EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103194/2022

Held by Cloud Based Video Platform (CVP) on 20 September 2022

Employment Judge Neilson

Simon Hammond	**Claimant** **In Person**
Highland Health Board	**Respondent** **Represented by:** **Mr Davies -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claim of unfair dismissal does not succeed and is dismissed.

REASONS

1. At the hearing on 20 September 2022 the claimant was unrepresented and the respondent was represented by Mr Davies, Solicitor. There was a bundle of documents lodged by the respondent.

2. The respondent led evidence from Mr Alexander Ross Mackenzie, Area Manager ("Mr Mackenzie") and from Louise Bussell, Chief Officer (Ms Bussell"). The claimant gave evidence on his own behalf.

3. There were no preliminary issues.

4. The claimant accepted he was seeking compensation only as an outcome and the parties were agreed that the Schedule of Loss lodged by the claimant was an accurate representation of the loss sustained.

Issues

5. The claimant had brought a claim for unfair dismissal under section 94 of the Employment Rights Act 1996 ("the ERA"). The respondent admitted that the claimant had been dismissed but maintained that dismissal was for a fair reason, namely misconduct. The issues to be determined were as follows:-

   5.1 Was the reason for the claimant's dismissal a potentially fair reason, within the meaning of section 98(1) or (2) of the ERA?

   5.2 Was the claimant's dismissal for that reason fair in all the circumstances, in terms of section 98(4) ERA?

   5.3 If the claimant's dismissal was unfair, what compensation should be awarded?

6. In the course of the hearing it became evident that the material issues in relation to section 98(4) of the ERA were whether or not the claimant was given fair notice of the allegation of dishonesty that he maintained was the primary reason for his dismissal and secondly whether dismissal was within the band of reasonable responses.

Findings in Fact

7. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

Background

8. The claimant was employed by the respondent as an Advanced Paramedic Practitioner ("APP"). He was employed at the respondent's premises at the Portree Community Hospital in Portree, Isle of Skye.

9. The claimant's period of continuous employment commenced on 1 July 2007 and terminated on 16 March 2022.

10. The claimant was an experienced APP with over 20 years' experience.

11. In carrying out his role as an APP at the Community Hospital at Portree the claimant was often acting on his own without supervision from others.

12. APPs are a regulated profession. Their registration body is the Health and Care Professions Council ("HCPC"). APPs are required to register with the HCPC every two years. An APP falls within the definition of an Allied Health Professional ("AHP"). NMAHP is shorthand for Nursing, Midwifery and Allied Health Professional.

13. APP's are required to register with HCPC by 31 August every two years. The claimant was aware of this.

14. The HCPC maintain certain specified standards of conduct applicable to APP's. These are set out in a document from the HCPC – "Standards of conduct, performance and ethics".

15. The respondents maintain a specific policy dealing with registration. It is entitled Policy for Nursing, Midwifery and AHP Registration Monitoring. Paragraph 1.1 of that policy provides that "It is an essential component of professional governance arrangements to ensure that registered Nurses, Midwives and AHP's maintain up to date registration with the NMC and Health and Care Professions Council (HCPC) respectively." Paragraph 1.3 further provides that it is "the professional responsibility of all registered NMAHP's to meet the requirements of their regularly body, to maintain their registration and up to date contact details with their regulatory body and pay all registration fees in a timely manner. If an NMAHP registration lapses for any reason, it is responsibility of the member of staff to inform their manager as soon as is practical." The Policy sets out the process to be followed to renew registration. Paragraph 6 of the policy states "The above process should minimise the risk of any NMAHP registration lapsing, however if this does occur, the NMAHP staff member has breached their contractual terms of employment and under law cannot practise as a registered member of staff until registration is renewed."

16. The respondents maintain a Conduct Policy: guide to expected standards of behaviour. That document specifies certain actions that may amount to gross misconduct. These include gross negligence or irresponsibility; Unprofessional conduct as defined by reference to generally accepted

standards of conduct or ethics within a staff group; wilful failure to adhere to clinical governance/infection control policies (e.g. hand hygiene).

17. The respondents have an electronic employee support system called eESS. It is an online HR system. It has a link to the databases with details of both NMC and HCPC registrations.

18. An APP is not legally allowed to practice as such if they are not registered with HCPC.

19. On 2 June 2021 the claimant received a reminder from HCPC to his personal e mail address about the need to renew his registration with HCPC. On August 3 2021 the claimant received an e mail from eESS highlighting that his registration was due for renewal.

20. The claimant was aware, during the course of his employment (and in particular in the period from June to September 2021) of the requirement for him to be registered with the HCPC to enable him to carry out his role. The claimant was also aware that his registration would expire on 31 August 2021.

21. The claimant's registration with the HCPC expired on 31 August 2021.

22. The claimant carried on working in his role as an APP on the following dates:- 3, 4, 5, 9, 10, 11, 12, 15, 16, 17, 20 and 21 September 2021.

23. The claimant's line manager, Cathy Shaw, District Manager ("Ms Shaw") became aware on 22 September 2021 that the claimant may be working without being registered and took steps to ensure he could not act as an AAP until he had been registered and until an investigation into his conduct had been carried out.

24. The claimant notified the respondents on 28 September 2021 that he had been referred to the HCPC fitness to practice unit as he had completed a form stating he had worked when not registered. The claimant re-registered with HCPC with effect from 17 February 2022.

The Investigation

25. The respondent appointed Kate Earnshaw, District Manager ("Ms Earnshaw") and Allison Urquhart, HR Advisor ("Ms Urquhart") to investigate the circumstances surrounding the allegation that the claimant had been working whilst not registered with HCPC.

26. In the course of that investigation the claimant and Ms Shaw were separately interviewed. The claimant was accompanied by his trade union representative, Ms Oliver, at the investigatory meeting.

27. The investigation also considered various e mails and text messages and a letter from Ms Shaw to the claimant dated 1 October 2021.

28. During the investigation Ms Shaw provided evidence both in an investigatory interview on 22 October 2021 and in a signed statement. Her evidence was as follows. She was notified at 10:18 on 21/09/2021 through eESS that the claimant's registration with HCPC had possibly lapsed. At 12:20 on 21/09/2021 she e mailed the claimant and asked him to confirm his re-registration with HCPC. At 19.06 she sent a text to the claimant in the following terms "Simon please tell me you have renewed your registration". At 19.27 that day she sent a further text – "You can't work without it Simon you need to let me know asap." The claimant then immediately contacted her by phone and told her everything was fine he had renewed his registration with the HCPC and had been told by them that owing to the volume of registrants some registrations were not showing as active but he was able to work. He said he had an e-mail from HCPC confirming this. Ms Shaw asked again if he was certain he was able to go into work and again the claimant reassured her that everything was fine and his registration should be showing in the next couple of days. At 19:36 Ms Shaw emailed the claimant and asked him to forward the e-mail confirmation he said he had received from HCPC. She repeated this request by text message at 19:54. At 05:54 the following day she sent a further e-mail to the claimant advising that if she did not receive the requested proof that he was able to work as a registered practitioner she had no choice but to advise him he would not be able to work that night and

that she would have to contact HR for advice. At 07:00 she received a phone call from the claimant. He was very quiet initially saying nothing. She asked him did he have an e-mail from HCPC and the claimant said no and that he was sorry he had let her down. The claimant sounded distressed when he was talking to her. She told him that she would have to cover his two remaining shifts and gave him the choice of coming into work as a band 2 that night or taking annual leave for two days. He chose to take the leave.

29. The e mails, text messages and letter referred to by Ms Shaw supported her version of events.

30. The claimant provided evidence at an investigation meeting with Ms Earnshaw and Ms Urquhart on 25 November 2021. At that meeting the claimant was asked about the allegation that he worked on various dates in September 2021 knowing that his professional registration had lapsed. The claimant gave the following evidence. The claimant said he was not registered because he had failed to register. He accepted he had not done what was required. It was completely his fault and he took full responsibility. He did make the effort to rectify it, but he didn't make his manager aware and he apologised for that. He agreed with the allegation that had been raised against him.

31. The claimant was asked at the investigatory meeting how it had come to his attention that his registration had lapsed. The claimant stated that on the 5th of September 2021 he was looking for his registration number to write up a prescription, but his name disappeared off the system. It made him feel sick. He contacted the HCPC on the 6th of September 2021 to find out what the process was for getting back on the register. He tried phoning them several times but could not get through. He e-mailed them from home at 10:47 a.m. asking them what he needed to do and at that point he should have spoken to Ms Shaw but he did not. He did not hear back from the HCPC so he e-mailed them again on the 16th of September at 10:00 a.m. and at 10:01 a.m. he received a generic e-mail to say they had a high workload because of covid. He tried phoning at 10:09 a.m. and that was the first contact he had with the HCPC. He spoke to someone called Ben in the registration

department, he filled in the appropriate paperwork and sent it back to Ben and left it with him to process. He was asked for the last date he practised and he said the 16th of September as at that point that was correct.

32. At the investigatory meeting the claimant was asked why he did not speak to Ms Shaw if he was struggling to register. He stated he was embarrassed and had not had the best relationship with management or the NHS and this may have prevented him from raising it. He was also asked why he told Ms Shaw he had renewed his registration when he had not. The claimant said he should have told Ms Shaw that he had not registered and was taking strides to re-register. He was asked why he told Ms Shaw there was an e mail from the HCPC to confirm he was registered. The claimant said he was referring to the re-activation e mail he was waiting to come though, as at that point he was under the impression he'd done everything he had to and he was just waiting for his registration to come through.

33. When asked at the investigatory meeting whether the claimant thought he was practising safely, ethically and lawfully the claimant said he was not registered so no.

34. The investigation report ("the Report") was submitted to the respondents on 24 January 2022. The Report concluded that a number of standards of conduct, performance and ethics had been breached and recommended that the case proceed to a conduct hearing. The Report consisted of the report itself and various appendices containing the notes of the investigatory meetings with the claimant; the statement from Ms Shaw and the relevant e mails, texts and letters.

35. The Report also concluded that the claimant "was deliberately evasive with the truth in the hope that he could deal with this retrospectively".

36. By letter of 16 February 2022 the Claimant was invited to a conduct hearing to take place on Tuesday 8 March 2022. The allegation set out in that letter was as follows:- "You continued to work, undertaking shifts and treating patients knowing that your professional registration had lapsed on the following dates: 3, 4th & 5th September 2021; 9th, 10th, 11th & 12th September

2021; 15th, 16th & 17th September 2021; 20th & 21st September 2021". In the letter the claimant was given the right to be accompanied and was notified that the formal disciplinary sanctions available to the panel included first written warning; final or first and final written warning; alternatives to dismissal and dismissal. The claimant was also given a copy of the Report and its appendices.

37. The claimant attended the conduct hearing on 8th March 2022 with his trade union representative, Ms Oliver. The conduct hearing was heard before Mr Mackenzie as the disciplining manager. Mr Mackenzie was accompanied by Ms Mackay, HR Advisor and Ms Moss, Associate Director AHP's as a technical advisor. Ms Earnshaw and Ms Urquhart were also in attendance to present the findings of the Report.

38. At the conduct hearing Ms Earnshaw summarised the findings set out in the Report.

39. At the conduct hearing the claimant confirmed that he accepted the factual accuracy of what was set out in the Report. The claimant admitted that he had failed to re-register in time. The claimant further stated that he should have made better decisions and got in contact to say there was a definite possibility that he was no longer registered.

40. The claimant was asked at the conduct hearing why he told his line manager that he could work on 21/09/2021 and that he had an e mail confirming this. The claimant responded to say it was his understanding it would be a quick registration and it was going through and he would get back to being a registered practitioner.

41. The claimant was also asked at the conduct hearing if there was any reason he did not speak to his line manager or professional lead and he responded that he did not as he was embarrassed and because he had got in touch with HCPC as soon as possible a quick registration would be sufficient. The claimant also stated he did not get anything to say he was not registered.

42. At the conduct hearing the claimant put forward a number of mitigating factors including the fact he was shielding during the pandemic from March to July 2020; his return to NHS Highland employment in July 2019; his divorce and his son moving to Spain in March 2019; the ill health of his mother in June/July 2021 and NHS changes to e mail addresses and software systems during the summer of 2020.

43. The conduct hearing was adjourned to allow Mr Mackenzie to consider the evidence before issuing his decision.

44. By letter of 15 March 2022 Mr Mackenzie notified the claimant of the outcome of the conduct hearing. Mr Mackenzie informed the claimant that he found the allegation set out in the letter of 8 March 2022 to be upheld.

45. Specifically Mr Mackenzie found that the claimant had continued to work as an APP when he knew he was not registered and that he had deliberately covered up his registration status in the hope he would get it sorted before being discovered and then advised that he had e mail confirmation from HCPC which subsequently proved to be untrue.

46. In arriving at this decision Mr Mackenzie concluded that the claimant had demonstrated gross negligence and irresponsibility; unprofessional conduct and wilful failure to adhere to clinical governance. He also concluded that the claimant's actions may be deemed to be in breach of a number of the requirements of the HCPC Standards of conduct, performance and ethics.

47. In arriving at that decision Mr Mackenzie did consider the mitigating factors that had been put forward but concluded that most of these related to periods not related to the current issue and in any event the current issue was sufficiently serious to outweigh any mitigation.

48. Mr Mackenzie also considered whether there was any alternative to dismissal but concluded that given the seriousness of the misconduct, the nature of the misconduct, its potential impact on patient and public confidence and the breakdown in trust and confidence between the Board and the claimant this was not possible.

49. Mr Mackenzie's decision was to dismiss the claimant with immediate effect and without pay or pay in lieu of notice.

The Appeal

50. The claimant was offered a right of appeal and duly appealed his dismissal.

51. The claimant was invited to attend an appeal hearing on Monday 20 June – a date that was subsequently changed to 27 July 2022.

52. The claimant's appeal was heard on 27 July 2022 before the appeal manager, Ms Bussell. Also in attendance to support Ms Bussell were Ms Black, HR Advisor and Ms McBain, Deputy Director for AHP. The management case at the appeal was presented by Mr Mackenzie supported by Ms Mackay. The claimant attended accompanied by his union representative, Ms Oliver.

53. Ms Bussell is a registered nurse with experience of chairing appeal hearings.

54. Prior to the appeal hearing the claimant submitted written grounds of appeal (Claimants Grounds of Appeal) and a statement in support of the appeal (Claimants Appeal Statement). There were six grounds of appeal. (1) The claimant was not given fair notice of the allegation of dishonesty for which he believed he was dismissed; (2) The reason for dismissal (dishonesty) goes beyond the allegation that was upheld; (3) The upholding of the allegation that the claimant worked on 3 and 4 September 2021 knowing he was not registered was at odds with a finding that the claimant became aware of the issue on 5 September 2021; (4) The upholding of the allegation that the claimant worked knowing he was not registered was not supported by the evidence; (5) Mr Mackenzie had failed to take account of the efforts the claimant made to obtain registration in the period between 5 and 16 September 2021; (6) Mr Mackenzie failed to take into account that HCPC had determined that he was fit to practice.

55. Mr Mackenzie also submitted a written document (dated 9 June 2022) (Mackenzie Appeal Statement) prior to the appeal setting out the grounds for the decision to dismiss. In the conclusion section Mr Mackenzie stated:- *"Based on the evidence presented I formed a reasonable belief that the*

allegation made against Mr. Hammond was true. Mr Hammond did work and treat patients knowing that his professional registration has lapsed. I formed a belief that Mr. Hammond deliberately tried to cover this up by telling his line manager he was registered, by telling her that there was a backlog, and that he had an e-mail confirmation of same before finally being forced to admit that no such e-mail existed and that he accepted he had let his manager down. I considered all the evidence presented and found this to be a significant breach of the NHS Scotland Guide to Expected Standards of Conduct in that you demonstrated gross negligence and irresponsibility, unprofessional conduct, as defined by reference to generally accepted standards of conduct within a staff group, and wilful failure to adhere to clinical governance."

56. Ms Bussell reviewed the following documents prior to the Appeal Hearing:- Claimants Grounds of Appeal; Claimants Appeal Statement; Mackenzie Appeal Statement; the Report; the letter of 16 February 2022 inviting the claimant to the conduct hearing and the dismissal letter of 15 March 2022.

57. In the Claimants Appeal Statement at paragraph 32 the claimant stated *"I am aware that Cathy Shaw has given her version of our contact on the evening of Wednesday 21st September 2021 and the morning of Thursday 22nd September 2021. I do not accept her version of events as accurate. I think that she has misinterpreted what I was trying to tell her. What I was telling her was that I had submitted the re-admission form and that I was waiting for the form to be processed but I had not been informed that this prevented me from working while it was being processed. That was my understanding and state of mind at time."* Ms Bussell had read this prior to the appeal.

58. During the course of the appeal hearing the claimant addressed the hearing and was asked questions about why he did not disclose to his line manager that he was not registered. Mr Mackenzie addressed the appeal hearing and explained his decision to dismiss and the grounds for that. The claimant was afforded the opportunity to ask Mr Mackenzie any questions.

59. Ms Shaw attended at the appeal hearing and gave evidence to the appeal hearing concerning the events on 21 and 22 September 2022. The evidence

she gave was consistent with the evidence she provided as part of the investigation. Mr Mackenzie asked Ms Shaw *"are you absolutely clear that the question that you were asking was whether or not Simon was registered and able to work as supposed to whether he had updated any information on the system?"* Ms Shaw answered *"Absolutely, 100% clear that I had asked was he registered and actually in the text message I said you cannot work unless you are and Simon was very clear with me that he had got it sorted."*

60. The claimant and his representative were given an opportunity to ask Ms Shaw any questions at the appeal. They did not challenge the evidence that was provided by Ms Shaw at the time she gave the evidence and later in summing up.

61. After the appeal hearing concluded Ms Bussell considered the evidence and came to her decision a few days later. Ms Bussell accepted Ms Shaw's evidence regarding the events of 21 and 22 September 2021 as being accurate. Ms Bussell set out her decision in a letter of 3rd August 2022 to the claimant. Ms Bussell did not uphold any of the appeal points.

62. Specifically on appeal point 1 - Ms Bussell found that whilst the allegation was not specifically identified in the invite letter to the conduct hearing the claimant had been provided with the Investigation Report where the information was contained.

63. On appeal point 2 - Ms Bussell was satisfied that there was written and verbal evidence that the claimant had failed to disclose a belief that he may not be registered and informed Ms Shaw on the 21 September 2021 that he had an e mail from HCPC confirming his registration which later was found to be untrue. On that basis Ms Bussell found that there was a failure by the claimant to be honest and trustworthy.

64. On appeal point 3 - Ms Bussell was satisfied that any differentiation between the claimant's state of knowledge as regards the 3 and 4 September and the later dates was not material. She was also satisfied that in any event this highlighted the fact that by 5 September the claimant clearly knew there was a problem with his registration.

65. On appeal point 4 - Ms Bussell was satisfied that no evidence was presented at the appeal that would change the conclusion that Mr Mackenzie came to that the claimant knowingly worked whilst not on the register.

66. On appeal point 5 - Ms Bussell found that it was not disputed that the claimant made attempts to re-register – but this did not take away from the fact that the claimant did not disclose any of this at the time to his employer.

67. On appeal point 6 - Ms Bussell's position was that the HCPC process was a different process and not relevant ton the outcome of the internal NHS process.

68. Ms Bussell upheld the decision of Mr Mackenzie to dismiss the claimant.

Submissions

Submissions for the respondent

69. For the respondent Mr Davies submitted that the only real issue that the claimant had raised related to lack of fair notice about the dishonesty. The respondent maintains that firstly there was no material unfairness in this but, secondly, if it was, it was cured on appeal.

70. On the first point the respondent accepted that the invitation to the conduct hearing only referenced the primary allegation of continuing to work whilst knowing that his professional registration had lapsed. However, there was no prejudice to the claimant as the claimant was still given an opportunity at the conduct hearing to answer the allegation that he misled his line manager on 21 September 2021.

71. On the second point Mr Davies referred to ***Taylor -v- OCS Group 2006 IRLR 613*** – para 47 (referenced below at para 84). The procedural fairness was addressed in the claimant's grounds of appeal at paragraphs one and two and in the outcome letter to the appeal from Ms Bussell under those headings. The respondent does not need to succeed on the first point because clearly a fresh decision was made on that point by Ms Bussell. The appeal panel re-

heard the evidence and formed a view on the facts. This cured any procedural unfairness.

72. With regard to the test in ***British Home Stores Ltd v Burchell [1978] IRLR 379*** conduct as the reason is not in dispute. There was a genuine belief that the misconduct occurred. There were reasonable grounds upon which to sustain both the belief that the claimant had worked knowing that his registration had lapsed and that he had deliberately misled his line manager on 21 September 2021.

73. On the issue of sanction Mr Davies submitted that the evidence disclosed that continuing to work whilst not registered was a very serious matter. In respect of the dishonesty allegation Mr Davies submitted that the failure to disclose that he was not registered and the deliberate decision to cover that up involved deliberate dishonesty. The fact the claimant worked alone strengthened the requirement for trust. The respondent's position was that dismissal fell within the band of reasonable responses.

74. On remedy the respondent accepted there was no failure to mitigate but if the Employment Tribunal finds for the claimant then the respondent's would maintain that there was both an argument that the claimant would have been dismissed in any event had a fair process been followed (***Polkey -v- A.E. Dayton 1987 IRLR 503***) or contributory conduct on the part of the claimant to be taken into consideration.

Submissions for the claimant

75. The claimant made submissions on two points. Firstly that the charge of dishonesty was something not properly put to him during the disciplinary process. It was something that in his view "appeared" as the process progressed. He believes this then became the main reason for dismissing him. He believes that that is unfair. He accepts he made a mistake and he accepts that it was a risk that he was not registered. However, he refutes that he acted dishonestly. In particular he refuted this at the appeal.

76. Secondly the claimant submitted that dismissal was not the appropriate sanction. He believes given that he had no previous disciplinary record that a written warning or final written warning would have been the more appropriate sanction.

The Law

77. Section 94 of the ERA provides for the right of an employee not to be unfairly dismissed by his employer.

78. Section 98 of the ERA provides:-

"(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 reasons) 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 dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of an employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on the part of his employer) of a duty or restriction imposed by or under an enactment.

(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."

79. In terms of Section 98(1) of the ERA it is for the employer to establish the reason for dismissal. In the event the employer establishes there was a potentially fair reason for dismissal, the Tribunal then has to go on to consider the fairness of the dismissal under Section 98(4).

80. The Tribunal must ask whether in all the circumstances the employer acted reasonably in treating that reason as a sufficient reason for dismissing the employee. The onus of proof is no longer on the employer at this stage. The matter is at large for determination by the Tribunal under section 98(4).

81. Each case must turn on its own facts. The Tribunal must not substitute its view for that of the employer (***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439*** and ***Foley v Post Office 2000 IRLR 827*** and ***HSBC Bank v Madden [2000] ICR 1283***). The question is whether the dismissal fell within the band of reasonable responses which a reasonable employer might have adopted in response to the employee's conduct, not whether the Tribunal itself would have dismissed in these circumstances.

82. In misconduct cases it is appropriate to consider the tests set out in ***British Home Stores Ltd v Burchell [1978] IRLR 379***:-

"First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further.

It is not relevant, as we think, that the tribunal would itself have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before him, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure" as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter "beyond reasonable doubt". The test, and the test all the way through, is reasonableness, and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstances be a reasonable conclusion."

83. The ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) para 9 states "*If it is decided that there is a disciplinary case to answer the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification."* Under section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 the Employment Tribunal shall take into account the Code of Practice.

84. It is possible to cure any defects in the procedure leading to dismissal by holding a full and fair appeal. See ***Taylor -v-OCS Group 2006 IRLR 613*** and in particular paragraph 47 of the Court of Appeal decision – *"Although, as we have said, both Whitbread and Adivihalli contain a correct statement of the law, it would be advisable for Whitbread not to be cited in future. The use of the words 'rehearing' and 'review', albeit only intended by way of illustration, does create a risk that ETs will fall into the trap of deciding whether the dismissal procedure was fair or unfair by reference to their view of whether an appeal hearing was a rehearing or a mere review. This error is avoided if ETs realise that their task is to apply the statutory test. In doing that, they should*

consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage."

Discussion & Decision

85. The Tribunal was satisfied that the evidence disclosed that the reason for dismissal was misconduct. Indeed it was not disputed that the reason for dismissal was conduct. The claimant admitted at all stages of the process that he had worked as a paramedic in September 2021 whilst he was not registered.

86. The primary issues in this case centred around whether the employer, the respondent, acted reasonably in accordance with the provisions of section 98(4) of the ERA.

87. The key issue here turns on two points. Firstly, whether there was a procedural failing in that the respondent failed to put to the claimant prior to the conduct hearing the allegation that the claimant misled his line manager on 21 September 2021 by claiming he was registered and had an e mail confirming that and secondly whether dismissal was within the band of reasonable responses. It is the claimant's position that the reason he was dismissed for gross misconduct was essentially on grounds of the allegation that he deliberately misled his line manager which is a distinct and separate ground from the allegation that was actually put to him in the conduct hearing on the 8th of March 2022 (and as set out in the letter of 16 February 2022). The Tribunal accepts that as a matter of law it is of fundamental importance that the claimant should be given fair notice of the allegation or allegations which he is required to respond to at any conduct hearing. This is supported by the terms of the ACAS code, in particular paragraph 9 referenced above.

In the view of the Tribunal it was clear that the letter of 16th February 2022 did not specifically reference the allegation that the claimant deliberately misled his line manager on 21 September 2021 (indeed Mr Davies accepted this in his submissions). The allegation that was put to the claimant was that the claimant had continued to work, undertaking shifts and treating patients, knowing that his professional registration had lapsed. It was also clear to the Tribunal that in the course of the conduct hearing there was only limited attention paid to the allegation that the claimant deliberately misled his line manager on 21 September 2021. The claimant maintains that the real reason for his dismissal was this allegation rather than the fact that he continued to work knowing his professional registration had lapsed. The tribunal has some sympathy with this position. Although Mr McKenzie denied that the allegation of misleading his line manager was the reason for dismissal he did accept (under cross examination) that it did help establish awareness of the fact that the claimant knew he had not registered. However it is quite clear in both the decision letter of 15 March 2022 and in the Mackenzie Appeal Statement produced by Mr Mackenzie for the appeal that the allegation of misleading the line manager was a key part of the decision making process. In particular in the Mackenzie Appeal Statement Mr Mackenzie states he *"Formed a belief that Mr. Hammond deliberately tried to cover this up by telling his line manager that he was registered, by telling her that there was a backlog, and that he had an e-mail confirmation of same before finally being forced to admit that no such e-mail existed and they accepted he had let his manager down."* The decision letter of 15 March 2022also specifically referenced these points.

88. It is the view of the Tribunal that there were two separate allegations here that were being considered by the respondent. Firstly, there is the conduct of the claimant in continuing to work, knowing that his professional registration has lapsed ("the First Allegation"). That does to some extent contain an element of dishonesty in that the allegation proceeds on the basis the claimant is working fully in the knowledge that he is not registered – so there is implicit in that an element of deception of the respondent. However, that is different from an allegation that he deliberately misled his line manager by telling her he was registered and had an e mail confirmation – when he knew that was not the

case ("the Second Allegation"). It is also clear that in arriving at his decision Mr Mackenzie has had regard to both the First Allegation and the Second Allegation being established. In the view of the Tribunal there should have been two separate allegations put to the claimant in both the invite letter and at the conduct hearing itself.

89. Mr Davies in his submissions sought to make the point that even if there was a failure to put the Second Allegation to the claimant – that that was not material and there was no prejudice to the claimant. We cannot agree with that position. It was clearly material in that it played a part in Mr Mackenzie's thinking as to the outcome of the hearing. It is simply not possible for the Tribunal to say whether or not dismissal may have been the outcome if only the First Allegation was upheld with no reference to the Second Allegation – since clearly both allegations were instrumental in the decision-making process.

90. However, Mr Davies in his submissions correctly reminded the Tribunal that it is possible to cure procedural defects in a case by way of a robust appeal process – and in his submission that is what has happened here. The Tribunal has had regard to the guidance set out by the Court of Appeal in ***Taylor -v- OCS Group 2006 IRLR 613*** and in particular the guidance at paragraph 47 quoted above. The claimant specifically raised the issue in his appeal that (1) the Second Allegation had not been put to him; and (2) there was no evidential basis to support the upholding of the Second Allegation. Both of these points were addressed in the appeal hearing. Ms Shaw attended the appeal hearing and gave her evidence regarding the events of 21 and 22 September 2021. The claimant and his representative had an opportunity to question Ms Shaw and to put forward the claimant's position as to why he claimed there was no evidence to support the Second Allegation. Ms Bussell also had before her the Claimants Grounds of Appeal; Claimants Appeal Statement; Mackenzie Appeal Statement; the Report; the letter of 16 February 2022 inviting the claimant to the conduct hearing and the dismissal letter of 15 March 2022. Ms Bussell directly dealt with both appeal points (1) and (2) in her outcome letter of 3rd August 2022. The issue of the Second Allegation was very much a live

issue at the appeal hearing and the claimant had a full opportunity to put forward his position in regard to the Second Allegation.

91. It is not necessary for the Tribunal to determine whether the appeal hearing was a full re-hearing of the case. The issue for the Tribunal to consider is whether or not the overall process was fair. When you consider both the conduct hearing and the appeal hearing the Tribunal is satisfied that the claimant did know, as part of the whole process, that the allegations he had to address included both the First Allegation and the Second Allegation. Ms Shaw attended the appeal hearing and gave her evidence regarding the discussions she had with the claimant on 21 September 2021. The claimant and his representative had an opportunity to ask Ms Shaw any questions. Ms Bussell stated in her outcome letter of 3 August 2022 when commenting on the First Allegation and Second Allegation *"I believe that both of these points show a failure to be "honest and trustworthy" both by omitting to declare your situation which had the potential to put yourself and others at risk and in stating you had an e mail confirming registration which you had not actually received."*

92. Having regard to the whole process the Tribunal is satisfied that, in relation to both the First Allegation and the Second Allegation, the respondent did believe in the fact of the misconduct and that the respondent had in its mind reasonable grounds upon which to sustain that belief. The claimant did not at any point suggest that there had been any failure to properly investigate the allegations and the tribunal is satisfied that there had been a reasonable investigation.

93. The other issue raised by the claimant related to whether dismissal was within the band of reasonable responses. This was to some extent tied up with the first point. The claimant's position was that he did not act dishonestly and that on the allegation that he carried on working when he knew he was not registered the claimant maintained that his position was that he did not know he was not registered rather he was uncertain as to whether or not he was registered. On that basis dismissal was not a sanction within the band of reasonable responses.

94. On the facts as found by the Tribunal we were satisfied that the respondent had before it evidence upon which it could come to the view that the claimant did know that he was not registered, certainly by 5 September 2021, and continued to work and that he did mislead Ms Shaw when he spoke with her on 21 September 2021 by telling her he was registered and had an e mail to that effect. Registration was clearly a very important requirement for the respondents. The respondent had evidence from which it was entitled to conclude that there had been a clear failure by the claimant to obtain his registration (indeed it was admitted) and that in failing to inform his line manager about that and in actively misleading her about his registration status he had acted dishonestly. An unregistered paramedic carrying out activities that were reserved to registered paramedics clearly carried risk to the respondent. That allied to the fact that the claimant was required to work autonomously in circumstances where there was evidence of dishonesty made this a very serious matter. Against that background the Tribunal was satisfied that dismissal was within the band of reasonable responses open to the respondent in this case.

95. The Tribunal accordingly dismisses the claim of unfair dismissal.

Employment Judge: Stuart Neilson
Date of Judgment: 01 November 2022
Entered in register: 01 November 2022
and copied to parties