was asked questions from 11.25 until 13.55 and a substantial amount of those were from the claimant and Mr Fazakerley. The claimant suggested that his responses were dismissive because he was in the mindset of dismissal rather than fact finding, but that was not put to Mr Goacher nor is that reflected in the notes.
154. It was suggested that the panel slavishly followed the recommendations of Mr Goacher, but that, as I have found, is not true. Mr Goacher when he presented the case submitted all of the allegations amounted to gross misconduct and the appropriate sanction was dismissal. The panel reached different conclusions (see paras 90 and

91). That is evidence which demonstrates, as Wendy Simon explained, the panel reached their own view.

155. I therefore do not find that Mr Goacher becoming the presenting officer was outside the band of reasonable responses, or resulted in the employer acting unreasonably in treating the reason they have found as a sufficient reason to dismiss.

(c) Chair of dismissing panel.

156. The Acting Mayor chaired the disciplinary panel, which resulted in the appeal panel being chaired by another Councilor who was, as it was submitted by the claimant, subordinate to the Acting Mayor.

157. It is common practice for the most senior member of staff, or line management, to be 'saved' for the appeal, but of course, Councillors are elected officials. None of them had direct line management of the claimant or each other. That distinction was noted by Councillor Murray who made it abundantly clear she is perfectly capable of making up her own mind. There was no evidence I heard of Councillor Murray or the appeal panel being unduly influenced by Councillor Simon.

(d) the terms of reference were extended.

158. The claimant's complaint in this regard is not that these were illegitimate lines of enquiry, but that because the investigation had already been ongoing for some months they ought to be covered under a separate investigation. The ACAS guidance says "*it will usually be preferable to incorporate new matters into the existing investigation unless it would make an investigation overly burdensome or unduly complicated*" [1238].

159. Mr Goacher referred the new matters back to Mr Wormald who in turn passed it to Mr Reeves, so approval was given for the extension. Although the claimant refers to the passage of time, there is no other suggestion that the extension caused unfairness to the claimant. He was given, but declined, the opportunity to give his account of the allegations.

160. It was within the band of reasonable responses for the investigation to be extended once new matters had come to light. To do so was within the ACAS Guidance. The claimant had the opportunity to have his say and challenge witnesses on these matters.

161. Neither of the new matters (bullying and small sites disposal) resulted in findings of gross misconduct and the claimant received written warnings in respect of them both. They therefore were not treated as a reason to dismiss the claimant and the respondent did not act unreasonably in considering them.

(e) The Chair 'shut down' the point of order.

162. The issue raised by the claimant is that Wendy Simon was quick to shut down a point of order (relating to Weightmans providing the training so Councillor Hanson queried any potential conflict). This was not explored by the claimant with Ms Simon in her evidence and it was not until the claimant gave evidence that his complaint became clear. His concern was not about the point of order itself but the way it was

stified. The claimant inferred that similar attempts might have been to 'shut down' any points in favour of the claimant.

163. Even if I was to find that Councillor Hanson was cut off, or 'shut down' it would be too much of a stretch to find that occurred in the panel's decision making. The claimant was unable to point to any other example of any member of the panel being prevented from speaking or appearing to be discouraged from expressing a view. Given the hearing lasted five days and the only example the claimant can point to is this one relating to training I cannot conclude there was an unfair or unreasonable approach to deliberations. Indeed I heard Councillor Simon's evidence on the way in which the panel discussed each individual matter and I accepted it.

Inconsistency/Delegated Authority.

164. The claimant submits that the system of delegated authorities required counter signatories from the Head of Finance and the Deputy Solicitor and therefore the responsibility for these transactions cannot lie with him alone, as Mr Fazakerley submitted 'no one person can act alone'. He says that the High Court agreed with this, but I have not been provided with any judgment and I understand the case before the High Court was Mr Elliot Lawless seeking a judicial review of his arrest and search of his home. It therefore is very different to the issues I have to decide, which is whether this respondent acted reasonably in treating the conduct they found as a reason to dismiss.

165. The claimant's complaint here is that the lack of disciplinary action, or even investigations, into the other individuals is evidence of Mr Reeves' vendetta against the claimant and the panel were wrong to conclude the responsibility lay with the claimant.

166. Not all of the findings of gross misconduct relate to the issue of delegated authority. The finding that the claimant made inappropriate comments to Mr Falkingham about X1's plan not being supported or getting planning permission for example [210].

167. However, it was clearly considered as part of some other allegations. The Panel reached a view on the role and responsibility held by the Director which was to ensure compliance and they considered form of wording on the Delegated Authority form [213]. On the basis of this they reached the conclusion that failure to meet that responsibility amounted to a destruction of the relationship between employee and employer such that it amounted to gross misconduct.

168. The panel therefore, on the claimants own case, were taken to the delegated authorities, had them in the investigation report, the claimant made written submissions about the other signatories having given their approval.

169. The fact that the panel reached the conclusion that he was responsible having considered the evidence in the round was a reasonable conclusion and fell within the band of reasonable responses. As Mr Kenward pointed out there was no other officer in an equivalent position in respect of whom those findings had been made.

Was the sanction within the band of reasonable responses?

170. I must not consider what I would have done, but whether in the particular circumstances of this case the respondent's decision to dismiss falls within the band of reasonable responses which a reasonable employer might have adopted.
171. The claimant actually refers to this issue as one of proportionality and submits that he has overseen some £8.5 billion investment and regeneration. Whereas the value of the projects that he has found to have been guilty of misconduct are relatively small. He further submits that errors do occur in local authorities and it is therefore disproportionate to dismiss. That is another way of submitting that the decision was outside the band of reasonable responses taking into consideration mitigating factors and the overall benefit the claimant brought in his role.
172. This point was not explored with Wendy Simon in her evidence.
173. Nonetheless looking at the dismissal letter and Wendy Simon's evidence the panel clearly did consider mitigating factors such as length of service and clean record [216] together with any submissions made by the claimant.
174. The panel was careful to identify those allegations that amounted to gross misconduct. In respect of those that amounted to gross misconduct it concluded that the claimants' actions were serious because of the *"risk of potential financial loss, significant reputational damage in relation to the integrity of asset disposal process. This it found was so significant that it was conduct which has gone to the root of the employment contract so as to destroy the relationship and ultimately resulting in a loss of trust and confidence"*. In light of my other findings this was a reasonable conclusion to have reached.
175. Although this was a 'first offence', there were five findings of gross misconduct. Mitigation was considered, but taking into consideration the grade of the claimant and the nature of the findings and the seriousness of them for the respondent I find the decision to dismiss was within the band of reasonable responses.

Conclusion

176. I have considered each matter the claimant complained about individually and collectively and taken a holistic view of the reasonableness of the decision of the respondent.
177. In my judgment there were legitimate reasons for the respondent to have commenced both the 'China Town' and later disciplinary investigations. The circumstances and allegations were not manufactured and they were supported by witnesses and documentary evidence. They were subject to a thorough investigation which the claimant was fully able to participate in. The respondent did have a genuine belief in the claimant's misconduct.

178. The claimant knew the case against him and was able to present his case at a disciplinary hearing run by an independent panel. The fact that Mr Goacher became the presenting officer did not affect the overall fairness because the claimant was able to cross examine him, as were the panel, and ultimately I was satisfied that it was the panel's decision to dismiss the claimant not Mr Goacher or Mr Reeves.
179. There is no basis for a finding that Mr Reeves colluded, or scapegoated the claimant. Mr Reeves handed the investigation to an independent person, once he became a witness he took a very limited role and the bulk of the evidence before the panel did not come from him. In order to find this was a 'stich' up I would have to have found that the witnesses had been encourage to give certain evidence, that Mr Goacher was tainted and that the panel had been corralled into finding against the claimant. There was no factual basis for me to do so.
180. The matters complained of by the claimant, whether viewed individually or collectively, did not result in the respondent acting unreasonably in treating the reason they have found as a sufficient reason to dismiss. The sanction was within the band of reasonable responses.
181. I therefore find the claim is not well-founded and dismiss the claim.
182. In light of my decision it has not been necessary for me to consider the issues of Polkey or contributory fault.

Employment Judge Mellor

22nd June 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
27 June 2022

FOR EMPLOYMENT TRIBUNALS

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