



## EMPLOYMENT TRIBUNALS

**Claimant:** Mr. T E Merson

**Respondent:** Royal Devon University NHS Foundation Trust

**Heard at:** Southampton

**On:** 21, 22 February 2024

**Before:** Employment Judge Dawson

### **Appearances**

For the claimant: Ms Hornblower, counsel

For the respondent: Ms Clarke, counsel

## RESERVED JUDGMENT

1. The claimant was unfairly dismissed by the respondent.
2. The case is listed for a one hour telephone case management hearing in order to discuss remedy and give directions at noon on **28 March 2024** the parties should dial 0203 6088838 at the appropriate time and enter the code 391381 when prompted to do so.

## REASONS

1. By a claim form presented on 8 June 2023 the claimant presented a claim of unfair dismissal to the tribunal.
2. By way of very brief overview, the claimant was dismissed on 26 May 2023. The respondent says that the reason for the dismissal was that because the claimant had been arrested for, and was being investigated by the police in respect of, allegations of rape and voyeurism the claimant's ongoing employment was untenable. It contends that was "some other substantial reason for the dismissal".
3. The claimant was paid three months compensation in lieu of being given notice.

## The Issues

4. It was agreed at the outset of the hearing that the issues that would be determined at this hearing were;
  - a. what was the reason for the dismissal, and
  - b. was the decision to dismiss fair, including
    - i. whether the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss,
    - ii. whether the decision to dismiss was within the range of reasonable responses open to a reasonable employer,
    - iii. whether there was there a fair procedure.
5. It was also agreed that questions of contributory fault and “*Polkey*” would be left to the remedy hearing.

## The Conduct of The Hearing

6. At the outset of the hearing an order was made under rule 50 of the Employment Tribunal Rules of Procedure preventing identification of the complainant (being the person who made the complaint to the police which led to the claimant’s arrest) and replacing the initials of that person in any record of the proceeding with the initials VJ<sup>1</sup>.
7. I also drew attention to the provisions of the Sexual Offences (Amendment) Act 1992. Where a an allegation has been made that a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of the offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act. No waiver or lifting has occurred.
8. The parties helpfully agreed a timetable for cross-examination of witnesses and submissions and stuck to that timetable. I express my thanks to both Ms Hornblower and Ms Clarke who both conducted their cases with a great degree of care and skill.
9. I heard evidence from;
  - a. Mr. Stevenson, Associate Director of Nursing for Surgical Services (Dismissing Manager),
  - b. Ms Holt, Safeguarding Lead Nurse and

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<sup>1</sup> which initials were chosen using an Internet based random letter generator.

- c. Mr. Corbridge, HR Manager Surgical Services division,  
for the respondent and from;
- d. Mr. Merson and
- e. Ms Taverner, Clinical Matron, for the claimant.

## **Findings of Fact**

10. Although a significant amount of evidence was heard about the background to this matter, ultimately I have not considered it necessary to determine every dispute of fact which was put before the tribunal. I set out below the facts which I have found it necessary to find in order to reach my decisions.
11. At the time of his dismissal the claimant was employed by the respondent as a Clinical Operating Department Practitioner Manager in the Princess Elizabeth Orthopaedic Centre Theatres, Wonford. He had been employed by the respondent since 19<sup>th</sup> July 2004 and, therefore, the time of his dismissal had some 19 years' service with the respondent.
12. It is not in dispute that during that time, at least until 2023, there were no concerns about his professional conduct or any suggestion that he presented a risk in respect of his care to patients.
13. It is also not in dispute that for a period, in or around early 2022, the claimant had a relationship with VJ who was employed by the respondent in a junior role to the claimant. That relationship terminated and the ongoing relationship between the claimant and VJ was troubled. In May 2022 VJ made an allegation that is recorded as being one of domestic abuse (page 34) but that is clarified in a subsequent risk assessment as follows "in regards to their relationship VJ has implied Tom has made her undertake activities she is uncomfortable with causing her emotional distress. No physical abuse has been alleged." The claimant complained that VJ had made unwanted persistent contact towards him. As a result VJ was relocated to a different part of the trust (Nightingale Orthopaedic Theatres) to prevent them working together.
14. On 8 June 2022 a different colleague wrote to Heather Barlow, the Cluster Manager, and Ms Taverner stating that she had been in a relationship with the claimant in the past and had now been receiving messages from VJ which she described as rather nasty, gloating messages.
15. On 8 July 2022, a letter was written to the claimant referring to concerns by Heather Barlow about the impact of his relationship with VJ on the workplace and the delivery of good, safe patient care. On 25 August 2022, Ms Taverner, the claimant's clinical matron, wrote to him advising him that VJ would be returning to the department but allocated to scrub and not anaesthetics and that an escalation plan had been agreed should there be a subject that arose where the claimant needed support from either Ms Taverner or Ms Barlow.

16. It is apparent that towards the end of 2022 discussions were taking place between VJ and managers at the respondent about whether she was to pursue a formal allegation against the claimant. An email sent by Ms Barlow to others on 20 December 2022 stated that VJ did not want to proceed down the formal route as she wasn't sure there was enough evidence to support her claims.
17. On 11 January 2023 Ms Barlow wrote to two colleagues being Claire Gaston, Freedom to speak up Guardian, and Lynne Goss, Senior Matron, stating that the claimant was considering lodging a formal bullying and harassment allegation against VJ.
18. The next day, Claire Gaston replied stating that "James Corbridge has kindly offered to support you with this case and next steps. He has been fully briefed and was hoping to make contact with you today. A priority as part of all of this will be supporting VJ back to work ASAP"
19. Although the VJ did not wish to pursue a formal allegation, the respondent, through its employees, was concerned about the behaviour of the claimant and on the 25 January 2023 he was invited to a formal investigation in relation to potentially inappropriate conduct/interaction with female colleagues as well as an arrest for drink-driving. By this point, the respondent was concerned that the claimant had had a number of relationships with other members of the team which might be inappropriate. Thus one of the parts of the investigation to be undertaken was "to establish if there is evidence in support of [the claimants] personal relationships in the team having an adverse impact on the effective functioning of the team by creating an unacceptable and untenable team dynamic and culture..." (Page 58)
20. A number of colleagues were interviewed in February 2023 in respect of the investigation and some were critical of the claimant, most were not. Indeed some of the claimant's colleagues spoke highly of him. In an interview on 13 February 2023 Julia Hornbrook stated that VJ had been in quite a toxic relationship with the claimant and on one occasion had told her that the claimant had ruined her life, that she could get him arrested or struck off. She said that she had never seen the claimant interact inappropriately with female colleagues and, when asked if the claimant's actions were maintaining standards of personal conduct and professional conduct, she said "I would say yes. I don't see the actions of two consenting adults as a crime." That was the view of most people but not everyone. Mr. Galvin said that he had spoken to the claimant and told him that someone had gone to him with concerns. Mr. Galvin said to the claimant that it was felt that his behaviour could be perceived as predatory because of the relationships and the age gaps.
21. The investigation was never finished, it was common ground that was because it was overtaken by the accusation against the claimant made to the police.
22. On 18 January 2023 a risk assessment was carried out in relation to the claimant and it was recommended that due to the current position that had emerged over time, redeployment was recommended to stabilise the workplace and support the claimant whilst further consideration was given to addressing

the relationship between the claimant and VJ. That would also allow a safe space for VJ to return to work.

23. On 1 February 2023 the claimant raised a grievance against VJ alleging that she had been bullying and harassing him. He said that she was guilty of defamation of his character.
24. On Monday, 20 February 2023 the claimant met with Mr. Corbridge and someone called Lynne to discuss his complaints.
25. I recite the above documentary evidence without making any finding as to whose allegations were correct, if anyone's. It is, nevertheless, part of the factual background to this matter that the respondent had received allegations and counter allegations about the behaviour of both the claimant and VJ.
26. On 9 March 2023, VJ submitted an online report to the police. At 20:06 that day she sent an email to Mr. Corbridge stating "Hi James I submitted a police report this evening online. They just rang me, and we've agreed for them to call me when I'm home on Thursday as I said now isn't the best time as I'm not alone." It is not clear from the evidence why VJ emailed Mr. Corbridge that night but it is not disputed that he had been involved in the investigations over a period of time.
27. On 10 March 2023, Caroline Holt wrote to a number of others, including James Corbridge, stating that she had spoken to the police and LADO who had stated they had no reports of any concerns related to women in relation to the claimant (other than the allegation which had been reported to them) that LADO had no reports of any concerns about the claimant from anyone but that a police officer, whose name has inexplicably been redacted in the bundle, commented "if there is a report of rape, he should not be working with vulnerable patients, some of whom may be under age."
28. On 13 March 2023, Fern Deasington, Head of Safeguarding, sent an email to Caroline Holt about VJ and the claimant. She noted that the claimant had been moved to a different site and was having unofficial supervision whilst on duty. She said there was a push to get him into a role where he could work from home and that Lynne Goss and David Stevenson did not feel that the claimant should lone work, which she agreed with. She recorded that David Stevenson had stated that he did not feel that Tom should work with females at all. She made some further observations about the relationship between the claimant and VJ and the claimant and his relationships generally. She stated "James [Corbridge] has asked what information they should share with [the claimant] regarding the allegation. I have said not to share any information as this could impact on any potential criminal investigation (getting rid of phone evidence etc). I have said that as this is also a form of domestic abuse, it place [VJ] at greater risk (although he is likely to work out what this is regarding). James said that he met with Tom and felt that he was unlikely to be a further risk to her, he was described as being pleasant enough. I have said that this is grooming and James recognises this." (sic, p126). It is apparent, therefore, that Ms Deasington was not taking a neutral stance in respect of the allegations and

appears to have persuaded Mr. Corbridge that the claimant was guilty of grooming.

29. The claimant was arrested on 18 April 2023 and told the respondent. That night the respondent was informed of his bail conditions which were not to contact or communicate directly or indirectly with VJ, including via social media and not go to Wonford Royal Devon & Exeter Hospital except in four closely prescribed circumstances which are irrelevant to this decision. The next day the police clarified that the claimant had not been charged with any offence and matters were very much within the investigation stage. He had been arrested and bailed for reports of rape and voyeurism. The investigation was likely to go on for “12 months+”.
30. On 25<sup>th</sup> of April 2023 Mr. Corbett wrote to the police stating that the respondent was assessing the risk in relation to Mr. Merson and asked whether the condition that he could not access Wonford Royal Devon and Exeter Hospital was extended to other trust hospital sites. The police replied “it is **only** WONFORD from which he has police bail conditions to stay away from... All other RD&E sites I’m afraid are fair game to him as they are not involved in the Police investigation as far as we know, and would it therefore be for your good selves to manage as part of any internal investigation that you are running.” (Original emphasis)
31. Mr. Corbridge forwarded that email to Mr. Stevenson, Lynne Goss, Claire Turner and Tracey Reeves stating “Dear all, please see below. Does not change our course of action.” When it was put to him in cross examination that he wrote that because the decision had been made that matters would end in the termination of the claimant’s employment, Mr. Corbridge replied that he could not recall, that his understanding was that they had not made the decision and that in May something might have been said which would have led them to a different decision. He was not able to say what he had actually meant by the words “does not change our course of action”. I will return to my findings in this respect below.
32. On 27 April 2023, the claimant was suspended. On the 28 April 2023 the claimant was invited to a meeting by letter which contains the following paragraph “in the light of the nature of the allegations... your role with the trust, the conditions of the police bail and the potential reputational harm that could be caused to the trust... I would like to meet with you to discuss this further. In particular I would like to discuss the impact of the circumstances on your ongoing employment... And whether these circumstances amount to a substantial reason to bring your employment to an end.”
33. The decision-maker was to be Mr. Stevenson and it was him who sent the letter. However, I find that he was being guided by Mr. Corbridge. Mr. Corbridge, in his witness statement, at paragraph 13, states that when he had sought clarification from the police about the scope of the bail conditions “this did not... affect my view that the circumstances might warrant a dismissal for “some other substantial reason” ...”. It is apparent from paragraph 7 of Mr. Stevenson’s witness statement that he was not aware of the concept of dismissal for “some other substantial reason” and that Mr. Corbridge explained it to him. In cross-

examination Mr. Stevenson stated that the advice that he had been given was that dismissing the claimant for some other substantial reason was a reasonable way forward. In answer to a question by me, he stated that he had been advised that “some other substantial reason was the way forward and suspension wasn’t an appropriate way forward because of the length of time” . I find that advice was given by Mr. Corbridge since he was the person advising Mr. Stevenson.

34. A meeting took place on 26 May 2023. It started at 09:55. In the course of the meeting the claimant maintained that he was innocent and said that the situation had arisen following a bullying issue and that it was vexatious. The meeting adjourned at 10:07 and resumed at 10:19 at which point Mr. Stevenson said that he was dismissing the claimant. In a lengthy explanation he said as follows:

- a. the claimant was subject to bail conditions which prevented him from carrying out his role or attending the trust premises at all except in certain prescribed circumstances,
- b. he did not consider that the claimant was able to carry out the usual duties from home which created a problem for the trust given the length of the police investigation,
- c. even if the claimant carried out alternative duties from home, he would still need access to IT systems which caused a concern in terms of the ability of the claimant to contact and influence witnesses,
- d. he did not consider it possible to move the claimant to an alternative site because the claimant would still have access to patients, their records and contact details which created a safeguarding concern,
- e. if the claimant remained in post with access to patients or patient’s records the fact that he was being investigated for a serious sexual offence could seriously damage the confidence that the public had in the trust,
- f. even if the bail conditions were to be lifted or amended prior to the conclusion of the police investigation, the claimant’s role with the trust brings him into contact with members of the public including vulnerable and often unconscious patients which created a safeguarding issue,
- g. he referred again to the risk of reputational damage.

35. The claimant’s dismissal was confirmed by letter dated 31 May 2023 which repeated the reasons given in the meeting for the dismissal.

36. It will be easily observed that what was said in that meeting is extremely similar to the content of the letter confirming the claimant’s dismissal, including the mistaken statement that the claimant was subject to bail conditions which prevented him from attending the trust’s premises at all. Despite that mistake, both in the meeting and in the dismissal letter, Mr. Stevenson went on to

consider redeployment to alternative sites. After some cross-examination Mr. Corbridge confirmed that he was the person who drafted the letter of dismissal. It was not suggested to Mr. Stevenson that the letter was created prior to the dismissal meeting and I make no findings in that respect. It was, however, put to Mr. Stevenson that dismissal after a 12 minute break following a 12 minute hearing suggested that the outcome was predetermined.

37. In denying that the outcome was predetermined, Mr. Stevenson stated that if he had received evidence from Mr. Merson in the course of the meeting that could have changed the course of events. When asked what kind of evidence would have caused him to change his mind, the only example Mr. Stevenson could give was that the police had dropped the investigation
38. Mr. Stevenson was asked about the reason for the dismissal and, in particular, whether he took account of the allegations which been made against VJ by the claimant. He, over the course of his evidence, confirmed that he was aware of some of the allegations but that he was making the decision based on the situation that the claimant was in with the police and the potential reputational damage if the matter became public. He repeated that point on at least two further occasions in the course of his evidence. He made the point a patient coming in for treatment would not expect to be treated by somebody who was under investigation for assault. It was put to him that in the light of the answers I have set out above, he did not consider safeguarding to be an issue, at which point he said that it was in his letter but not one of the key determining factors. I accept that evidence. However, it is also clear that to the extent that Mr. Stevenson took account of safeguarding, he did so on the basis of what he had been told by the safeguarding team.
39. In that respect it is important to note what Ms Holt said about safeguarding. At paragraph 16 of her witness statement she states “my view was that there would be safeguarding risks in any role that Tom could potentially be redeployed to because he would still need to have access to patient systems and NHS email. My concern here was that he could gain personal details which he could use to threaten staff victims known to him or influence staff who were witnesses. This would pose a risk to the integrity of the police investigation.” She clarified in her evidence that the reason why she thought the claimant could not be redeployed elsewhere was to protect the police investigation.
40. Having regard to all of the evidence which I have set out above, I find that Mr. Corbridge had a significant involvement with all of the matters which had gone on in the lead up to the allegations being made to the police. The fact that VJ messaged him in the evening after she had reported the matter to the police suggests that she felt that he was being supportive of her. There is no criticism to be made of him in that respect, but such closeness raises the question of whether he was able to remain sufficiently impartial throughout the subsequent decision-making process as to what should happen to the claimant’s employment.
41. I also find that it is more likely than not that Mr. Corbridge had a predetermined view that once a report had been made to the police the claimant should be dismissed. That conclusion is based firstly on the statement “does not change



our course of action”, which Mr. Corbridge could not adequately explain. Secondly, I note that Ms Deasington records that she had explained to Mr. Corbridge that the claimant was guilty of grooming and Mr. Corbridge “recognise[d]” that. Thereafter Mr. Corbridge had guided Mr. Stevenson to the consideration of some other substantial reason and, having done so, told him that it was not appropriate to consider suspending the claimant. Simply guiding Mr. Stevenson to the concept of “some other substantial reason” by itself would not be inappropriate. That would be expected of a human resources manager. However, Mr. Stevenson should have been told that whether suspension of the claimant was appropriate or not was a matter for him as the person making the decision. He should not have been told that such an option was inappropriate, even if he might have been told that there were reasons why he might consider it the wrong course of action in this case.

42. In my judgment Mr. Corbridge had lost sight of his role as a human resources adviser and started to guide Mr. Stevenson to an outcome which he wanted. Mr. Stevenson allowed himself to be so guided.
43. Having said that, I accept that Mr. Stevenson did not make any decision on the merits of the allegations and did consider only the factual situation which arose from the allegation to the police and the subsequent bail conditions. It appears that there is a mistake in the letter of dismissal (which followed the mistake in the dismissal meeting) in that the minutes of the meeting and the letter of dismissal appear to suggest that Mr. Stevenson thought that the claimant could not attend any of the respondent’s premises. That is, in my judgment, a mistake in the record rather than an accurate record of what Mr. Stevenson thought since later on in the meeting and in the letter Mr. Stevenson addressed the question of whether the claimant could work from home or another site. However, it is not clear what relevance Mr. Stevenson thought the bail conditions had. The bail conditions as they actually existed did not stop the claimant working from another site or from home.
44. Having listened carefully to the evidence of Mr. Stevenson, I gained the impression, and I find, that what really exercised him was the thought that there would be a public outcry if it subsequently became known that the respondent had allowed the claimant to come into contact with patients when an allegation of rape and voyeurism had been made against him. I also find that was a view which he had reached prior to the dismissal meeting and he attended that meeting with the intention of dismissing the claimant unless the police investigation had been dropped, that is why the meeting was so brief and he could so quickly deliver the lengthy reasons for dismissing the claimant.
45. However, it was implicit in the evidence of Mr. Stevenson that he was also of the view that there was some risk to patients given that the allegation of rape and voyeurism related to a woman who was sleeping. One can easily see how the respondent would be concerned about allowing somebody who was subject to such an allegation to have contact with patients. The claimant’s evidence was that he would “rarely, if at all” be alone with a patient. Thus even on the claimant’s own evidence it was a possibility that he would be alone with patients. That concern of Mr. Stevenson was a reasonable one.

46. Mr. Stevenson's concerns about contact with patients did not mean that the claimant could not work on another site without patient contact. I find that the reason why Mr. Stevenson thought that course of action inappropriate was because of what he had been told by the safeguarding team. However it is apparent from the evidence of Ms Holt, that the safeguarding team thought redeployment was inappropriate because doing so might threaten the integrity of the police investigation. I do not consider that to be a satisfactory position for the respondent to take. The respondent had approached the police and the police had made clear that as far as they were concerned the claimant could attend all other RD&E sites and the respondent could carry out any internal investigation that it wanted to. The police did not suggest that they were in any way concerned about contact with any other employees apart from VJ. If the respondent genuinely thought that police should be concerned about that then it should have informed the police.
47. The respondent did not call any evidence to suggest that the claimant could not perform his role satisfactorily from another site. Indeed the risk assessment which I have quoted above recommended that the claimant could be deployed to another site and I find that he could be.
48. I find that Mr. Stevenson gave no thought the question of whether the claimant should be suspended, either on full pay or on half pay, apart from to take the view that he could not consider that because he had been told that it was not an appropriate way forward.
49. The claimant was given no right of appeal. Mr. Stevenson said that was a decision which he and Mr. Corbridge talked about, but when he was asked why it was decided that the claimant would not be given a right of appeal Mr. Stevenson said that he had not been told why. I infer from that that, again, he was being guided by Mr. Corbridge. Mr. Stevenson did, however, volunteer that he subsequently became aware of another employee who was dismissed for some other substantial reason, who was given a right of appeal.
50. Ms Taverner gave evidence that she was aware of a consultant who had been suspended from all duties for 2.5 years on full pay while he was being investigated. The respondent did not challenge that but put to her in cross-examination that did not involve a police situation. In the circumstances, I accept the evidence of Ms Taverner in this respect.
51. The claimant referred to the situation of another consultant who worked for the respondent who, whilst holidaying in France, took images of the reflection of people standing in the shower cubicle next to him, in the water on the floor. The consultant's assertion had been that he had not been motivated by sexual matters but other reasons. The Medical Practitioner's Tribunal Service found that it was more likely than not that there was no sexual motive for his behaviour. Thereafter, a further allegation was made against the consultant which led to his suspension and the respondent sent a message asking people to be supportive of him and not spread rumours. However I have been provided with no evidence as to what that further allegation was. I am unable to take the view that the consultant's situation was in any way comparable with that of the

claimant. The first situation was not comparable, there is insufficient evidence to reach any conclusion in respect of the second comparison.

## The Law

52. Section 98 Employment Rights Act 1996 provides that it is for the Respondent to show the reason for dismissal and that it is a potentially fair reason, being either a reason set out in section 98(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.
53. Section 98(4) states that "The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)- 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 shall be determined in accordance with equity and the substantial merits of the case".
54. It is now well established law that the range of reasonable responses test applies to all aspects of the decision to dismiss, including the investigation stage; it is not for me to substitute my own opinion for that of the employer.
55. The question of dismissal for some other substantial reason was considered in *Leach v OFCOM* [2012] IRLR 839. It is difficult to extract a single quote from that judgment, not least because the Court of Appeal endorsed the EAT decision and I pay tribute to the written submission of Ms Clarke which fully sets out the various parts of that judgment which the tribunal must consider. In particular I note that the question is not whether the claimant has suffered an injustice but whether the conduct of the respondent towards him was fair. I also note that reputational damage is something an employer is entitled to be concerned about and take steps to protect, if necessary, by dismissing an employee. The facts of that case, it should be noted, included that although the claimant had been acquitted, the Metropolitan Police Child Abuse Investigation Command wrote to the respondent stating that they still had suspicions about the claimant and the EAT noted that "it is plain that an employer in such a case cannot be expected to carry out his own independent investigation in order to test the reliability of the information provided by a responsible public authority. He will typically have neither the expertise nor the resources to do so." I note that suspending or redeploying the claimant in that case would not have assisted in protecting the respondent's reputation. There was, in effect, nothing the respondent could do to protect its reputation, short of dismissal.
56. The question of reputational damage was also considered in *Lafferty v Nuffield Health* UKEAT/0006/19, where an employee with 20 years' service was charged with assaulting a patient with intent to rape. He was employed as a surgical porter and without waiting for a court to decide whether the claimant was guilty or not, the respondent dismissed him because of the risk to its reputation of continuing to employ the claimant where he had access to vulnerable patients. I note from paragraph 7 of the judgment that the dismissing

officer had applied his mind to the question of suspension, noted that it would be open ended and felt that a suspension on full pay would not amount to a proper use of charitable funds.

57. In *L v K* [2021] IRLR 790 a teacher was investigated by the police in respect of indecent images on his computer. The police did not pursue any prosecution and the employer, an education authority, determined that it could not have been confirmed that the teacher had not been involved in obtaining the images and that that gave rise to safeguarding concerns and to reputational risk. The claimant in that case was dismissed and the Employment Appeal Tribunal held that because there was a real possibility that the claimant was an offender, it was reasonable to dismiss him. That case is distinguishable from the present one in that Mr. Stevenson's evidence was that he never considered whether the claimant was guilty or not. He never formed a view that there was a real possibility that the claimant was guilty. He eschewed any consideration of the merits of the allegation.
58. In *Moore v Phoenix Product Development Ltd* UKEAT/0070/20 the EAT held that where an appeal would be futile, a respondent could act reasonably in not providing an appeal

## Conclusions

59. I accept that dismissing an employee in order to prevent reputational damage can be "some other substantial reason" for dismissing them. I also accept that protecting patient safety can be "some other substantial reason" for dismissing an employee. However, the question is whether the employer acted reasonably or unreasonably in treating those matters as a sufficient reason to dismiss the employee.
60. I consider that it was reasonable for Mr. Stevenson to decide not to consider the merits of the complaint to the police which had been made about Mr. Merson. Whilst the police had not asked the trust to refrain from investigating, I do not criticise it for not investigating, and neither did the claimant through his counsel.
61. However, at the time when Mr. Stevenson was making his decision, he did need to take account of the fact that he was dealing with an employee with long service and an unblemished record. The police had not charged the claimant and he was entitled to a presumption that he was innocent. Mr. Stevenson should also have taken account of the serious consequences to the claimant of losing his job. In reaching that conclusion, I am not suggesting that the test which I must apply is whether the claimant has suffered an injustice, I am simply recording that the consequences to Mr. Merson of losing his job is one of the factors which Mr. Stevenson should have had in mind when he made his decision.
62. There was nothing in the bail conditions of themselves that required the respondent to dismiss the claimant and it was not reasonable to rely upon those bail conditions as a sufficient reason to dismiss him. If the only issue was the

bail conditions then the respondent could easily work around them by allowing the claimant to work from another site.

63. The question of reputational damage and the question of patient safety could potentially both have been managed in this case without dismissing the claimant. He could have been suspended. The main failing of the respondent in this case is that Mr. Stevenson did not even consider suspending the claimant. If he had considered it and concluded that there were good reasons not to suspend the claimant then it may be that dismissal would have been an appropriate outcome, but he did not apply his mind to it. Moreover, it is not sufficient for Mr. Corbridge to say that suspension was not appropriate because of the length of time the claimant was likely to be suspended for. The respondent has suspended a consultant for 2.5 years on full pay. I do not consider that it makes any difference that the police had not been involved in that case. Even if the respondent was unwilling to pay the claimant full pay while he was on suspension, it could have spoken to him about being suspended without pay. There would be no reason why the respondent and the claimant could not enter into such an arrangement, varying the claimant's contract if necessary.
64. On the evidence which I have seen, I conclude that it was not only outside the range of reasonable responses for Mr. Stevenson not to consider the question of suspension but it was also outside the range of reasonable responses not to suspend the claimant in this case. At the point the claimant was dismissed no charges had been brought against him, it was simply the case that somebody had made an allegation against him. The police had not suggested to the respondent that it was likely that the claimant was guilty (as in *Leach*) and the respondent has had people on suspension for a long period in the past. If the respondent had suspended the claimant there was no real risk of reputational damage to the respondent. Any fair-minded member of the public would accept that where the police have not even brought charges, the appropriate thing to do would be to remove the claimant from having contact with the public (and possibly other staff) through his job, but not to dismiss him.
65. In those circumstances I consider that the dismissal was unfair because the dismissing officer did not properly consider suspension and also because the failure to suspend the claimant rather than dismiss him was outside the range of reasonable responses.
66. Whilst I am also of the view that any risk could have been managed in this case by moving the claimant to a different location and removing any access to patients, I am less confident that failure to do so was outside the range of reasonable responses. I would be somewhat hesitant in reaching a conclusion that no reasonable employer could have decided that redeployment was inappropriate in the circumstances. In the event I have not considered it necessary to decide that point given my decision that the dismissal was unfair because of failure to consider and implement suspension.
67. I do, however, consider that the failure to allow the claimant an appeal against the decision to dismiss him also made the dismissal unfair. Although I accept that the ACAS code on disciplinary matters does not relate to this type of

situation, it seems to me that for an employee of 20 years' service to be dismissed without being given the right of appeal is unreasonable. It is particularly unreasonable in circumstances where the meeting which led to the claimant's dismissal was only 12 minutes long. The claimant did not, in that meeting, raise the question of redeployment and he said in his evidence that with the benefit of hindsight he wishes he had. It is not surprising that in a short meeting the claimant did not bring to mind everything that he would want to say and an appeal would have allowed him to do so. Moreover, it would be fair to allow the claimant have an opportunity to address another person within the respondent in case Mr. Stevenson's decision was wrong. This is not a case where it can be said that an appeal would have made no difference. In the circumstances of this case, I consider that the failure to give the claimant a right of appeal meant that the process fell outside the range of reasonable responses.

68. Finally, and arising out of those matters which I have referred to above, I also consider that the involvement of Mr. Corbridge and his influence made the decision to dismiss the claimant unfair. His influence prevented Mr. Stevenson making an unfettered decision because of the way he presented the options to Mr. Stevenson. I do not find that Mr. Corbridge acted in bad faith. However, I have reached the conclusion that his involvement in the earlier allegations meant that he was less objective than he should have been and he was more involved in the decision than he should have been. He ended up guiding the process to a conclusion which he wanted, that was inappropriate for a human resources adviser.

69. I do not find that there was any unfair disparity of treatment between the claimant and the consultant referred to in paragraph 51 above, I am not satisfied that the circumstances of the two cases were comparable.

70. In the circumstances the claim of unfair dismissal succeeds.

Employment Judge Dawson

Date 29 February 2024

JUDGMENT SENT TO THE PARTIES ON

14<sup>th</sup> March 2024

FOR THE TRIBUNAL OFFICE

## **Notes**

### **Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

### **Recording and Transcription**

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>