EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT		**RESPONDENT**
MR M HOPE	**V**	**BRITISH MEDICAL ASSOCIAION**

HELD AT: LONDON CENTRAL (VIA CVP) **ON: 29 SEPTEMBER – 2 OCTOBER 2020**

EMPLOYMENT JUDGE: M EMERY

REPRESENTATION:
FOR THE CLAIMANT **In person**
FOR THE RESPONDENT **Mr J Mitchell (Counsel)**

JUDGMENT

The claim of unfair dismissal fails and is dismissed.

REASONS

The Issues

1. The claimant was dismissed for gross misconduct. The respondent contends that it reasonably believed that the claimant had committed gross misconduct by: (i) making frivolous and vexatious grievances; (ii) refusing to obey line management instructions; and that (iii) this caused a fundamental breakdown in

the working relationship between the claimant and senior managers within the respondent. It says it followed a fair process at disciplinary and appeal stage.

2. The claimant in his lengthy claim statement contends that the respondent fabricated a disciplinary case against him *"in retaliation for my use of the grievance procedure"* (claim statement, page 13), that his conduct was misrepresented, the respondent's actions during the grievance process was unreasonable for example the imposition of arbitrary guidelines, and that they misrepresented the claimant's position in the disciplinary process. He argues that the respondent failed to follow a fair process. He does not accept that the respondent genuinely believed he had committed misconduct.

3. Verbal judgment and reasons were given at the conclusion of the Hearing.

4. Unfair Dismissal

    a. What was the reason for dismissal? The respondent alleges gross misconduct, the claimant disputes his behaviour can reasonably be classed as misconduct. The claimant's case is that the disciplinary case was brought in retaliation for using the grievance procedure.

    b. Has the respondent proved that it dismissed the claimant for its stated reasons? If not, the claim of unfair dismissal succeeds.

    c. If yes, did the respondent:

        i. Act reasonably in commencing a disciplinary process against the claimant?

        ii. have reasonable grounds for believing that the claimant had committed misconduct by his actions?

        iii. carry out as much investigation as was reasonable in all the circumstances of the case?

    d. Was dismissal within the range of reasonable responses available to a similar type and resourced reasonable employer in the circumstances?

    e. If the dismissal was unfair, would the claimant have been dismissed under a fair process, had one been followed, if so when? Alternatively, under a fair process, what was the percentage prospect of the claimant being dismissed at some point? (The *Polkey* issue).

    f. If the dismissal was unfair, did the claimant contribute to his dismissal by way of his conduct, and if so would it be just and equitable to reduce compensation by any extent? (The compensatory fault issue).

The legislation and relevant legal principles

5. Employment Rights Act 1996

Part X Unfair Dismissal

Chapter I

Right not to be Unfairly Dismissed

s.94 The right
(1) An employee has the right not to be unfairly dismissed by his employer.

Fairness

s98 General

(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 subsection (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 subsection if it—

(b) relates to the conduct of the employee,

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

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

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

6. The following paragraphs contain summaries of the relevant legal principles, as set out in *Harvey on Employment Law.*

7. S.98 requires the respondent to prove its reason for dismissal. If it cannot, the claim succeeds. If the respondent can prove the reason for dismissal, s.98(4) requires the tribunal to be satisfied that the respondent has acted reasonably in all the circumstances in treating this reason for dismissal as sufficient. There is a neutral burden of proof, and the tribunal must make up its mind whether s 98(4) is satisfied in the light of all the information before it.

8. It is not for the tribunal to substitute its own opinion for that of the employer as to whether certain conduct is reasonable or not. Rather its job is to determine whether the employer has acted in a manner which a reasonable employer might have acted, even although the tribunal, left to itself, would have acted differently

9. *British Home Stores v Burchell [1978] IRLR 379:*

    1. first, there must be established by the employer the fact of a belief in the misconduct; that the employer did believe it;

    2. secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief;

    3. and thirdly, that the employer, at the stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in the circumstances.

10. *Iceland Frozen Foods v Jones [1982] IRLR 439*:

    (1) the starting point should always be the words of s 98(4) themselves;

    (2) in applying the section a tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal considers the dismissal to be fair;

    (3) in judging the reasonableness of the employer's conduct the tribunal must not substitute its decision of what is the right course to adopt for that of the employer;

    (4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

    (5) the function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

11. This means, in principle, that an employer need only adopt such procedural safeguards as a reasonable employer would adopt.

12. *Linfood Cash and Carry Ltd v Thomson [1989] IRLR 235*, the relevant question is whether an employer acting reasonably and fairly in the circumstances could properly have accepted the facts and opinions which he did. The tribunal is not entitled to interfere simply on the grounds that it prefers one witness to another; it must have logical and substantial grounds for concluding that no reasonable employer could have assessed the credibility of the witnesses in the way in which the employer did.

13. Cross examination by experienced advocates in the tribunal may produce a picture of the evidence which is quite different to the picture which emerged before the employer, yet it is the reasonableness of the latter's conduct, in the light of the circumstances prevailing at the time of dismissal, which must be assessed.

14. In *Morgan v Electrolux Ltd [1991] IRLR 89* the court of appeal considered that "serious allegations", at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by lay persons and not lawyers. The test is still whether a reasonable employer could have acted as the employer did. However, more will be expected of a reasonable employer where the allegations of misconduct, and the consequences to the employee if they are proven, are particularly serious: see *Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721*

15. In considering whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the employer's view, have been appropriate, but rather whether dismissal was within the band of reasonable responses that an employer could reasonably make in the circumstances. The fact that other employers might reasonably have been more lenient is irrelevant (see the decision of the Court of Appeal in *British Leyland (UK) Ltd v Swift [1981] IRLR 91*

16. On the question on the disciplinary process, the question to consider is:

— had the employer reasonable grounds on which to sustain his belief;

— had he carried out as much investigation as was reasonable; and

— was dismissal a fair sanction to impose?

17. The investigative process is important for three reasons in particular:

a. it enables the employer to discover the relevant facts to enable him to reach a decision as to whether or not an offence has been committed;

b. if properly conducted, it secures fairness to the employee by providing him with an opportunity to respond to the allegations made and, where relevant, raise any substantive defence(s); and

c. even if misconduct is established, it provides an opportunity for any factors to be put forward which might mitigate the offence, and affect the appropriate sanction.

18. The ACAS Code emphasises the importance of an investigation to establish the facts**.** Paras 5 to 7 of the ACAS Code of Practice highlight the following elements of disciplinary procedures which are relevant to investigations carried out by employers:

> "5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case…

19. The EAT commented in *ILEA v Gravett [1988] IRLR 497*, the extent of the investigation depends upon the extent of the evidence available to the employers.

> "… at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation, including questioning of the employee, which may be required, is likely to increase'.

20. Delay in carrying out the investigation may itself render an otherwise fair dismissal unfair, there being no formal requirement for the employee to prove actual prejudice caused by that delay (though of course evidence of actual prejudice could strengthen the employee's case) (*RSPCA v Cruden [1986] IRLR 83*; *A v B [2003] IRLR 405, EAT*).

Witnesses

21. I heard evidence for the respondent from Mr Raj Jethwa, the respondent's Director of Policy; Ms Stella Dunn who was the line manager of Mr Daniel McAlonan (the claimants line manager): Mr Chris Darke a senior manager who heard the claimant's grievance, Mr Thomas Kibling a barrister in private practice who was instructed to Chair the disciplinary hearing; Claire Armstrong who heard the claimant's appeal against dismissal. I then heard from the clamant and a friend who attended the appeal hearing, Mr Alex Gray. Prior to hearing the evidence, I read all witness statements and the documents referred to in the statements.

22. I do not recite all of the evidence I heard, instead I confine the findings to the evidence relevant to the issues in this case, all of which was known to the parties during the investigation and disciplinary process.

23. This Hearing was conducted by CVP online. The claimant objected on the first day to the Hearing being conducted online, in part because he had one computer which meant he was disadvantaged with an electronic trial bundle and being able to see the proceedings. The respondent sent him a hard-copy of the Hearing bundle that day, and on the commencement of day 2 the claimant raised no objections to continuing, which I made clear would be conditional on ensuring that the Hearing was conducted fairly, in particular that there was no disadvantage to the claimant in conducting the hearing online. While there were occasional connection issues, I did not consider there was any disadvantage to the claimant, and the claimant did not raise any objections during the Hearing

24. This judgment incorporates quotes from my notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The relevant facts

25. The claimant was employed as a Senior Policy Adviser by the respondent, with a special responsibility for professional regulation and for raising concerns/ whistleblowing. He supported the work of the respondent's GMC working groups on these issues. Amongst other things he sat on BMA Working groups, including on the Cities and local Govt Bill, Health and Social Care. The respondent's position was that the claimant's membership of working groups and attendance at other meetings, including those of contention as set out below, was at the judgment of more senior staff, and was not a decision for the claimant.

26. The claimant's work performance throughout his employment was good; his appraisals record his ability to work well with others. Until the disciplinary issue in this case he had never been disciplined by the respondent.

27. On 22 January 2019 Mr Jethwa reviewed and commented on a lengthy email the claimant had written in response to comments by Ms Dunn on a report the claimant had written. It was Mr Jethwa's responsibility to sign off on the report, and he considered that while some of the claimant's comments were reasonable, some were, in his view, unprofessional and dismissive, questioning Ms Dunn's judgment, and the claimant had not followed process by cc'ing him in effectively to arbitrate on the different viewpoints. He considered that the claimant should have incorporated Ms Dunn's feedback and comments she had wanted to be added, all of which were reasonable. As he added in his evidence *"the letter should not have come to me that way, and he could have had a conversation with Ms Dunn and sent an agreed position."* Mr Jethwa's feedback was passed to the claimant's line manager Mr McAlonan, who told the claimant.

28. The claimant did not accept Mr Jethwa's position on this email, considering that his own judgment was being questioned. On 29 January he emailed Mr McAlonan saying he wanted to raise a formal concern, saying *"there was no basis"* for saying he had been dismissive of Ms Dunn, also that he was providing *"analytical, dispassionate"* information on the views of the BMA's members, that being able to write such emails was *"essential to [the staff member's] professional integrity and the effective functioning of the organisation"* (53). There was discussion with HR about whether this complaint merited a formal grievance, or whether an informal discussion with Mr Jethwa would be the best way to sort this; the claimant was offered the chance to speak to Mr Jethwa, his view in an email dated 20 February 2019 was the respondent should follow a formal procedure, that what he was asking for was *"a clear indication"* from the respondent that *"it does not stand by [Mr Jethwa's] view of the tone of my email"* (64).

29. On 22 February 2019 the claimant raised a further issue with Mr McAlonan, that he *"wished to discuss informally my concerns"* that he had been excluded from *"regular catch-ups"* in a high profile matter and that a concern had been raised

about him working late; he wanted to know whether these issues had been raised *"in response to my formal concern of 29 January 2019"* (66).

30. The claimant's 29 January 2019 grievance was not upheld, the reason given in the decision was *"that there can be seen to be a dismissive tone"* in his comments, and more generally that more time should be given when drafting consultation documents to enable all thoughts and views to be taken on board, which would enable different views to be aired and resolved.

31. The claimant appealed, saying that he again sought an indication that the respondent did not stand by this view, that his comments were dismissive. The appeal decision dated 2 July 2018 stated that the writer did not personally consider the claimant's views to be dismissive, instead being *"your own personal views based on your knowledge and skills in this area of work",* but that others did consider this to be the case, that the claimant should *"reflect upon any comments and amendments"* to avoid this perception in the future. The letter stated that the writer was disappointed the claimant had not taken up the offer of a meeting with Mr Jethwa, the management time taken up had been *"disproportionate"* and *"I am now directing" that* a meeting be held with Mr Jethwa to discuss his perceptions and to ensure effective working in the future (73-74).

32. For the claimant, the fact that he had raised a grievance was for him an issue of significant concern: as he put it repeatedly in his questions to Mr Jethwa, he believed that this may adversely influence Mr Jethwa against him in the future; Mr Jethwa did not agree that this was a reasonable assumption, or that in fact it did adversely influence his view of the claimant.

33. On 23 August 2018 Ms Dunn emailed Mr McAlonan expressing concern that the claimant had been disappointed by not being invited to be in a meeting organised by a Council member, who had already made invites (77).

34. In November 2018 the claimant expressed a concern about not attending meetings on a policy issue, which he considered caused a difficulty in gaining appropriate advice from outside legal counsel; in a chain of emails involving Ms Dunn he asked to speak to Mr McAlonan informally about this (page 84); Ms Dunn responded asking to also attending this meeting, the claimant said he wanted *"an informal discussion"* with Mr McAlonan, in accordance with the grievance policy, that *"any requirement I must discuss it with you as well would be inconsistent with the policy and could be seen as an attempt inappropriately to influence the process"* (page 83). The claimant met with Mr McAlonan and expressed the view that he should be invited to particular meetings relevant to his areas of expertise; Mr McAlonan's account suggests that the claimant did not accept that Mr Jethwa and Ms Dunn could determine who should attend, that he wanted to continue to keep his options open to make the grievance formal (124). On being asked whether he wished to move to the formal grievance process, the claimant said "*I'm not keen to move to the formal procedure but would prefer at this stage not to give up my ability to do so as I have a similar concern about an incident last week…"* (82). For Ms Dunn, this was an issue of significant concern – the claimant did not want to meet with her

because he felt he may be victimised, as she said in her evidence: *"This felt like a very serious allegation to be made about me as a manager. Having work taking away – there was never any suggestion of this".*

35. Following advice from HR Mr McAlonan stated that the claimant could have a deadline to 21 December 2018 to decide whether he wished to move to a formal grievance, and if he chose not to do so he could not do so in the future unless new evidence or issues arose. In response, on 20 December, the claimant raised *"a further concern that a deadline has been imposed on me…",* saying that a deadline *"could be seen as an attempt to inappropriately influence the process."* On being told that this deadline would remain in place, the claimant raised a grievance that a deadline had been imposed on him; he asked for this to be dealt with informally by Mr McAlonan, on getting no response he asked for this to be dealt with under a formal process (80). The claimant was subsequently given a deadline of 14 January 2019 to decide whether he wished to move to the formal grievance process.

36. By mid-December 2018, Ms Dunn considered that she was being subjected to what she described as *"persistent unwarranted criticism"* by the claimant, she considered this to amount to bulling conduct, and it was making her feel upsetting and isolating, to the extent that she cancelled her attendance at the respondent's Christmas party once she became aware the claimant would be attending. As she said in her evidence *"I was getting to the stage that it was intolerable for me at work; the way the grievance process was being used meant that my version of events could not be put forward - either discussing with you or in a formal process to put my version across. I was being accused of serious issues, and this left me concerned."*

37. The claimant and Mr McAlonan met on 28 December 2018 and had an *"informal discussion";* on 11 January 2019 Mr McAlonan asked him whether this discussion had resolved matters or if he wished to move to the formal procedure (126).

38. On 14 January 2019 the claimant raised a further informal grievance, that he had not been invited to a further meeting by Ms Dunn which he believed he should have been invited to. Mr McAlonan was on paternity leave for the next month, and Mr Jethwa, who had been cc'd in, offered to meet with the claimant to discuss. The claimant said that this would be in appropriate, given Mr Jethwa's involvement in the grievance previous year, that he considered he was entitled to discuss the matter informally with his line manager Mr McAlonan.

39. In the evidence in this case, the claimant repeatedly questioned why he had been *"excluded"* from meetings; one he referenced was a meeting on a fitness for practice issue, where he *"had direct relevant and specific knowledge"*. Ms Dunn's evidence, at the hearing was the same as it was during the events in question; that the claimant had not been excluded, that it was for management to determine the most efficient use of staff resource and the appropriate level of attendees at such meetings. As she put it in her evidence in relation to one meeting, the issue of whistleblowing cut across two teams, the claimant's team and the Inclusion and Culture Team; it was a significant issue reputationally; it

was politically sensitive internally; and *"I was responsible and accountable for this work. So when making decision about who was going to meetings, it was coming from that perspective".*

40. Another example of the claimant's non-attendance at a meeting, Ms Dunn again reiterated that an invite has been made to specific senior management by a Council Member of the BMA, as was the Board's prerogative, and that this did not include the claimant: *"This was a meeting of two council members proposed by chair of council, I was asked to be there as I am accountable for this work; if this meeting had gone ahead it would have been a difficult meeting, and not to discuss the detail of policy. I was capable of managing the issues that may have come up, and I would have fed back to you and Daniel issues of relevance".* For Ms Dunn it was only a small number of meetings the claimant did not attend: two meetings with the Council Chair the clamant had not been invited to; one meeting she attended without any knowledge of what it would be about, one meeting with Public Concern at Work and one with NHS Improvement *"In my mind this was minimal to meetings he was attending and relevant to his work… So lots of work he was doing, and involved with, and he was not going to meetings he did not need to attend … and did not affect his role."*

41. In his evidence the claimant was asked why he had persisted in wanting an informal process, to keep the option open of a formal process: his answer was that he was scared that this would mean the process would get *"closed off … I had not withdrawn them but I was not actively pursuing them. I did not want to withdraw it - but not actively pursue - which is all I thought I needed to do, I did not see it as an issue if I did not pursue."* He said that it was *"naive not to think it was possible – I was trying to give an account of what was worrying me and why I was frightened by these events at the time".*

42. The claimant agreed to meet Mr Jethwa, who following their discussion on 31 January 2019 set out in an email his views – that it was for him and Ms Dunn to determine if he was required to attend meetings; also that this was not an issue which should be dealt with via the grievance process, that instead he, the claimant and Ms Dunn should have an informal discussion about ways of working, the claimant was told that if he persisted with grievances on this issue it may be treated as a disciplinary issue (128). Mr Jethwa's note of meeting shows that the claimant stated that he would prefer to have the meeting with Mr McAlonan, that Mr Jethwa's view was that this was not practicable or desirable given the issues were decisions taken by more senior management, and that the claimant *"did not seem able to grasp the point"* that these were not issues that could be resolved by Mr McAlonan, who in any event was off work on paternity leave at this point for a further month (244-5).

43. In response, the claimant wrote to the BMA Chair, saying he wanted to raise an informal concern about Mr Jethwa's email: that the threat of disciplinary action was victimisation for having raised grievances, and it was bullying conduct; that the threat not to treat his concerns as grievances was also bullying conduct, that there was "*an attempt to force me"* to discuss concerns with Ms Dunn and Mr Jethwa, which was *"an inappropriate interference in the grievance process".*

The outcome he sought was for the threat of disciplinary action to be withdrawn and for his concerns about attending key meetings to be treated as an informal grievance (128-9). Mr Jethwa responded to this email on 20 February 2019 stating that he proposed he, Ms Dunn and the claimant meet to discuss for a meeting to discuss, that if this issue could not be resolved informally then the formal grievance process would be followed; he was warned that if a grievance was regarded as frivolous or vexatious it could lead to disciplinary action (131).

44. The claimant's 14 January 2019 grievance not having been resolved, the claimant was written to on 12 March 2019 inviting him to a grievance meeting the aim of the meeting being *"to understand the nature of your grievance more fully"* (132-133). For the claimant, he said that the allegation against Mr Jethwa of bullying was *"not an allegation made easily, it was made in response to explicit threats of 7 & 20 February 2019, this was bullying … and abusing procedure by forcing me into meeting to withdraw my concerns or suffer detriment … the* case was retrospectively contrived – there was no suggestion of misconduct of breakdown of working relationships" before the letter of 22 March 2019, but he did accept that there had been a reference to a disciplinary process if he persisted.

45. Following a series of emails about the *"invitation"* the claimant was sent to attend the grievance meeting, the claimant refused to attend: his explanation was that he believed that this was an invitation rather than a requirement to attend, that he therefore wanted to decline; he instead wished to discuss his informal concerns with Mr McAlonan (134-140).

46. The grievance process went ahead in his absence. The conclusion of the Mr Chris Darke who chaired the meeting was that the claimant's *"behaviour was frivolous and vexatious"*: in his requiring informal grievances to be kept informal in circumstances where he had been dissatisfied with his line manager's response at the informal stage; and in his failure to attend the grievance meeting. He also concluded that the claimant's conduct towards Mr Jethwa was *"disrespectful and insubordinate"*, that the claimant had disregarded Mr Jethwa's *"measured response"* about what meetings the claimant would be invited to; the claimant had failed to adhere to the guidelines in the grievance policy -which states "… should the informal process not resolve the grievance, the employee *"must use the formal grievance procedure"* (142-3). In his evidence Mr Darke stated that his view was that there was *"an onus on everyone in the process to deal with it asap, not delay, not hang it out for long periods or add to existing complaints. It's very important to pursue and seek to resolve. I was attending to do so, to see if there was a way to resolve, but you refused to do so. And when we met at the disciplinary hearing you made no attempt to ask me questions or challenge me at hearing."*

47. The claimant informed that the disciplinary process would be invoked and on 10 April 2019 he was invited to a disciplinary hearing. The allegations were that he had (i) submitted *"numerous and frivolous grievances"* against Ms Dunn and Mr Jethwa; (ii) failed to follow reasonable line management instructions; and as a consequence (iii) there was a fundamental breakdown of a working relationship between him and senior management. He was told a range of

sanctions could be applied, including dismissal, The claimant chose to be accompanied by a colleague; he was given documentation by the respondent including statements by Mr Jethwa and Ms Dunn, the latter describing the impact of the issues on her, that she considered this to be *"persistent unwarranted criticism"* and amounted to bullying behaviour which had taken a significant toll on her (250-252). A postponement of the hearing was granted, and the disciplinary chair was changed in advance of the hearing to an independent barrister, Mr Kibling. The disciplinary hearing took place on 22 May 2019 and the claimant provided an electronic presentation including statements from himself which explained his actions, and from two team members who said they did not evidence any breakdown in working relationships (263-4), and documents including electronic diaries and email chains. He made a presentation at the hearing. The respondent's witness was Mr Darke.

48. Mr Kibling's decision letter states that he considered the respondent's grievance policy which states that grievances are to be *"dealt with promptly, consistently and fairly",* that if the issue *"cannot be resolved informally and promptly with the claimant's line manager"* a formal process *"will be followed";* the employee will attend the grievance hearing *"unless good reason for not doing so".* Mr Kibling's position was that this meant if an employee *"engages the grievance procedure it is incumbent on that employee to ensure that grievances raised are bona fide and to take the necessary steps to ensure that the grievances are resolved promptly".* He did not accept that the employee *"can prevent the grievance moving to the formal stage if unresolved at the informal stage and this decision to progress to a formal stage can be at the insistence of the employee as well las the BMA."* He stated that failure to attend a grievance hearing without good reason *"would constitute a failure to carry out a reasonable and lawful instruction".* He described the claimant's repeated refusal to meet with managers in respect of his grievance and his non-attendance at the grievance hearing to be *"a significant breach of the obligations".* He stated that the claimant's refusal to attend the grievance *"and a consideration of your conduct in relation to the grievances raised"* led to an allegation that his conduct had been frivolous and vexatious, and in respect of Mr Jethwa, *"disrespectful and insubordinate"*. Mr Kibling concluded that the claimant had raised three grievances, that in wanting these dealt with informally by Mr McAlonan, a subordinate of Ms Dunn against whom the grievances were directed, that the subject matter of the grievances which related to attendance at meetings which were not for claimant to determine attendance. And the claimant was "*therefore seeking to challenge the exercise of management prerogative to determine who should attend meetings",* then refusing to meet to discuss the problem with senior management; that the three grievances which followed were on the same issue, and *"thereafter further grievances were raised about the grievance process being followed"*; that this impacted on the working relationship with Ms Dunn *"and made worse by your interaction with Raj Jethwa".* He stated that the matters the claimant has raised *"not only were they time-consuming but they were unwarranted".* He described the effect on Ms Dunn's health. He concluded that the claimant had been reasonably not invited to meetings, and that *"your continued refusal to accept the legitimacy of these decisions made*

became personal and that the purpose of the subsequent grievances was vexatious on your part".

49. Mr Kibling concluded also that the claimant had failed to attend which was evidence the claimant was not acting in good faith, that the claimant's explanation that he *"could not reasonably have been required to attend a formal grievance hearing about the concerns I had raised as informal grievances…"* was evidence he was not engaging in good faith nor seeking to resolve matters expeditiously. His refusal to attend a meeting with Mr Jethwa was a further line management instruction which he failed to follow. Mr Kibling concluded that here was a fundamental breakdown in the working relationship as a consequence of the claimant's actions. He concluded that *"it has troubled me that an employee who raises grievances ends up being disciplined in respect of them"*; he concluded that the claimant's actions amounted to gross misconduct, a fundamental breach his working relationship with the respondent and was a breach of his obligation not to act in a manner likely or calculated to breach the term of trust and confidence. He was dismissed for gross misconduct, and given a payment in lieu of his notice entitlement (163-171).

50. The claimant appealed, his grounds including there was no evidence to support the allegations; the grievance policy was wrongly construed, the decision was one no reasonable tribunal could reach on the facts. He says his grievances were not frivolous and vexatious, they were a reasonable response to feedback *"that manifestly was a misrepresentation of my behaviour and in my view retaliation…"* that there was no suggestion these were regarded as frivolous or vexatious before he got the disciplinary letter, there was no management instruction he refused including the invite to the grievance meeting, but he should have been warned in advance he was breaching an instruction if one was made; in any event he could not reasonably have been required to attend a formal process; there was no general right in the grievance policy to move the grievance to a formal process; Ms Dunn's statement was *"deeply misleading and contrived … that was retrospectively obtained…"* (177-179). This was distilled at appeal into three issues: there was no evidence to support the allegations; Mr Kibling wrongly construed phrases from the grievance policy; the decision was one that no reasonable tribunal could reach on the facts (184-5).

51. The claimant also raised concerns about Mr Kibling presenting the management case at appeal, as the respondent had breached its policy by appointing an external hearing manager and this compromised the process as Mr Kibling was paid; he was a legal representative which made the process *"manifestly unfair";* Mr Kibling was in a conflict of interest at the appeal stage and this cast doubts on his independence (183) and this was treated as a fourth ground of appeal. The claimant objected to the original appeal chair, who was replaced. The appeal hearing started on 9 July 2019 and was adjourned to allow the claimant to brief a friend to attend and assist, reconvening on 23 July 2019. A firth ground, that the claimant had not been given all documents on which Mr Kibling had based his decision was also added.

52. The appeal was not upheld. Dealing with Ground 4 first, the chair concluded that it was not outside of policy to instruct Mr Kibling given the conflict of interest

between the claimant and management given the issues to be decided; there was shortage of senior management; Mr Kibling was not instructed to act as a legal adviser; the claimant did not object to Mr Kibling's appointment; being paid to provide this service does not constitute bias. Ground 5 – the appeal decision was that Mr Kibling was not in possession of additional documents. Ground 1 – the appeal found that the grievance policy was not wrongly construed, as it states that a formal process will be followed if an informal grievance remains unresolved. Ground 2 – there was evidence that decisions were made about attendance at meetings and the claimant was seeking to challenge the authority of management to make these decisions, that there *"was a significant body of evidence from a range of sources that the numerous grievances were vexatious and frivolous, that there had been a breakdown of working relationships… and that you had failed to follow reasonable line management instructions".* Ground 3 – the chair concluded that the *"repeated nature of this behaviour, the failure to take up offers of alternative ways to resolve the issues, the continuation of your behaviour despite having been informed where it could lead, the cumulative impact on working relationships and the wellbeing of others and your failure to follow reasonable line management instructions on more than one occasion can, taken together, constitute gross misconduct".* The decision observed that the claimant was rude and aggressive which *"further emphasised the fact that you are unable to accept the legitimate authority of management.. and further evidence that you are incapable of ensuring cordial and good working relationships…"* (194-200).

Submissions

53. Mr Hope argued that there was *"no scenario"* in which the use of a grievance process could constitute gross misconduct – no reasonable person could believe that it did. There was no evidence on the facts of grievances being raised in a way that was frivolous, vexatious, nor was there a failure to follow management instructions. The allegations were retrospectively contrived - because no one had suggested he had raised a frivolous grievance or had failed to follow management instructions. It was *"not reasonable to turn up at the formal grievance process … I was not required to do so - and also not reasonable or fair to require me to attend a formal grievance - this is based on the idea I was going to pursue issue. I would have withdrawn."* He said he believed that if he did not engage the grievance will be withdrawn or would remain unresolved; it was only on 20 March 2019 that attendance was *"turned into a requirement. I then sent email on 21 March suggesting that this not reasonable ….";* he stated he believed that the requirement was *"retracted … so I then declined and said if not official I am declining again".*

54. Mr Hope argued that the charge was retrospective – there was no indication that non-attendance would be used as disciplinary issues – frivolous/vexatious conduct or breach management instruction; when he was *"going out of way not to breach - and it was unfairly treated as evidence of frivolous of vexatious conduct"*. He said he did not see how his conduct could be considered *"deliberate wrongdoing";* he had a clean disciplinary record, he was raising concerns. There were only two instances of issues with management instructions, one of which was not going to an informal meeting. *"These were*

not frivolous or vexatious – I wanted to have concerns dealt with but did not ask for action to be taken against anyone. This was about my perception about doing my job and using grievance procedure as a shield; I understand procedures not to be used as weapon – this was protection and I was not challenging management's authority but putting on record my concerns. No one saying the issues were trivial – this was about accepting and registering my concerns so I was protected."

55. Mr Mitchell had provided a written Skeleton. He said that in this case there is a *"more than normal danger of substitution"*, that it was unusual to have heard from witnesses in a disciplinary process, on which it is possible to form a judgment, *"so be cautious not to substitute"*. He argued that at the heart of the case *"is trust, in truth from early 2018, the claimant did not trust Mr Jethwa and Ms Dunn"* and this is why he ignored the direction to attend meeting with them. *"And a failure to address this on his part has caused a lack of trust and is what has caused the breakdown in relationship. The claimant says that the respondent has been misleading, misrepresenting, victimising him, bullying, contriving and fabricating evidence; this explains what is a proper finding of a breakdown in working relationships by the respondent, and it's an irretrievable one."*

56. A potential fair reason for dismissal – a vexatious and frivolous grievance - why does the claimant not turn up to address his grievance? He's instructed to attend - he is invited to a hearing to his grievance and he chose not to attend. "*These are grievances he is insisting be dealt with by a subordinate, who had failed to resolve them, making this insistence even more difficult to understand".*

57. The process was fair – the claimant was informed of and attended the disciplinary heating and he produced documents to support his case. Mr Kibling's appointment was fair and reasonable. The decision he reached was because of an irretrievable breakdown, he was entitled to come to this conclusion; it may be at the outer of the band, or range, of reasonable responses *"but is within this band"*, even though it was a decision which *"rightly did trouble"* Mr Kibling.

58. All of the attempts to get the claimant to sit down and hear and understand each point of view – this could have enabled relationship to be rebuilt - but the claimant believed that Ms Dunn was fabricating matters; and this has meant the employment relationship was irretrievable - and no other step could have been taken to improve the relationship.

59. Mr Hope responded; he said that he was not intending to break the relationship but his concerns about the issues in his grievances; there was no breakdown between him and Ms Dunn, they continued to interact in a professional way. He did not consider the asking grievances to be dealt with by Mr McAlonan was unreasonable, this is what he expected and he continued to assume that this was reasonable there was no lack of trust, or unwillingness to cooperate on his part.

Conclusion on the evidence at the law

60. I reminded myself that it was not for the tribunal to substitute its opinion for that of the respondent; that the test is whether the respondent's actions were within the *"range of reasonable responses"* open to an employer of similar size and resources. I noted that to fairly dismiss for misconduct:
    a. the respondent must prove that it dismissed the claimant for its stated reason of misconduct – was this the respondent's real reason for dismissal?
    b. the respondent had reasonable grounds for this belief in the claimant's misconduct ;
    c. it had carried out as much investigation as was reasonable in the circumstances; and
    d. dismissal was a fair sanction to impose.

61. I first considered the rationale for determining to move the issue to a disciplinary hearing, which was the recommendation at the grievance stage. It is for the employer to prove the reason for dismissal, and this I considered included the decision taken by Mr Darko. I concluded that the reason why the decision was taken by Mr Darko to recommend a disciplinary process was because of the claimant's conduct, which included the following: persisting in making multiple informal grievances; leaving open the open of option of proceeding to a formal process without taking the step to either do so or withdraw the grievance; persisting in seeking informal resolution from his line manager, including when he was on paternity leave, when the grievances were about more senior managers and when an informal meeting on 28 December 2018 had not resolved the issues; refusing to meet with Mr Jethwa and Ms Dunn; complaining about Mr Jethwa's line management instruction to him to the Council Chair; failing to attend the grievance hearing. I concluded that this was the actual conclusion reached by Mr Darko was that the claimant's actions were vexatious and unreasonable.

62. I also considered whether it was reasonable for Mr Darko to conclude that the claimant's actions were vexatious and unreasonable. I noted that the legal question was whether the employer, acting reasonably, could *"properly have accepted"* that the claimant's actions may have amounted to vexatious and unreasonable conduct, that he had unreasonable refused to attend meetings and the grievance hearing, that this impacted on the working relationship. I concluded that Mr Darko did properly accept that this was conduct which potentially amounted to misconduct.

63. I further concluded that the conduct of the disciplinary investigation was reasonable: appropriate staff including Ms Dunn were asked questions. It took into account all relevant documentation supplied by the claimant, it considered the grievance policy and it considered the claimant's actions. It was reasonable to conclude at this stage of the process on the basis of the evidence that the claimant had potentially committed acts of misconduct; I concluded that the respondent's actions at this stage were not motivated by the mere fact of the

claimant having raised grievance, but by what they genuinely considered at this stage to be his misuse of this process.

64. I concluded also that it was within the range of reasonable responses for Mr Kibling to conduct the hearing for the reasons stated by the respondent – the need for independence, the lack of available senior managers; also I noted that the claimant did not object to his appointment or the manner in which the hearing was conducted. I noted that the presence of an employment lawyer in conducting such a process may impact, given the extensive knowledge of employment law may be seen to give an unfair disadvantage to an unrepresented employee; however I concluded that the hearing was undertaken fairly with the claimant being given a full opportunity to present his case, and that this was fully taken into account by Mr Kibling in is decision.

65. I concluded that the disciplinary hearing took account of the significant impact that the claimant's conduct had on the respondent's employees. I concluded that the findings of the disciplinary hearing were findings which were reasonable to make, given that there was significant evidence of the claimant's conduct in making repeated grievances and his disregard of attempts to resolve the grievances informally, his refusal to attend the grievance hearing; the clear evidence of a breakdown in the relationship with Ms Dunn and the impact of his conduct on her.

66. I further concluded that the claimant's dismissal was for the reasons stated by the respondent, and it was not retaliation for the claimant's use of the grievance process.

67. I concluded that the dismissal was within the band of reasonable responses of a similarly sized and resourced employer in these circumstances. In doing so, I carefully considered the explanation that the claimant gave for his actions at the disciplinary hearing: that he was treating the grievance process as a shield, he was worried about the conduct he was experiencing at work. However, I concluded that whilst this was the claimant's viewpoint, it was within the range of reasonable responses for the respondent to view the claimant's actions as repeated complaints about legitimate actions taken by the respondent in respect of who attends meetings, complaints which the claimant was neither willing to progress to the formal stage, nor drop; and he then failed to attend the grievance hearing. There was significant evidence of the impact that this conduct had on the working relationship with Ms Dunn, I concluded that it was within the range of reasonable responses for the respondent to conclude that the grievances were therefore vexatious, that the claimant's conduct had undermined the working relationship, that this was an irretrievable breakdown and amounted to conduct which was likely to breach the implied term of trust and confidence. I concluded that the claimant's appeal was properly considered at appeal stage.

68. In conclusion: the respondent has proven the reasons for dismissal, its disciplinary process was reasonable, it collected and took into account all relevant evidence, the decision that the claimant had committed gross misconduct was reasonable in the circumstances, and dismissal was a sanction within the range of reasonable responses.

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EMPLOYMENT JUDGE M EMERY

Dated: 17 November 2020

Judgment sent to the parties
On: 20/11/2020

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For the staff of the Tribunal office

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