



- investigation, and subsequently investigated the disciplinary allegations against Mr Bestley; Mr Whitton, a non executive director of the Trust who heard and dismissed an appeal by Dr Bestley against the outcome of his grievance; Mr Snowden, the chief executive of the Trust (now retired) who heard Dr Bestleys' disciplinary hearing and dismissed him; Mr Miller, another non executive director of the Trust who heard and dismissed Dr Bestley's appeal against dismissal; and Miss Heppell, a senior human resources manager for the Respondent.
3. The Tribunal was referred to five agreed bundles of documents, running to some 2230 pages. In addition, we accepted as late evidence a letter from the GMC of 22<sup>nd</sup> May 2014; and various correspondence between the Respondents and the BMA relating to the conduct of Mr McFadden. Although we accepted the evidence, we were not significantly assisted by it. We did not accept the offer of some general guidance on the nature of Bi-Polar Disorder.

### Claims and Issues

4. The only claim brought by Dr Bestley was for unfair dismissal. The parties had helpfully agreed a list of issues that we would need to consider; we confirmed with the representatives at the start of our hearing that those issues remained appropriate. The list is as follows:
- 4.1. What was the reason for dismissal? (The Respondent contends that the reason for dismissal was gross misconduct. The Claimant contends that the dismissal was a sham designed to move him from his post of Clinical Director).
  - 4.2. If the reason for dismissal was the Claimant's conduct, did the Respondent have a genuine belief that the Claimant was guilty of misconduct and in particular that the Claimant's actions amounted to gross misconduct?
  - 4.3. If so, did the Respondent have reasonable grounds to sustain that belief?
  - 4.4. Had the Respondent carried out as much investigation as was reasonable in the circumstances of the case?
  - 4.5. Were the procedures adopted by the Respondent otherwise fair having regard to Section 98 (4) ERA 1996?
  - 4.6. Was the Claimants' dismissal within the band of reasonable responses having regard to Section 98 (4) ERA 1996?
  - 4.7. If the answer to any of the questions 1 – 4 is no, so that the Claimant's dismissal was unfair:
    - 4.7.1 Was the Claimant's dismissal to any extent caused or contributed to by any action of the Claimant?
    - 4.7.2 If the dismissal was procedurally unfair, should any compensation be reduced to reflect the possibility that the Claimant would have been dismissed in any event (Polkey)?
5. In relation to points 4.5, the Claimant referred to a number of procedural points set out in paragraph 54, attached to his Tribunal claim form. We observe that there is nothing unusual in that list of issues; those issues arise in pretty well every claim for unfair dismissal where the employer

maintains that the reason was misconduct.

### Findings of Fact

- 6 Having heard the witnesses, and considered the documentary evidence we were referred to, the Tribunal makes the following findings of fact. Further findings, particularly on disputed issues, are set out as part of our consideration, below.
- 7 The Respondent is an NHS Trust; it is a relatively large employer, with about 3000 employees and an annual turn over of £135 million pounds. It has a professional HR department and also calls on advice from specialist employment solicitors, when required.
- 8 Dr Bestley commenced employment with the Trust as a consultant psychiatrist in 1993. In August 2010 he was appointed, to run alongside his substantive post as consultant, as Clinical Director for Older Peoples Mental Health Services for the Trust. He had previously shared a similar position with similar responsibilities, for some years with a colleague.
- 9 On 16<sup>th</sup> June 2011 five clinical members of staff met with Mr Snowden, the chief executive, under the Trust's whistle blowing policy; they told him of a number of concerns that they had about Dr Bestley. He told them that they should put their concerns in writing; and that if so, their concerns would be investigated by Mrs Mason, the deputy chief executive and lead officer for whistle blowing for the Trust. On 23<sup>rd</sup> June Mrs Mason received their written concerns. That letter was signed by two other colleagues as well. That letter set out two broad areas of concern. Firstly, there were some general concerns about the implementation of the Trust strategy for Older Peoples Mental Health Services; these included concerns about Dr Bestley, alongside some of his colleagues; and also concerns about Dr Bestleys leadership role in implementing the Trust's strategy. Secondly, concerns were raised about *"The wider behaviour and clinical practice of Dr Bestley."* Ten specific examples of these concerns were given. These included examples of *"adopting a belittling attitude"* towards multi disciplinary team working; and the *"use of oppressive and inappropriate sexualised language"* towards junior members of staff.
- 10 On 20<sup>th</sup> June Mrs Mason was given her terms of reference by Mr Snowden under the whistle blowing policy: to meet the whistle blowers and explore the issues they had raised; to report and make recommendations as to whether there was a case to be answered; and to undertake investigation, under strict confidentiality. On the same day, Dr Gee, the Trust's Medical Director, met with Dr Bestley and told him of the allegations: *"patient care"* and *"relationships with staff which may amount to bullying and sexual harassment. Due to the potential seriousness of these allegations, together with the fact that the allegations may compromise the safety of patients, and in the absence of any appropriate or alternative arrangements I confirm the decision to exclude you from your duties."* Dr Bestley remained on suspension, until his dismissal.
- 11 Mrs Mason, with the assistance of HR, interviewed the seven signatories of the whistle blowing letter. She submitted her report to Mr Snowden on 8<sup>th</sup> July; so far as Dr Bestley specifically was concerned, she referred to the General Medical Councils *"Good Medical Practice"* Guidance for Doctors and *"identified the following areas of practice which appeared to*

*be absent in [Dr Bestleys] practice*": good clinical care, maintaining good medical practice, maintaining and improving your performance, relationship with parents, good communication, relatives carers and parents, maintaining trust in the profession, working with colleagues, respect for colleagues, probity and the management of patients. She gave a number of specific examples in relationship to his attitude and behaviour, which gave rise to concern, and of inappropriate sexualised comments. She concluded: *there is clear evidence that [Dr Bestley] is not giving the corporate message and leadership of the consultants to implement the Older People Service Strategy and the care clusters packages approach. There is a breadth of examples and variety of professionals that have raised issues regarding his conduct and practice. There is clear evidence of misuse of position and power.* She recommended that there was a case to answer.

- 12 The report and its recommendations were discussed at a meeting on 11<sup>th</sup> July with Mr Snowden, Mrs Mason, Dr Gee and Ms Truscott, head of HR for the Trust. The issues of clinical practice raised were referred to Dr Gee to consider. Dr Gee investigated. None of the issues of clinical practice raised were taken further. On 26<sup>th</sup> August he wrote to Dr Bestleys representative to *"confirm that there are currently no matters of clinical capability being formally investigated by Trust formal processes. The current case investigation is purely looking at issues of personal conduct. .... There are two areas of clinical practice that we are going to look at further, but not under formal disciplinary or capability processes."* One of these related to the wording of a letter to relatives: Dr Bestley was to be offered an opportunity to reflect on his clinical practice in this area. Secondly, concerns had been raised regarding Dr Bestley's use of ECT *"however at this point in time there is no clear evidence to suggest that Dr Bestley's use of ECT is inappropriate and for the time being I am simply going to arrange for a clinical audit to take place of Dr Bestley's use of ECT"*. That audit concluded, in late October, that Dr Bestley's use of ECT gave no cause for concern. On the same day, in a separate letter to the BMA, Dr Gee confirmed that the exclusion was continuing: *"although issues of patient safety are therefore no longer the reason for exclusion the decision to continue exclusion was and is, due to the seriousness of allegations that have been lodged against Dr Bestley with regard to his personal conduct, namely bullying and harassment of a number of staff"*.
- 13 At the meeting of 11<sup>th</sup> July it was decided that the issues of Dr Bestley's conduct should be dealt with under the Trust disciplinary policy for medical staff. This policy requires a Case Manager to be appointed to oversee the investigation, and a Case Investigator to investigate. Dr Gee was appointed Case Manager, and Mrs Mason, Case Investigator.
- 14 On 15<sup>th</sup> July 2011 Dr Gee wrote to Dr Bestley to tell him that, following the report from the whistle blowing investigation, the Trust had decided to investigate his *"behaviour towards your colleagues at work"*; He listed the issues of concern:

*"Your behaviour towards and comments about your colleagues is inappropriate, for example*

- a) To a colleague regarding psychologists – *"the trouble with your profession you know it all"*.

- b) To a colleague regarding EMC – “That woman” “are you friend or foe?”.
- c) Instructing an occupational therapist to stand outside of the multi disciplinary team meeting for a lengthy period.
- d) Regarding a suggestion that Health Care Assistants attend a ward round to enrich discussion – “*you may as well invite the cleaners as well*”.

Your behaviour and comments to colleagues and patients is sexualised, for example:

- e) Suggesting to a Junior Nurse that there should be a pole and pole dancers on the unit “*to occupy the men and give the women something to aspire to*”.
- f) Asking a patient who complained of insomnia “*have you tried sex?*”.
- g) Commenting on a psychologist’s heart condition and medication “*are you impotent then?*”.
- h) In a telephone discussion with a female Staff Nurse from the community team stating “*do you know you sound very sexy on the telephone*” and informing her that if he required a care plan it would involve being cared for by 17 year old girls.
- i) With reference to the appearance of a Parkinson Nurse “*She’s an absolute knock out*”.

This evidence which has been brought to my attention suggests a pattern of behaviour which could be considered contrary to the standards of behaviour expected from all staff under the Trust’s harassment and bullying policy.”

- 15 So far as Dr Bestleys exclusion was concerned, Dr Gee confirmed that this would be continued: “the National Clinical Advisory Service (NCAS) have been made aware of your case and the possibility of continued exclusion and will be discussing your case again with me on 25<sup>th</sup> July 2011. Proper consideration was given as to whether you could carry out non clinical duties such as medical revalidation but in light of the seriousness of the allegations, it was not felt appropriate”. NCAS is a national body which has a role in overseeing the exclusion of medical staff. Correspondence between the Trust and NCAS continued throughout the period of the exclusion.
- 16 In conducting her investigation , Mrs Mason had a head start since she had already conducted interviews with the principle complainants under the whistle blowing investigation. However, the benefit of that was lost, since she was absent for some weeks during August on leave. More over, following her return to work on 17<sup>th</sup> August, Dr Bestley was himself on holiday until 26<sup>th</sup> August. The four weeks allowed under the Trust policy to complete the investigation expired on 12<sup>th</sup> August. That target was missed. Eventually, taking account of the availability of Mr McFadden, the 12<sup>th</sup> September was agreed for the first investigatory meeting with Dr Bestley. A further three witnesses were interviewed as part of the investigation on 2<sup>nd</sup> September.
- 17 On 12<sup>th</sup> September at the first investigatory meeting with Dr Bestley, he

was given copies of six statements from the management witnesses; he was told that management were still waiting for further statements to be typed up, signed and consent given for the statements to be used and released to Dr Bestley. There would therefore have to be a further meeting. Dr Bestley gave his initial reaction to the allegations against him; but in several cases was frustrated at the lack of information provided.

- 18 The second investigatory meeting with Dr Bestley was held on 6 October 2011. In the meantime a further four management witnesses had been interviewed, and statements from them were handed over. It appeared that a further two statements from management witnesses were still outstanding. Dr Bestley provided his response to the allegations in the management witnesses previously supplied. Mr McFadden said they would try to respond to the statements just submitted within a further three weeks; he was struggling with his diary and offered the 2 November for a third meeting.
- 19 That third investigatory meeting was held on the 2 November. The issues raised by the allegations in the management witness statements were again discussed. In addition, Dr Bestley who viewed the investigation as one sided, supplied a list of witnesses he wished to be interviewed. This was agreed to.
- 20 The fourth investigatory meeting was held on the 16 November 2011. Not all Dr Bestley's witnesses had yet been interviewed; in addition he requested an extra witness be interviewed, his secretary, Sue Smith.
- 21 Interviews with all the subsequent witnesses were concluded by the end of November 2011. By this stage, these included Dr Gee himself. He was required as a witness to give evidence as to previous incidents. On 31 October 2008 following complaints and discussions over the summer of 2008, Dr Gee had written to Dr Bestley recording:  

*"On having the opportunity to reflect on the use of language you were able to agree with me that the use of such language in these incidents was inappropriate and have agreed to moderate your use of language in the future. I indicated to you that should I received further concerns over inappropriate use of language that further action may than be necessary."*
- Since Dr Gee was now featuring as a witness in the case, it was not appropriate for him to continue as Case Manager. Dr Oade, the Medical Director from a neighbouring NHS Trust, was appointed in his place.
- 22 Miss Heppell had been given the job of preparing an initial draft of the report by Mrs Mason. Mrs Heppell required surgery towards the end of November and so was absent for some weeks, causing some further delay. The report was completed and sent by Mrs Mason to Dr Oade on 23 December 2011.
- 23 Meanwhile, Dr Bestley had become increasingly dissatisfied and suspicious, both about his treatment and about the delays in the investigative process, and his continued exclusion. On 20 December Mr McFadden wrote to protest on his behalf and to tell the Trust that Dr Bestley was considering submitting a grievance about his treatment.
- 24 On 4 January 2012 Dr Oade informed Dr Bestley she had reviewed the

report and decided that there was a case to answer; disciplinary proceedings were appropriate.

- 25 On 20 January 2012 Dr Bestley submitted a formal grievance complaining that he had been the victim of sustained bullying and victimisation by members of the executive team; specifically he included Dr Gee, Mrs Mason and Mr Snowden. He referred to a number of earlier incidents of which he complained and also to his exclusion from work on 20 May 2011, and "the patently incompetent investigation lasting six months". There was correspondence between Mr McFadden and the Trust over the composition of the disciplinary panel (Mr McFadden was requesting an independent panel; the Trust would not go that far, but offered advice for Mr Snowden, who was to chair the panel, from an independent HR Officer); and over the dates of the disciplinary hearing. It was eventually agreed this should take place towards the end of March 2012.
- 26 However, once the import of Dr Bestley's grievance had been considered, it was apparent, since it directly challenged the good faith of Mrs Mason and Mr Snowden, that the disciplinary hearing could not take place until the grievance was dealt with.
- 27 ~~A further reason for delaying the disciplinary hearing was Dr Bestley's health: he commenced a period of acute ill health on 17 February 2012. That continued until the end of May 2012. It was then agreed between the parties that Dr Bestley would not be able to attend further hearings because of his health until the end of July. The management statement of case was sent to Dr Bestley on 2 March 2012.~~
- 28 The grievance hearing was eventually set for 20 August 2012. The grievance was heard before Mr Duffield, a non-executive Director of the Trust. Following the grievance hearing, he investigated the grievance at some length, interviewing witnesses; he also received and considered a further lengthy submission from Mr McFadden, sent on 21 September 2012. On 21 October 2012 Mr Duffield produced his grievance report and sent a copy to the claimant to Dr Bestley. The grievance report was lengthy, running to some 150 pages, including the various appendices.
- 29 Mr Duffield rejected all Dr Bestley's grievances. He found no collusion or conspiracy amongst the senior executives to remove Dr Bestley; he rejected the charge that Dr Bestley had been victimised or singled out, or targeted or bullied. However, in conclusion Mr Duffield also expressed some sympathy for Dr Bestley: "We do understand the frustration and distress that Dr Bestley has experienced and still is experiencing. To be suspended from work since 20 June 2011 and still not be at the end of the process is akin to having ones life put on hold for sixteen months. Although delays at each step can be rationalised and explained, nevertheless with hindsight there must be a way of ensuring that this length of time is shortened for any similar cases."
- 30 There followed correspondence between Mr McFadden and Mr Duffield about his findings, which concluded with an appeal against the findings being lodged by Dr Bestley on 2 November 2012.
- 31 The appeal hearing against the outcome of the grievance was convened on 26 November 2012 before Mr Whitton, another non-executive Director. After lengthy and thorough consideration, all points of the

appeal were dismissed by letter of 14 December 2012.

- 32 There followed further correspondence between the parties for the disciplinary hearing, postponed from the previous March. It was agreed two days would be required; both Mr McFadden and the Trust had only limited availability; and the dates of 25 and 26 March 2013 were eventually agreed.
- 33 The hearing took place before a panel chaired by Mr Snowden; he was advised on HR matters by Ms Barnard, a senior HR Officer from another Trust. The management case was present by Mrs Mason, with advice from Miss Heppell on HR matters. The Trust called a number of witnesses, including some of the original signatories to the original whistle blowing complaint matter: Dr Fewston, Ms Lisa Poole, Ms NG Smith. Mr McFadden and Dr Bestley questioned the Trust's witnesses, on occasion robustly and at length. At the conclusion of the first day Dr Bestley and Mr McFadden were concerned at the distress Dr Rewston had shown when they were questioning him; both signed a letter apologising for the distress that had occasioned him, through their inappropriate questioning. The following morning they gave the letter to Mr Snowden, asking that it be forwarded to Dr Rewston. The two days set aside for the hearing proved insufficient; the hearing was reconvened to resume on 22 and 24 April 2014. At the conclusion of the hearing, Mr Snowden took time for deliberation.
- 34 On 8 May 2013 Mr Snowden sent Dr Bestley a letter dismissing him. The dismissal letter sets out the seven allegations considered. (These are set out above in paragraph 15; by the time of the Management Statement of Case, two allegations had been dropped, c and f). The letter makes it clear the allegations solely relate to behaviour to colleagues rather than patients. The panel found there was insufficient evidence to regard two of the allegations as proven: b. that you referred to EMC as "that woman" and asked "are you friend or foe?"; and i : you commented on a Parkinson Nurse " she's an absolute knock-out". The other five allegations were upheld:
- a. that you remarked to a colleague [Dr Rewston] regarding psychologists – "the trouble with your profession is you think you know it all."
  - d. that in response to a question that healthcare assistants attend ward rounds to enrich discussions you remarked "you may as well invite the cleaners as well".
  - e. that you made a remark to a student nurse [Ms Poole] that there should be pole dancing videos in the gym "to occupy the men and give the women something to aspire too".
  - g. that you remarked to a colleague [Dr Rewston] in relation to heart condition and medication "are you impotent then?"
  - h. that in a telephone conversation with a female staff nurse [Lisa Smith] from the Community Team, you told her that she "sounded sexy", questioned whether she "felt sexy", and that you remarked to the same Community Nurse that if you required a care plan "it would involve being cared for by 17 year old girls".
- 35 Mr Snowden commented: "throughout the evidence given by the three



management side witnesses the panel was struck by the constant theme of them feeling belittled and humiliated by your actions or comments. That was in marked contrast to your evident failure to consider the impact you have made upon them, and that failure continued even after you had heard their evidence. This was a real concern to the panel, and suggested to them you lack insight into how your actions and behaviour can adversely affect others. Indeed your statement on the final day that you had "done nothing" suggests that you have no real insight and therefore would be very unlikely to change your behaviour in the future." Mr Snowden also commented on the inappropriate questioning of Dr Rewston, and the distress this caused him; the panel found Dr Rewston to be a thoroughly credible and honest witness. The panel found there was "considerable evidence of gross misconduct, sufficient to warrant summary dismissal". They found no significant mitigation to reduce the appropriate sanction in the circumstances. Dr Bestley was summarily dismissed with immediate effect. He was given the right of appeal.

- 36 Dr Bestley requested time to submit his appeal, which was agreed by the Trust. The appeal was submitted on 28 May 2013; the appeal hearing was held on 29 July 2013; and dismissed on 5 August 2013. Mr Milner a non-executive member of the Trust, chaired the appeal panel.

### Submissions

37. Miss Keogh challenged the procedural fairness of the dismissal on a number of grounds. She protested the delays involved, referring us to **AvB [2003] IRLR 405**; and **Gogay Hertfordshire County Council [2000] IRLR 703**; she argued that both the delay and the protracted and improper exclusion, in breach of the respondents own policies, rendered the process unfair. Referring to **Crawford v Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402** she disputed that the respondents had a genuine belief in Dr Bestleys misconduct ; and challenged the procedure under which Mrs Mason and Mr Snowden had taken the decision, referring us to **Moyes v Hylton Castle Working Mens Social Club [1986] IRLR482**; she argued that the investigation was unfair and one-sided; in particular, she argued that the respondent should have obtained a medical report on Dr Bestleys condition of bi-polar disorder, referring to **Chamberlain Vinyl Products Ltd v Patel [1996] ICR 113**. She argued there were no reasonable grounds from which the respondents could have concluded Dr Bestley was guilty of gross misconduct; and that the decision to dismiss him fell outside of the range of reasonable responses, in particular having regard to the insight and remorse he had demonstrated in the earliest stages of investigation.
38. Mr Webster in his submissions stuck closely to the approach indicated for misconduct cases by **BHS v Burchell**. He urged us to find that Mr Snowden had had a genuine belief in Dr Bestley's misconduct, taking us through one by one the individual allegations of misconduct found proved, arguing that there were reasonable grounds on which Mr Snowden could properly reach that belief in each instance. The respondents had conducted a reasonable investigation; he referred us to the cases of **Santamera v Express Cargo Forwarding Limited [2003] IRLR 273** and **ILEA v Gravett [1988] IRLR 497**. He reminded

us that Dr Bestley's exclusion had been kept under review throughout by NCAS, who were impartial outsiders appointed for that purpose, and who had found no cause for concern; he reminded us that exclusion should not in itself form part of our consideration of fairness (not that there was anything incorrect about the exclusion). The respondents had behaved reasonably in relying on Dr Powell's reports, and Dr Bestley's own knowledge of his condition, in not investigating further the issue of his bi-polar condition. So far as the fairness of the procedure was concerned, he argued that we should not separate out the issue of delay as a subject in its own right; he referred us to **Taylor v OCS Group Ltd [2006] IRLR 613** for the principle that we should consider the fairness of the dismissal in the round, rather than focussing on any particular alleged procedural breaches. The respondents had conducted a fair investigation which had revealed ample grounds for their conclusion. In those circumstances, dismissal fell squarely within the range of reasonable responses. In particular, the tribunal should be careful not to substitute their own judgment for that of the employer; and that principle extended even to the employer's view of the credibility of particular witnesses: **Morgan v Electrolux [1991] IRLR 89**. The respondents were fully entitled to place weight on the lack of insight and remorse shown by Dr Bestley at his disciplinary hearing, and on the distress shown by Dr Rewston.

39. Both representatives addressed us on whether, if we were to find this dismissal unfair, we should also make a finding on the possibility of a fair dismissal occurring in any event (the Polkey question); and the question on whether Dr Bestley had contributed thought his conduct so it would be just and equitable to reduce any compensation otherwise awarded to him.

## Consideration

### **Reason for the Dismissal**

40. We considered first the reasons for Dr Bestley's dismissal, under Section 98 (2) Employment Rights Act 1996. The Respondent maintains that this was a straightforward dismissal for misconduct. Dr Bestley urges us to find that any misconduct was simply a pretext for his dismissal; that the real underlying motive was a desire by Trust Management, and in particular Mr Snowden and Mrs Mason, to get rid of him because he was seen as an obstacle to their plans for reorganising the Trust's Mental Health Services. Dr Bestley's argument rests on a number of factors. Firstly, he said there had been tension between the views of psychiatrists and other clinicians within the Trust over the Trust's proposals for reorganising Mental Health Services, and that as Clinical Director for Older Peoples Mental Health Services, he was the focal point for that dissent. There is certainly evidence of disagreement over the proposed reorganisation, and differing views about Dr Bestley's role as Clinical Director. Dr Bestley saw himself as leading the views of his colleagues and other clinicians in representations to the Trust Management; Trust management saw his role as to reflect their views to those in the department that he was leading. Secondly, he argues that the handful of, as he describes them, relatively minor acts of misconduct for which he was dismissed cannot

possibly justify a dismissal. Thirdly, he points to what he says are a whole series of breaches of procedure that the Trust made in the processes leading up to his dismissal, including inordinate delay. He argues that all of these suggest some ulterior motive was at work. Fourthly, he points to a number of earlier incidents which he says demonstrate a desire to get rid of him.

41. We take the first and fourth points together. Unless there is some contemporary and extraneous evidence of ulterior motive, Dr Bestley is not greatly assisted by his second and third points: such allegations are common in many unfair dismissal claims: We accept there were disagreements about the proposed restructure (which was, it turns out, subsequently shelved during the period of Dr Bestley's suspension). But such tensions between different levels of management are common place in any management restructure. There is nothing in them to suggest any pretext for dismissal. The contemporary incidents relied on by Dr Bestley as showing such intention include a series of emails between Mr Snowden, Mrs Mason and the appointment panel in 2010 when he applied for and was given, the post of Clinical Director. Read in isolation, these could acquire a sinister connotation, as they have for Dr Bestley. Read in context, they strike us as routine comments, to which we attach no particular significance. ~~The context is that Dr Bestley was the only candidate for the post. The interview panel may well have regarded the appointment as a formality. Mr Snowden was simply emphasising that it was not to be seen as such; there were concerns over the issues of medical leadership; the panel should apply their normal rigorous scrutiny. We make a similar finding with regard to Mr Snowden's involvement in the issue of consultant cover. Chief executives may from time to time concern themselves in issues that are not strictly their job. That is their prerogative. We see nothing surprising or sinister in Mr Snowden's involvement. There is nothing in the contemporary evidence to indicate any underlying motive, let alone malicious intent, on the part of Mr Snowden or Mrs Mason. We accept Mr Snowden's evidence that the reason for Dr Bestley's dismissal was misconduct, as reflected in the letter of dismissal.~~

#### **Fairness of the Dismissal**

42. We turn to consider the fairness of the dismissal, applying the test set out in Section 98 (4) Employment Rights Act:
43. .... 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 employers 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.
44. Case law has given guidance to Tribunals on how they should apply that test in the context of dismissals for conduct. We should consider whether the employer had an honest belief in the misconduct as charged. We should consider whether the employer had reasonable grounds upon which to sustain that belief. We should consider whether

the employer had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. Both the investigation and the grounds for belief in the misconduct are to be judged by the standards of the reasonable employer. We should consider whether the decision to dismiss on those grounds falls within the range of responses open to a reasonable employer. In considering those issues, the Tribunal should be careful not to substitute its own judgment for that of the employer. Providing the decision the employer came to was a reasonable one, it is irrelevant that other employers, or the Tribunal themselves, might have come to a different decision. Lastly, the employer should follow a fair procedure throughout; and guidance on what constitutes a fair procedure is provided for employers and Tribunals by ACAS in their Code of Practice on Disciplinary Procedures (2009).

**Genuine belief in the misconduct?**

45. Dr Bestley deploys the same argument to attack Mr Snowden's good faith that he used, above, to argue that there was some underlying ulterior motive for his dismissal. There is no history of antagonism or animosity between the two managers, (as opposed to some history of disagreement) beyond the couple of incidents we mentioned above, and they seem to us common place in any managerial relationship. Mr Snowden evidently carefully considered the evidence against Dr Bestley at the disciplinary hearing. Of the seven charges against Dr Bestley, he dismissed two of them as not established. We find that he had a genuine belief in the misconduct.

**Did the Respondent conduct a reasonable investigation?**

46. Putting to one side for a moment the question of delay in the investigation, we reject most of Dr Bestley's criticisms of the investigation. Mrs Mason was a reasonable choice to conduct the investigation. She had a head start since she had already interviewed the whistle blowing complainants. (Unfortunately, the benefit of that head start was immediately lost, since she was on holiday for two weeks in August, a point we return to below). We do not accept that her earlier involvement in the whistle blowing investigation rendered her unsuitable: she had no direct involvement in the matters complained of.
47. Much was made of a conflict of evidence as to whether Mrs Mason was present at the initial meeting at which the whistle blowers gave their account to Mr Snowden. There are three separate documents subsequently recording Mrs Mason's presence at that meeting; yet in oral evidence, both she and Mr Snowden denied that she was present. Mr Snowden's account is that he explained to the whistle blowers at the end of the meeting that if they wanted their concerns to be taken further, they should put them in writing and that he would then appoint Mrs Mason to investigate. On leaving his room therefore, they went across the corridor to tell Mrs Mason to expect a letter from them. Mrs Mason said she was not present at the initial meeting, but immediately after did see the whistle blowers who told her to expect their letter. It may be that those two meetings have been elided in the written accounts. Either way, the dispute does not seem to us critical: if Mrs Mason was not present at the whistle blowing meeting she learnt soon enough of the whistle blowing complaints from their letter; and

interviewed them within a couple of weeks or so. The inconsistency with the written accounts acquires significance because it contributed to Dr Bestley's view that the Respondent has something to hide by concealing Mrs Mason's presence. We do not see what there may have been to hide: if she were present at the initial meeting, she would simply have received full knowledge of what she was to learn anyway, in a day or two.

48. The subsequent investigation was thorough and detailed. We make no criticism of the interviewing techniques: open questions such as "Do you have anything to add?" or "Are you aware of any other improper comments?" are to be expected in a misconduct investigation of this type. The number of witness's interviewed, 23, was large; but (subject to the delay point) we do not criticise that. Many managements may have made do with fewer interviewees; this one did not. Either approach was reasonable.
49. Much was made of the choice of policy to pursue the investigation under. At the meeting on 11<sup>th</sup> July, Mr Snowden decided, in conjunction with Dr Gee, Mrs Mason and Mrs Truscott from HR that the charges should be taken forward under the Trust's disciplinary policy for medical staff rather than under the Trust harassment and bullying policy. There is considerable overlap between the two policies, with some inconsistencies, in procedures and timings, for example. Give that at that stage, some allegations about clinical issues were still under consideration, as well as allegations of bullying and harassment, we find the choice of the disciplinary policy was a reasonable one.
50. The Trust is also criticised for deciding that a formal disciplinary investigation was necessary, rather than dealing with the issues informally. Give then number of allegations, the number of complainants, and the range of issues potentially raised, we see nothing surprising in the decision to launch a formal disciplinary investigation. It was a reasonable decision. That other managements may have come to a different view is neither here nor there.
51. We accept that there are criticisms to be made of the investigation process, but none of them, taken singly or cumulatively, are such as to make the overall process unfair. For example, it is said the investigation was one sided. That is an easy allegation to make about any misconduct investigation: clearly, the initial focus will be to look for evidence of misconduct. But Mrs Mason did see that the witnesses suggested by Dr Bestley were interviewed; their statements were there as part of the evidence; it was open to Dr Bestley had he chosen to do so to call them as witnesses in his defence.
52. One particular difficulty facing the investigation was the width of the initial allegations. Mrs Mason had concluded her whistle blowing report with a mountainous list of allegations: she found over a dozen areas of "good medical practice" from the GMC's Guidance for Doctors 2006 "which appear to be absent in [Dr Bestley's] practice." These included: good clinical care, maintaining good medical practice, relationships with patients, good communication, maintaining trust in the profession, working with colleagues, and respect for colleagues, probity, and management of patients and so on. That report was necessarily one sided: it was simply to investigate the whistle blowing complaints and

see if there was a case to answer. At that stage, under the Whistleblowing procedure, Dr Bestley's views had not been sought. The meeting of 11<sup>th</sup> July brought a sense of proportion back to the proceedings. The vast majority of these concerns were never taken further. The allegations of poor management, generally, were dropped. The allegations of poor clinical practice were referred to Dr Gee, the Trusts Medical Director to investigate. By the end of August he had written to Dr Bestley's representative to confirm that all of these were dropped: "*The issues being investigated are not related to clinical practice*". (The audit of ECT took until late October or early November to complete, when it confirmed that Dr Bestley's use of ECT was not exceptional; but Dr Gee accepted that there had never been evidence – as opposed to a suggestion – that Dr Bestley's use of ECT was of concern). What was left were the two issues of general concern set out in the letter to Dr Bestley of 15<sup>th</sup> July 2011:

- i. Your behaviour towards and comments about your colleagues is inappropriate; and
- ii. Your behaviour and comments to colleagues and patients is sexualised.

~~53. Four specific examples were given of inappropriate behaviour and comments to colleagues; and five specific examples of sexualised behaviour and comments. Since the nine specific instances were given as examples of the general issues of concern, it was never entirely clear whether what was being investigated - and charged - were general allegations of poor behaviour to colleagues, or simply that Dr Bestley had on nine occasions made specific questionable remarks.~~

54. That lack of clarity continued into the Management Statement of Case, eventually produced in March 2012 where the same two general allegations were put forward, supported by the same specific instances as examples; (by this stage, two of the specific examples had been dropped, one from each general allegation: seven specific examples were taken forward.)

55. The initial width of the allegations contributed to the length of the investigation; and to Dr Bestley's suspicions and distrust of the disciplinary process and of the officers conducting it.

56. One particular point on which the investigation was criticised was that it had not specifically explored the question of whether Dr Bestley's inappropriate behaviour may have been caused or contributed to by his underlying medical condition of Bi-Polar Disorder. Both parties were aware that he had this condition. Dr Bestley had been under the care of Dr Powell, an Occupation Health Consultant, over the years. Dr Bestley had considerable insight into his condition and had developed a number of strategies to identify the onset of acute episodes; and to manage the condition generally. Dr Powell provided a number of reports on Dr Bestley's health during the disciplinary proceedings, on his ability to cope with them and to attend hearings and so on. Dr Powell was not asked to comment on whether Dr Bestley's condition may have caused or contributed to his behaviour. His reports indicated that Dr Bestley was managing his condition well. One of Dr Bestley's colleagues, Ms Munro, a Senior Matron in Older Peoples Services, was interviewed as

part of the investigation. In her statement, she suggests that his condition (bi-polar disorder) may have contributed to his behaviour. If so, and if confirmed, that would potentially be a significant exculpatory factor. Miss Keogh criticised the Trust for not pursuing this point further; for example, they could have requested a specific report on the question of causation from Dr Powell, or some other appropriate consultant. She referred us to the case of **Chamberlain Final Products Ltd v Patel [1996] ICR 113** in support. That case provides an example of circumstances where a Tribunal could properly hold that an employer had failed to investigate reasonably by not obtaining a medical report. But in that case, the employer had identified the issue of whether a mental health condition had contributed to the misconduct as crucial; but nevertheless went ahead without obtaining a report. In this case, the Respondent did not take that view. Dr Powell had said that Dr Bestley managed his condition well. Most significantly, Dr Bestley, who had insight into his condition, never suggested it as a contributory factor. Dr Bestley was represented by the British Medical Association. His representative Mr McFadden was aware of the point. He discussed it with Dr Bestley and it was decided not to pursue it.

57. In many cases, in other circumstances, a failure to obtain such a report could be very significant. ~~In these circumstances, some employers may have decided to commission such a report, despite the fact that the Claimant himself was not requesting such a report or arguing that his condition had contributed to his behaviour. But other employers may, equally reasonably, have decided not to commission such a report. We find the Respondent's decision, absent any suggestion from Dr Powell or request from Dr Bestley to take the issue further, was a reasonable one.~~

58. Putting aside the question of delay for the moment, we find that the investigation into Dr Bestley's conduct was a reasonable one; whilst criticisms can be made of it, none of them are such as to render it unfair.

**Were there reasonable grounds for Mr Snowden to find the misconduct had occurred as alleged?**

59. The first general allegation was that Dr Bestley's "*behaviour towards and comments about your colleagues is inappropriate*". Three specific examples were taken forward in the management statement of case.

To a colleague [Dr Rewston] regarding psychologists – "*the trouble with your profession is that you think you know it all*".

60. There was certainly evidence from which Mr Snowden could properly conclude that Dr Bestley had made this remark. Dr Rewston gave evidence that it was said, both in his initial whistle blowing interview and also at the disciplinary hearing 22 months later. Dr Bestley had no recollection of saying it, but could recall a context in which, if he had said it, it would have been said. The context rendered the remark relatively innocuous: Dr Bestley said that he may have made the remark as a riposte to a comparable, derogatory remark about psychiatrists (words to the effect that they only prescribe pills) from Dr Rewston. Dr Rewston evidently impressed Mr Snowden as a reliable witness, and Mr Snowden was entitled to accept his account that the

words were said. It is less clear that the remark amounts to misconduct. If Dr Bestley's view of the context for the remark is accepted (and Dr Rewston gave no context for the remark itself: by the time he complained about it, he had no recollection of the circumstances), the remark is relatively innocuous. Dr Rewston's distress at the remark was apparent to Mr Snowden at the disciplinary hearing, and he therefore accepted that it had been made in an abusive and derogatory context; and therefore amounted to misconduct.

To a colleague [Dr Rewston] regarding VM Cook - "That woman" and "Are you friend or foe?"

61. Dr Snowden, despite accepting Dr Rewston as generally a reliable witness, was not persuaded that this allegation was made out; and did not take it further.

Regarding a suggestion [to Dr Rewston] that Health Care Assistants attend a ward round to enrich discussion - "He may as well invite the cleaners as well".

62. The evidence for this remark came from Dr Rewston, but he did not provide any clear context. Dr Bestley had no recollection of making the remark; again, if he had made it, he provided an innocent context, referring to the difficulty of managing a case conference in which too many people were present. On the evidence before him Mr Snowden was entitled to conclude that the remark was made; and that Dr Rewston found it offensive; it was not suggested that the remark had been made in the presence of any Health Care Assistants.

63. The second general allegation was: "*That Dr Bestley's behaviour and comments to colleagues and patients are inappropriately sexualised*" four examples were given:

Suggesting to a Junior Nurse (Ms Poole) that "there should be pole dancing videos in the gym to occupy the men and give the women something to aspire to"

64. Dr Bestley accepted that he had made this remark, in a casual conversation with Dr Kuehnle on an occasion when Ms Poole had been present. He had been referring to his attendance at a gym not on the unit (the original allegation made against him). Ms Poole gave evidence of her distress and upset at the remark. Clearly, there was evidence to support Mr Snowden's conclusion that this was misconduct.

Commenting on a psychologist [Dr Rewston's] heart condition and medication "Are you impotent then?"

65. Dr Bestley accepted that he did put that question to Dr Rewston. He said that he did so in the context of a discussion between himself and his fellow clinician, Dr Rewston; and that he asked the question because not every doctor was aware of the potential side effects of some of the medication that Dr Rewston told him he was taking for his condition. Dr Rewston confirmed to Mr Snowden that he was deeply distressed and offended by the remark; though he had not shown that offence to Dr Bestley at the time. Dr Rewston did not comment on the context. Clearly there was evidence from which Mr Snowden could conclude that the remark was insensitive to the point of misconduct; this was not a clinical consultation between colleagues, it was a chance



conversation at the canteen table.

In a telephone conversation with a female staff nurse [Lisa Smith] from a Community Team telling her that she sounded "sexy" and informing her that he if required a care plan it would involve being cared for by 17 year old girls.

66. D Bentley accepted he had said this, once, in a telephone conversation with Ms Smith, when she had telephoned him to ask his advice about the treatment of a patient. It was apparent she had a cold, and he therefore commented on her sexy voice. She said he had repeated the comment a number of times to her during the conversation; Dr Bestley believed he had only said it once. Dr Bestley's secretary gave a statement saying that she had overheard the conversation; she recalled Dr Bestley making the remark once; she had then "zoned out" and got on with other work. Dr Bestley maintained that he had often made a similar remark to other women in similar circumstances. Lisa Smith gave evidence of her distress and upset at hearing the remark. There was clearly evidence from which Mr Snowden could properly conclude that Dr Bestley had made the remark a number of times and caused offence. It was clearly misconduct.

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With reference to the appearance of a Parkinson Nurse "She's an absolute knock out".

67. This remark was made to Dr Rewston, who was offended by it. Mr Snowden took the view that it should not be proceeded with as evidence of misconduct.

68. We conclude that Mr Snowden did have reasonable grounds for his belief that the allegations of misconduct against Dr Bestley were made out.

**Was the decision to dismiss, for that misconduct, a reasonable one?**

69. In considering this question we remind ourselves that our view is not to determine whether we would have dismissed in these circumstances. The question is: could a reasonable employer have come to that view? As Mr Snowden recognised, not all misconduct calls for dismissal. There is a range within which some employers may not have dismissed, whilst others may have done so. Reasonable employers may properly take different views of the appropriate sanction. Our task does include consideration of where the boundaries of that range lie. It is only if we are satisfied that no employer, acting reasonably, could have dismissed in those circumstances, that we should find the dismissal unfair. Employers are allowed a wide area of discretion in such circumstances, particularly where as here, the employee is a senior manager, expected to give an example to others in his personal conduct.

70. All three of us had real concerns at the conclusion of our reading day, (when we had read the witness statements and a selection of the key documents) as to where we should draw those boundaries in this case whether the misconduct found proved could fall within the area where a reasonable management would be justified in dismissing.

71. Having heard the evidence exhaustively analysed and challenged; and considered lengthy submissions on the point; those concerns remain.

72. The incidents are spread over a considerable period, probably over a year or so. The dates of the earlier incidents complained of could not be ascertained beyond occurring some time in 2010. (The last incident complained of, Lisa Smith's, was in April 2011). The complaints come from three people. The allegations follow a lengthy and thorough investigation during which 23 witnesses were interviewed. All the complaints found proved were included in the original whistle blowing complaint. No further allegations, that could be sustained, were uncovered during the investigation. That tends to suggest that these are not examples of a more general pattern of bad behaviour and sexualised comments; but that these are the only instances of such behaviour. That is effectively how the case was put and dealt by Mr Mason at the disciplinary hearing. There was no suggestion that the comments were part of any campaign of deliberate harassment; or that they were accompanied by any threatening or abusive language or behaviour.
73. Of the three complainants, only Lisa Smith pursued her complaint at the time, raising it initially with her line manager, and subsequently pursuing it through the whistle blowing procedure. It appears that Miss Poole did not raise her complaint with anyone at the time, although subsequently she mentioned the incident to Dr Rewston. She then raised it, some months after the event, as part of the whistle blowing investigation. Dr Rewston had complained about Dr Bestley's behaviour towards him with his line manager Ms Evans, around January 2011. He agreed then that Ms Evans should deal with it informally, by having a word with Dr Bestley. She did so, telling Dr Bestley that he had upset Dr Rewston and needed to mend the relationship. Dr Bestley subsequently approached Dr Rewston, in or around February 2011; he apologised to Dr Rewston for any distress that he had caused; they shook hands. Dr Rewston confirmed at the disciplinary hearing that he had had no subsequent occasion to complain of Dr Bestley's remarks or conduct. At the time Dr Rewston had not raised Dr Bestley's question about impotence with either Ms Evans or Dr Bestley, since he was embarrassed to do so. It was raised for the first time as part of the whistle blowing investigation, alongside Dr Rewston's other earlier complaints. Neither Miss Smith's line manager nor Ms Evans thought that the complaints aired with them warranted formal disciplinary action. These factors tend to suggest that the complaints, seen at the time, were not perceived as anything like as significant as Mr Snowden subsequently found them.
74. Mr Snowden recognised, in his evidence to us, that not all the incidents were equally serious. He singled out two as amounting to gross misconduct, the remarks to Lisa Smith, and to Dr Rewston about impotence. The others he classed as misconduct, rather than gross misconduct. Even then, he told us, he would not have thought them sufficiently serious to justify dismissal, but for Dr Bestley's evident lack of contrition and insight, demonstrated at the disciplinary hearing.
75. Was Mr Snowden acting reasonably when he took the apparent absence of genuine contrition and insight from Dr Bestley into account in deciding that that tipped the balance in favour of dismissal? Before answering that question, we turn to deal, more generally, with the question of delay, which we have avoided addressing until this stage.

## Delay

76. An obvious question, raised for us by our preliminary reading, was the length of time it had taken to deal with what appeared to be a straightforward misconduct case, to answer allegations of seven inappropriate remarks, first raised on 16<sup>th</sup> June 2011 (the whistle blowing complaint) through until 8<sup>th</sup> May 2013 (the date of the dismissal letter) to resolve? All but two years? Both parties addressed us on the causes and reasonableness of the delay.
77. The initial whistle blowing investigation was conducted promptly, and within the time limit laid down in the policy of 20 days. Thereafter, the trust management decided reasonably promptly to instigate a disciplinary investigation, at the meeting of 11<sup>th</sup> July. The Trust's disciplinary policy sets a target "*wherever possible*" to complete "*the investigation within four weeks of appointment and submit their report to the case manager within a five further days*". Mrs Mason was appointed on 11<sup>th</sup> July; her written terms of reference were issued on 15<sup>th</sup> July. If we take the four weeks to run from that date, then the investigation should have been completed by 12<sup>th</sup> August; and the report to the case manager provided on 16<sup>th</sup> August. An investigation report was delivered to Dr Oade on 23<sup>rd</sup> December 2011, four months late.
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78. Some allowance must be made for a commencement date right at the start of the key holiday period. Mrs Mason had two weeks holidays booked; her return coincided with Dr Bestley's holiday which continued for another week. Dr Bestley's representative could not then attend a meeting until 12<sup>th</sup> September. That delay in meeting with Dr Bestley may be reasonable, but it did not effect the other aspects of the investigation: other witnesses could have been interviewed and the transcripts prepared by that date. Instead, the meeting of 12<sup>th</sup> September had to be adjourned as transcripts of some of the interviews were still in preparation; other witnesses still had to be interviewed; and of those already interviewed, some of the original whistle blowers had yet to confirm their statements and to waive anonymity.
79. The second meeting on 6<sup>th</sup> October was arranged to accommodate these difficulties. Even then, however, these difficulties on the Trusts part, remained; and a third (2<sup>nd</sup> November) and fourth meeting (16<sup>th</sup> November) were required before all the witnesses and transcripts were ready.
80. It is a truism of the operation of disciplinary procedures that delay compounds delay, aptly demonstrated in this case. Additional factors constantly cropped up, contributing to the delay. Mrs Heppell, for example, the HR officer who was assisting Mrs Mason with the investigation, had foreseen at the 6<sup>th</sup> October meeting that she was likely to require surgery, and promised to hand over the case if that was required before the report was finished; she did require surgery at the end of November; and that, foreseeably, then delayed further the production of the report. Moreover, as the investigation proceeded, further potential lines of enquiry emerged, and further witnesses were interviewed.
81. Dr Bestley himself requested that eight additional witnesses be interviewed at the 3<sup>rd</sup> (2<sup>nd</sup> November) meeting, and that delayed

matters. Mr McFadden had a busy diary, and that further delayed matters.

82. By December, Dr Bestley, still suspended, had not just lost patience with the investigation, he had lost trust in his employer's ability to investigate and conduct a disciplinary process fairly. He discussed raising a grievance about these issues with Mr McFadden. The grievance was submitted at the end of January, challenging Mr Snowden and Mrs Mason's position.
83. Meanwhile, Dr Oade completed her part with commendable promptness, confirming on 4<sup>th</sup> January 2012 that there was a disciplinary case to answer. It then took the Trust 8 weeks, to 2<sup>nd</sup> of March, to prepare their management statement of case, despite having all the documents and Mrs Mason's report to hand.
84. By then it was too late. Dr Bestley had submitted his grievance, which inevitably had to be dealt with before the disciplinary hearing; and his health broke down. He was unfit to play any part in formal proceedings until July 2012. We make no findings as to the cause of Dr Bestley's breakdown, but it is by no means uncommon for a prolonged suspension while facing disciplinary proceedings to be accompanied by such a reaction. ~~Dr Powell had warned the Trust of just such a possibility, for example, in his report of December 2011.~~
85. No progress could then be made until the end of July 2012. The grievance hearing was then arranged, reasonably promptly, in late August. Further submissions were made by Dr Bestley in September; and the report of the grievance outcome was not produced until 21<sup>st</sup> October. That delay appears reasonable given the amount that Mr Duffield was asked to investigate and resolve; and the appeal was subsequently dealt with reasonably promptly, by 14<sup>th</sup> December 2012.
86. A chance was missed in August or September 2012 when provisional dates could have been set for a disciplinary hearing to take place in December, if required. Given the delays, many managements may have taken that sensible step and braved the inevitable allegations of prejudgement which would have followed. This employer did not do so; in the circumstances, we cannot say they were unreasonable in not doing so. However, it then took a further three months before the disciplinary hearing could be reconvened, on 25<sup>th</sup> and 26<sup>th</sup> March 2013; most of that delay is attributable to Mr McFadden's diary commitments; we do not find it was unreasonable.
87. Two days proved insufficient and it took a further two days, 22<sup>nd</sup> and 24<sup>th</sup> April to complete the hearing. It then took a further two weeks for the dismissal letter to be issued. None of those delays are unreasonable.
88. As we have observed delay compounds delay; more issues are raised, more arguments processed, more chances for circumstances to intervene.

#### **Exclusion/suspension of Dr Bestley**

89. One factor that enabled the Trust to live with and to manage the delay more conveniently for them was Dr Bestley's continued suspension throughout. (The Trust in its procedures refers to suspension of a

medical member of staff as exclusion). The ACAS Code of Practice (2009) provides: *"In cases where a period of suspension is considered necessary, the period should be as brief as possible, and should be kept under review"*. That guidance is reflected in the Trust's own policies which are if anything stronger. Part II of the Respondents disciplinary policy and procedure for medical staff applies to the *"the restriction of practice and exclusion from work"* Paragraph 5 provides: *"exclusion from work should be reserved for only the most exceptional circumstances"*.

90. Paragraph 6 states: The purpose of exclusion is :

- i. *To protect the interest of patients or other staff; and/or*
- ii. *To assist the investigative process when there is a clear risk that the practitioner's presence would impede the gathering of evidence.*

91. Any question of a risk to patients had disappeared by the end of August, when Dr Gee accepted that there were no current clinical concerns in relation to Dr Bestley. We have seen no clear evidence that the interest of other staff could reasonably be thought to require Dr Bestley's exclusion. None had requested it; or said they felt threatened by him. We observed above that his acts of misconduct were one off, and not part of a targeted campaign of harassment aimed at any particular individual. Nor is there any clear evidence that we have seen that Dr Bestley's presence would impede the gathering of evidence. At its highest, when questioned, Miss Heppell referred to some remarks of Dr Bestley at the 4<sup>th</sup> October meeting suggesting Dr Bestley might have real animosity to some of his accusers. Miss Heppell was concerned about the possibility of a possible confrontation between Dr Bestley and those colleagues who had made allegations against him, perhaps even some form of retaliation, perhaps an attempt to influence their statements or alter the evidence against him. There is nothing *"exceptional"* about such concerns. The potential for such concerns exists in almost every situation where colleagues make allegations against each other. They are matters that management commonly have to deal with. Even if the concerns on this occasion, in early October, were considered to be *"exceptional"*, exclusion is reserved under the Trust policy for *"the most exceptional circumstances"*. It is hard to see how this situation could be described as exceptional, let alone as most exceptional.

92. There was after all by this stage some evidence of how similar situations had been dealt with by Dr Bestley in the past. In 2008 Dr Bestley had been given an informal warning, which he had accepted. There was no suggestion that he had ever sought to retaliate or confront those who had brought complaints against him on that occasion. In February 2011, he had been told by Miss Evans that Dr Rewston had complained about his behaviour; Dr Bestley had a meeting to make his peace with Dr Rewston; Dr Rewston accepted that there had been no subsequent incidents of concern to him. The Trust's concerns on these matters were never explored or raised with Dr Bestley. Alternative ways in which he might have been able to return to work, in some limited capacity, minimising contact with his accusers were never put to him. Moreover, any concerns about him interfering

with gathering of evidence must have diminished once that evidence was gathered; the investigatory report was completed in December 2011.

93. Paragraph 35 of the policy provides: *"normally there should be a maximum limit of six months exclusion, except for those cases involving criminal investigations of the practitioner concerned."* There was no suggestion of police involvement in this case. Dr Bestley's suspension continued for 22 months.
94. Mrs Mason and Mr Snowden gave evidence Dr Bestley's exclusion was the subject of regular and thorough reviews, as required by their policy, and that alternatives were regularly actively considered. Mrs Mason's estimate was that the exclusion was costing the trust some £7,000 per week. (That seems high to the Tribunal, but Mr Snowden did not demur when the figure was put to him in cross examination.) The Trust kept NCAS, the national body charged with oversight of such matters within the NHS, regularly informed of the suspension; and also informed a board member as they are required to do. The Trust case on these points would be stronger if any written record or minute of these various review meetings had been kept. Paragraph 35 of the Trust's policy sets out an elaborate staged procedure for reviews of suspension it provides: *"Each renewal is a formal matter and must be documented as such."*
95. We have serious concerns as to whether Dr Bestley's prolonged and continued suspension was justified, or complied with the Trust's own procedures. However, we remind ourselves that we are considering the fairness of his dismissal; not the propriety of the exclusion. But, whether proper or not, the continued exclusion of Dr Bestley made it much easier for the Trust to tolerate the delays in the investigatory and disciplinary process. It removed what would otherwise have been a compelling sense of urgency to resolve the issues, to enable the relationship between Dr Bestley and his colleagues to be taken forward, one way or another. To that extent, contribution to delay, the issue of exclusion is relevant to fairness.
96. The continued and prolonged length of the exclusion is relevant to the fairness of the dismissal in a second way. It contributed greatly (not least because of the apparent breaches of policy involved) to Dr Bestley's belief that the process was a sham; that he was not being treated fairly; and that his health was being seriously harmed as a result.
97. The suspension and the delays involved were powerful factors when it came to his demeanour and behaviour at the disciplinary hearing; those factors effect the conclusion that can reasonably be drawn from his behaviour and conduct at the hearing.

#### **Insight and contrition**

98. We return to the point we were considering at paragraph 76 above: whether it was reasonable for Mr Snowden to take into account Dr Bestley's apparent lack of insight in his behaviour, and contrition for the offence he had caused, as sufficient to tip the balance in favour of dismissal.
99. We accept that in many, perhaps most, misconduct cases those factors

can reasonably have a significant influence. In many cases, behaviour of the sort displayed by Dr Bestley (and his representative Mr McFadden) at the disciplinary hearing can properly be given significant weight. We refer to behaviour including the prolonged, intense and close questioning of witnesses; a detailed forensic analysis of minor inconsistencies or weaknesses in the evidence; personal attacks on honesty and integrity; a reluctance to wholeheartedly accept wrongdoing on Dr Bestley's part; an insistence on qualifying apologies (which were offered) with the words "*If I did cause offence then....*". In many cases, such behaviour could justify Mr Snowden's conclusion of a lack of insight and contrition, and reasonably lead to a decision to dismiss.

100. But in this case, that judgment was not reached in relation to what Dr Bestley said and did at the time, when, in his interviews over the autumn of 2011, he did express both insight and apology, but by how an embittered and distrustful Dr Bestley behaved at his disciplinary hearing, 18 months later, after a prolonged suspension, a breakdown in his health (which he attributed to the disciplinary charges and suspension), and after a disproportionate delay. In those circumstances, we find it unreasonable of Mr Snowden to draw the influence that he did.

101. A further reason for finding that Mr Snowden acted unreasonably in taking into account any apparent lack of remorse and insight from Dr Bestley at the disciplinary hearing was Mr Snowden's repeated reliance both in evidence to us, and in his letter of dismissal, on a remark made by Dr Bestley at the close of the disciplinary hearing: "*Of course, I've done nothing*". Taken on its own, such a statement would concern any management. During the hearing, it appeared that Dr Bestley had several times accepted misjudgements and causing offence; yet here he was, at the end of the hearing still proclaiming: "*I have done nothing*".

102. Taken in context, the remark does not stand that interpretation. We can be sure of the context, because we can read the transcript. The remark follows an argumentative passage in which Dr Bestley and Mr McFadden challenged Mrs Mason about her role in the investigation. She explained her actions at the time by referring to the whistle blowing policy under which "*The investigation will be carried out under terms of strict confidentiality i.e. by not informing the subject of the matter raised until or if it becomes necessary to do so*". Dr Bestley in his answer accepts that point, but points out that "*The disciplinary policy says that the person who is being excluded must be told within five working days of what the allegations against them are*". Mrs Mason replies: "*But at that stage did you see we were following the whistle blowing policy*". Dr Bestley replies: "*I've just answered that question, can I say being excluded and not knowing what your being accused of is a very, very distressing experience, I would put 100% more distressing than anything I am accused of, my wife was literally pulling her hair out and screaming at me what had I done, of course I had done nothing*".

103. It is very clear from the context of the remark that Dr Bestley is referring to his knowledge at the very beginning of the investigation, in late June 2011, when he had been suspended under the whistle

blowing policy, and all he had been told of the allegations against him was the information in the letter of 20<sup>th</sup> June 2011: *"The allegations fall into two categories: patient care; and relationships with staff which may amount to bullying and sexual harassment"*. In that context what could he say to his wife but *"I have done nothing"*. He could not reasonably be expected to have understood that the basis of the allegation of sexual harassment was his ill judged remark about pole dancing, made in Miss Poole's presence up to a year before; and his more recent remark to Lisa Smith that *"You have a sexy voice"*. To take his statement as implying a denial of all the allegations, once the details were known, is unreasonable and unfair.

104. No employer in Mr Snowden's position could have reasonably placed the weight he did on an apparent absence of insight and contrition from Dr Bestley displayed at the disciplinary hearing, in contrast to the earlier instances of insight and contrition, offered 18 months before.

105. It follows, without that additional factor, that Mr Snowden's decision to dismiss was unfair; since on his own account, it was that additional factor which persuaded him that what was otherwise serious misconduct which would not in itself have warranted dismissal, should receive a dismissal.

106. Mr Snowden was correct in that conclusion. To take the five allegations found proved as sufficient to justify a dismissal falls outside the range of responses open to a reasonable employer in those circumstances. We accept they constituted misconduct; but they do not come near the range within which a reasonable management would dismiss: see the discussion above, paragraphs 68 to 73. This was therefore an unfair dismissal.

### **Delay and Fairness**

107. However, even without that conclusion, we would have found the delay in this case, permeating the procedure, was such on its own as to render the dismissal in any event unfair. We were referred to the case of **AvB [2003] IRLR 405** where **Underhill J.** giving the Judgment of the EAT stated at paragraph 66: *"In our opinion, the question whether an employer has carried out such investigations as is reasonable in all the circumstances necessary involves a consideration of any delays. In certain circumstances a delay in the conduct of the investigation might of itself render otherwise fair dismissal unfair."* He goes on in paragraph 68 to state: *"Where the consequence of the delay is that the employee is or may be prejudiced, for example, because it has led to a failure to take statements which might otherwise have been taken, or because of the effect of delay on fading memories, this will provide additional and independent concerns about the investigative process which will support a challenge to the fairness of that process."* We accept that the period of unreasonable or unexplained delay in this case was much less than that in AvB, or in the other case referred to **RSPCA v Cruden [1986] IRLR 83**.

108. Delay affected the fairness of this dismissal in two ways. Firstly, the key period of unreasonable delay in this case is the initial delay in completing the investigation in the period from mid July 2011 to early



October. Accepting that this was a complex case; accepting that a large number of staff had properly to be interviewed; accepting that holidays unavoidably intervened; accepting that diary constraints caused delay, the investigation could and should have been concluded by early October, at the latest.

109. The Trust's excuses for that early delay – the transcripts had not been completed; the witnesses had yet to give their consent, or to be interviewed, are not reasonable in context. These were straight forward allegations of misconduct. The Trust was prepared to spend £7,000 per week on Dr Bestley's continued exclusion. Expenditure of a fraction of that amount would have enabled transcripts to be provided promptly; would have enabled additional HR to be drafted in if necessary to complete interviews; would have enabled Mrs Mason to be relieved of other duties to enable her to focus on the investigation. This is an employer of considerable size and administrative resources in any event.
110. Even that period of completing the investigation by early October, would have been three times as long as the Trust's own target. If the disciplinary hearing had taken place in November, it would have pre-empted both Dr Bestley's grievance and the breakdown in his health. Once those two events had arisen, the remaining delays were probably inevitable. If the disciplinary hearing could have been held in late October or November, attitudes would not have hardened, on all sides, to anything like the extent that had set in by March 2013.
111. It is not merely that the delay affected Dr Bestley's behaviour and presentation at his eventual disciplinary hearing, and his ability to defend himself fairly. The delay was not just prospective, affecting the time taken from July 2011 to complete the disciplinary proceedings; it was also retrospective, covering the period from July 2011, when charges were brought, over the previous year, back to some unspecified time in 2010 (or earlier) when the incidents complained of occurred. This second aspect in which delay affected the fairness of this case was that the Trust allowed, in the summer of 2011, stale complaints to be brought forward whose staleness very significantly affected Dr Bestley's ability fairly to defend himself. The three complaints from Dr Rewston that were taken forward all related to some time in the previous year, 2010. The key question about imputence (which weighed particularly heavily with Mr Snowden) occurred probably in August or September 2010. It is no answer to say, as the Trust do, that since Dr Bestley admitted the remark, its date does not matter. Context is everything in considering such a remark. The context offered by Dr Bestley is that of a consensual conversation between two clinicians about the possible side effect of treatment the other was receiving. Dr Rewston could not recall the context; only his distress at the remark.
112. Similarly with the comment about psychologists believing they know everything. Dr Rewston could not say when or how that comment was made; neither could Dr Bestley: all he could say is that if it was made it was made in an innocuous context. These remarks were at least a year old when Dr Bestley was questioned about them in the early autumn of 2011; and two and half years old when he was

questioned about them at his disciplinary hearing. Miss Poole's complaint was similarly stale.

113. The Respondents whistle blowing policy states at paragraph 5.2.1 "*A concern must be raised within **three months** (emphasis in original) of a member of staff becoming aware of the matter.*" Of the seven allegations of personal misconduct carried forward from the whistle blowing letter, only Lisa Smith's complaint met that time limit. The bullying and harassment policy requires staff to "*Raise their complaints in a timely manner*". Dr Rewston raised his complaints with his line manager, Jo Evans, in January 2011. Even then, they related to events some time in the previous year. They were resolved, to all intents and purposes, at the clear the air meeting with Dr Bestley in February 2011. Dr Rewston accepted, at the disciplinary hearing, there had been no further incidents of concern. Then, in June 2011 he chose to pursue the two complaints he had raised earlier with his manager, Miss Evans; and added an extra complaint, the query about impotence from August 2010, which he had never raised before.
114. Allowing stale complaints to be proceeded with adds greatly to the difficulties of management's task in investigating them, since the dates and witnesses cannot readily be ascertained, and memories have faded so that the context cannot be established; and makes it much harder for the individual accused to defend themselves.
115. Despite those time limits in their procedures, no clear reason has been put forward by the Respondent for allowing stale complaints to be proceeded with. It is not as if there had been any element of concealment at the time; none of the Claimants had any particular reason for the delay in pursuing their complaints. It was not as if the allegations were at the more serious end of the bullying and harassment spectrum. Embarrassment, Dr Rewston's explanation for not raising his impotence grievance at the time, or with his manager, Jo Evans, 5 months later when he did complain about Dr Bestley in January 2012, may be understandable, but hardly seems adequate for delaying such a serious charge, which was eventually to lead to Dr Bestley's dismissal. Dr Rewston is himself a senior clinician and a psychologist.
116. Once the decision was taken to allow the complaints to go forward as part of a disciplinary process, the delay in bringing them forward added greatly to the urgency with which the disciplinary process should then have been pursued. As it was, the longer the case dragged on, unavoidably after the first few months, the more attitudes hardened. That is certainly apparent, understandably, on Dr Bestley's side. By December 2011 he had lost all confidence in his management's ability to treat him fairly, and was finding evidence of conspiracy in every development. A hardening of attitude is also apparent in the approach of the management witnesses by the time of the disciplinary hearing. All displayed considerable distress at the incidents they recounted, to a much greater degree than they had shown at the time of the incidents in question; or in the statements taken over the summer and autumn of 2011. We do not for a moment suggest that they were insincere in that distress; the hearing must have been anticipated with considerable concern; at least one of the

management witnesses stated that she did not wish to be in the same room as Dr Bestley. The hearing itself was always going to be stressful; the hostile questioning they were subjected to made it the more so.

117. It would be surprising if attitudes had not hardened as well on the management side. So much time, money and effort – months of investigation, a lengthy grievance hearing and appeal, a 22 months suspension of a senior consultant - all added to the pressure on management to reach a clear result. By the time of Mr Snowden's decision, it would have been hard not to find the charges not just proved, but also that they justified a dismissal. That pressure shows in a number of ways, not least in Mr Snowden's taking Dr Bestley's remark towards the end of the disciplinary hearing out of context, and using it to justify the dismissal decision.

118. We remind ourselves of Section 98 (4) which encourages us to approach the issue of fairness broadly: our conclusion on fairness "*shall be determined in accordance with equity and the substantial merits of the case*". The substantial merits of the case did not justify Dr Bestley's dismissal, as we found above: the decision to dismiss him fell outside the range of response open to a reasonable management. The procedure followed was fundamentally flawed, in proceeding with stale charges and then compounding the difficulty this raised for Dr Bestley by delaying the initial disciplinary investigation unreasonably; so that it then dragged on, largely unavoidably, for another 18 months or so. The allegations proceeded with were relatively simple, and relatively minor. They could and should have been dealt with much more quickly, as the Trust's own policies, and the ACAS code required: paragraph 4 "*Employers and employees should raise and deal with issues promptly (emphasis in original) and should not unreasonably delay meetings, decisions or confirmation of those decisions.*" Paragraph 5 "*It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case.*"

### Comparators

119. An additional ground of unfairness argued by Dr Bestley before us is that he was treated unfairly in comparison to how other employees, in comparable circumstances have been treated. In considering this point, we remind ourselves of the judgement of **Waterhouse J in Hadjioannou v Coral Casinos Ltd [1981] IRLR 352**, approved by the Court of Appeal in **East Surrey District Health Authority [1995] IRLR 305** paragraph 34:

120. .... *Industrial Tribunals would be wise to scrutinise arguments based upon disparity with particular care. It is only in the limited circumstances that we have indicated that the argument is likely to be relevant, and there will not be many cases in which the evidence supports the proposition that there are other cases that are truly similar, or sufficiently similar, to afford an adequate basis for the argument. The danger of the argument is that a tribunal may be led away from a proper consideration of the issues raised by [Section 98 (4) of the Act of 1996]. The emphasis in that section is upon the particular circumstances of the individual employees' case. It would be most regrettable if tribunals or employers were to be encouraged to adopt rules of thumb, or codes, for dealing with industrial relations problems*

*and, in particular, issues arising when dismissal is being considered. It is of the highest importance that flexibility should be retained .....*

121. We were referred to the circumstances of three other employees:
- i. A, a Consultant;
  - ii. B, a Senior Nurse;
  - iii. C, a Physiotherapist.

The circumstances of A and B do not seem to us to be of any assistance. C is the closest to Dr Bestley's case. The circumstances there involved comment and behaviour of a sexualised nature, towards a patient. Behaviour to patients is more serious than behaviour to staff, the allegation against Dr Bestley. C was dismissed at his hearing, but the sanction was reduced to a final written warning and downgrading from Band 7 to Band 5 on appeal. The appeal panel were particularly impressed by the remorse and insight shown by C. The allegations against C included an assault on the patient, slapping the patient. Ms Heppell, who had been the personnel office who had attended the disciplinary hearing in C's case, told us that the disciplinary panel had accepted that this amounted to a tap on the wrist. That point illustrates vividly the dangers of relying on the written record to prove comparators. That the appeal panel decided in that case to reduce the sanction does not demonstrate any clear tariff from which we could find that individual employees in the same circumstances have been treated differently. The evidence of remorse and insight of that occasion weighed more heavily with the appeal panel than in Dr Bestley's case. That evidence does not establish, in either case, that either panel came to an unreasonable decision. Moreover, there is a significant difference between Dr Bestley's position, as a senior clinical leader, and C. Considering the way in which the employer treated A, B and C does not provide any basis on which we could find that the treatment of Dr Bestley was unreasonable. None of the comparator cases are truly comparable.

### **Possibility of a fair dismissal occurring in any event**

122. Having reached the conclusion that the dismissal was unfair, we turned to consider the two subsidiary questions that arise. Firstly, what are the chances of a fair dismissal occurring in any event had the case been handled differently? This is not an instance where the procedural unfairness consists of a single step missed out; or of the sort that could be put right on appeal. Bringing forward stale charges and then compounding the problem by delaying the initial investigation unreasonably, with the end result of a disciplinary hearing three years after the events complained of, is a fundamental flaw. If the disciplinary had been held, as it could and should have been, in say late October or early November 2011; and if proper weight had been given to the difficulties that Dr Bestley found himself in defending charges that even at that date were stale, we cannot see that a fair dismissal would have resulted. His expression of contrition and insight are much more likely to have carried weight. In any event, our central finding, that dismissal for the five instances of misconduct found proved falls outside the range

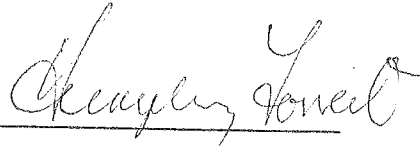
of responses open to a reasonable management remains. We do not see any possibility of a fair dismissal occurring if a fair procedure had been followed.

### Contribution

123. The Employment Rights Act makes provision for both the basic award (Section 122 (2)) and the compensatory award (Section 123 (6)) for unfair dismissal to be reduced if it is just equitable to do so, where the Claimant has contributed, through culpable misconduct, to his dismissal. In considering this point we make our own findings of fact as to whether misconduct occurred, on the evidence before us. We have heard from Dr Bestley in person, not from his accusers; and that to an extent may explain why our views on contribution and misconduct are different from Mr Snowden's.
124. Taking into account what Dr Bestley says of the probable content of any remark he made about psychologist's knowledge, it does not amount to misconduct; nor does the remark about inviting cleaners to case conferences. In isolation, both can be seen as insulting and abusive; but in context – and only Dr Bestley supplies a context – they are innocuous. The question to Dr Rewston about impotence was ~~unwise and ill-judged; Dr Rewston understandably took offence. But~~ that does not necessarily mean it was culpable misconduct. Dr Bestley reasonably thought it was acceptable, and well meant, in the context of conversation between two clinicians.
125. That leaves the ill judged and offensive comments about pole dancing in the presence of (although not directed to) Ms Poole; and the repeated comment about sounding sexy to Ms Lisa Smith. We note Dr Bestley's evidence that he recalls only making the remark once; we note his secretary Ms Sue Smith only overheard the comment once; but she accepts that she did not then listen to the remainder of the conversation; and we are struck by Ms Lisa Smith's written account that he repeated the remark during the conversation a number of times; and that is consistent with Dr Bestley's other evidence that he saw nothing wrong with the remark, and had used it frequently. We find it more likely than not that on this occasion he made the remark more than once. Dr Bestley is a senior clinical manager. He should know that such remarks are potentially offensive and demeaning to other employees. We think his secretary, Ms Sue Smith, got it right: *"He should be careful really who he says it to, because some people wouldn't take it the way it is meant"*. Dr Bestley barely knew either Ms Poole or Lisa Smith. To scatter sexist and offensive remarks around is clearly not just ill judged or insensitive, it is culpable misconduct.
126. But in the scales of such misconduct, it is towards the lower end of the scale. The remarks were not made to offend; they were not part of a campaign of harassment; they are offensive but not grossly so. In terms of the sanctions in the Respondents disciplinary procedure, the informal methods that had been tried with Dr Bestley in 2008 had not succeeded in producing any permanent change in his behaviour; formal sanctions were appropriate; perhaps an oral warning, perhaps even a written warning might be indicated. In our view, we place the remarks at the lower end of the scale of misconduct; we fix a contribution of 20% to his dismissal; and we therefore order that both his basic and

compensatory awards should be reduced by that amount. We see no ground for distinguishing between them.

127. We leave open for further consideration, since we have heard no submissions on the point, the question of whether any adjustment should be made in relation to any breaches of the disciplinary procedures, under Section 207A of the Trade Union Labour Relations (Consolidation) Act 1992.



Employment Judge Forrest

Date: 5/9/14

Sent to the parties on:  
5/9/14

For the Tribunal:  
[Signature]