Neutral Citation Number: [2011] EWHC 51 (QB)

Case No: HQ09X00185

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/01/2011

Before:

THE HONOURABLE MR JUSTICE MACKAY

- -

Between:

Richard Dermott	**Claimant**
- and -	
London Borough of Harrow	**Defendant**

- -
- -

Mr John Hendy QC &Ms Bella Morris (instructed by **McGrigors**) for the **Claimant**
Mr Andrew Warnock & Ms Rebecca Grant (instructed by **Barlow Lyde & Gilbert**) for the **Defendant**

Hearing dates: November 30, December 1-3, 6-7, 9-10

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE MACKAY

Mr Justice Mackay:

The Background

1. The Claimant is now 61 and has many years experience as a planning officer in local government. He started to work for the Defendant's planning department in June 1988 and by 2004 had become Committee Manager, effectively third in command in their planning structure.

2. On 25 November 2004 he was told he was being sent home on five days special leave pending an investigation into an allegation that had been made against him. He was not given any details of the allegation and heard nothing by way of explanation until a letter was delivered to him at his home on Saturday 27 November alleging "serious harassment, intimidation and physical contact of an intimate nature" involving a Ms Mann.

3. Over the next three years this matter went through a two step investigative process, a series of disciplinary hearings and an appeal process. The claimant never returned to work throughout this time and is no longer employed by the council, having taken ill health retirement.

The Claim

4. The Claimant did not bring proceedings for constructive unfair dismissal under the relevant employment protection legislation. This action is a common law claim based on breach of contract and negligence in which it is alleged that the claimant has suffered psychological injuries as a result of the Defendant's failures in breach of contract and in breach of its duty of care in negligence to act fairly and follow appropriate procedures in the course of its investigation of and adjudication upon disciplinary allegations made against Mr Dermott. He seeks a declaration that the findings reached by the disciplinary and appeal panels were reached in breach of contract and he seeks damages for psychological injuries both in tort and contract.

5. It follows, therefore, from the structure of this claim that this court's scrutiny of the case centres on the process leading to the ending of Mr Dermott's employment. I am not free to decide on the merits of the decision, assuming there to be no actionable breaches of procedure. A claim on the merits would have had to have gone to an Employment Tribunal which would have based its decision on all the issues, procedural and substantive, and the substantial merits of the case. It is therefore necessary to start with a consideration of the law so far as it relates to a claim of this nature.

The Law

6. It is now firmly established that in a contract of employment the law implies an obligation on both parties as to their conduct each towards the other. In Malik v BCCI SA [1998] AC 20 this proposition was considered by the House of Lords and approved. Lord Nicholls at 34A approved the parties' agreement that the contract -

> "…contained an implied term to the effect that the bank would not, without reasonable and proper cause, conduct

itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"

He added at 35C -

"The conduct must of course impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in its employer. That requires one to look at all the circumstances"

Lord Steyn at 47G endorsed this objective approach in these words.

"That is the correct approach. The motives of the employer cannot be determinative, or even relevant, in judging the employee's claims for damages for breach of the implied obligation. If conduct objectively considered is likely to cause serious damage to the relationship between the employer and employee a breach of the implied obligation may arise".

7. The House considered the proposition again in Eastwood v Magnox Electric PLC [2005] 1 AC 503, describing the term as providing the means by which an employee who resigns in response to outrageous conduct by an employer may obtain redress.

"Such conduct is a breach of a fundamental term of a contract of employment and an employee who accepts this breach as a repudiation of a contract by the employer is "constructively" dismissed".

8. In applying this concept to a dispute as to the application of an agreed disciplinary procedure Swift J in Hameed v Central Manchester University Hospitals NHS Foundation Trust [2010] EWHC 209 QB at 66-69 stressed that the task of the court is to look at the overall requirements of the procedure to see whether the employers action's had been consistent with it, and to decide whether any breach of the employers' obligation in relation to disciplinary process is actionable at common law. In Bristol City Council v Deadman [2007] EWCA Civ 822; 2007 IRLR 888 the Court of Appeal considered such a case. The court held at 18 that there was -

"…no separate contractual obligation to act sensitively; there was merely an obligation on the council not to undermine the relationship of mutual trust and confidence and a duty to take reasonable care not to cause him foreseeable harm"

These are the two implied terms that the parties agree are in play in this case. The second implied contractual duty is co-terminous with the familiar duty of an employer in tort to take reasonable care not to expose his employees to risk of injury to health. When I refer to "breach of duty" I shall be referring compendiously to these duties, which have no relevant differences for the purposes of this case at least.

9. Whether the alleged breaches are viewed as breaches of contract or tort in either case liability will depend on foreseeability of damage.

10. In cases involving psychiatric injury caused by work related stress the decision of the Court of Appeal in Hatton v Sutherland [2002] ICR 613 is a valuable starting point, reminding myself that it is not a set of statutory criteria but merely guidance to lower courts.

11. At paragraph 43 Hale LJ set out a list of now familiar practical propositions, as she called them, of which the following appear to me to be relevant to this case.

> "(2) The threshold question is whether this kind of harm to this particular employee was reasonably foreseeable (Para 23): this has two components (a) an injury to health (as distinct from occupational stress) which (b) is attributable to stress at work (as distinct from other factors) (Para 25);
>
> (3) Foreseeability depends on what the employer knows (or ought reasonably to know) about the individual employee. Because of the nature of mental disorder, it is harder to foresee injury, but may be easier to foresee in a known individual than in the population at large (Para 23). An employer is usually entitled to assume that the employee can stand the normal pressures of the job unless he knows of some particular problem or vulnerability (Para 29); .....
>
> (5) Factors likely to be relevant in answering the threshold question include … (b) Signs from the employee of impending harm to health (Para's 27 and 28). Has he a particular problem or vulnerability? Has he already suffered from illness attributable to stress at work? Have there recently been frequent or prolonged absences which are uncharacteristic of him? Is there reason to think that these are attributable to stress at work, for example because of complaints or warnings from him or others?
>
> (6) The employer is generally entitled to take what he is told by the employee at face value unless he has good reason to think the contrary. He does not generally have to make searching enquiries of the employee or seek permission to make further enquiries of his medical advisors (Para 29);
>
> (7) To trigger a duty to take steps the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it (Para 31);….
>
> (11) An employer who offers a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty (Para 17 and 33);….

(13) In all cases, therefore, it is necessary to identify the steps which the employer both could and should have taken before finding him in breach of his duty of care (Para 33);

(14) The claimant must show that breach of duty has caused or materially contributed to the harm suffered. It is not enough to show occupational stress has caused the harm (Para 35);

(15) Where the harm suffered has more than one cause, the employer should only pay for that portion of the harm suffered which is attributable to his wrongdoing unless the harm is truly indivisible. It is for the defendant to raise the question of apportionment (Para's 36 and 39);

(16) Assessment of damages will take into account any pre-existing disorder or vulnerability and of the chance that the claimant would have succumbed to a stress related disorder in any event."

12. In the later case of Hartman v South Essex NHS Trust [2005] ICR 782 the court stressed as a general observation that:-

"It is *foreseeable injury* flowing from the employer's breach of duty that gives rise to the liability. It does not follow that because a claimant suffers *stress* at work and that the employer is in some way in breach of duty in allowing that to occur that the claimant is able to establish a claim in negligence"

Contractual Terms

13. It is accepted that by virtue of paragraph 13 of the written statement of particulars attached to his contract of employment Mr Dermott's contract incorporated the Defendants' Disciplinary Procedure. The relevant terms of that procedure can be summarised as follows:-

a) 3.4: Gross misconduct was defined as "conduct which is serious enough to destroy the contract of employment…such acts are regarded as so serious that the penalty of dismissal is justified for a first offence" - (examples are given which include serious threatening or abusive behaviour and serious harassment against a council employee).

b) 4: Step one of the process is a fact finding exercise to gather sufficient information to reach a decision on how to progress the matter further. "If the allegation is considered to amount to gross misconduct, as an alternative to suspension consideration should be given to sending the employee home on five days paid leave. This will be with a view to possible suspension from duty".

c) 5: The second step is the formal investigation by an Investigating Officer which should normally be completed within 10-15 days. The purpose of this is to establish the relevant facts of the case and consider whether the matter should progress to a disciplinary hearing.

d) 6: The third step is a disciplinary hearing in front of a disciplinary panel of not less than two people. The employee and representative are invited to the hearing by a letter which should (6.6) state the following:-

- The alleged conduct which is leading the Council to contemplate either dismissal or taking disciplinary action
- The basis for the allegations
- ….the Investigating Officer's report, copy of all interview statements referred to …and all other relevant documents
- The employee's right to be represented by a trade union representative or work colleague and to call witnesses.

e) 6.10: The panel "must allow an opportunity for both sides to put their case fully and must make sure that both sides have a fair hearing. Each side must be allowed an opportunity to bring witnesses and put questions to witnesses brought by the other side. In general the panel shall conduct the hearing in such a manner as it considers appropriate to the circumstances"

f) 7: The final step is a right of appeal. The purpose of the appeal is to review the decision and not to re-hear the case. The ground for an appeal can relate to procedural irregularities which prejudiced the decision, whether the facts supported the decision, and whether the misconduct justified the level of disciplinary action.

g) An appellant is entitled to choose a Members Appeal Panel consisting of three members. The obligation of the panel so far as the discharge of its functions are concerned are in identical terms to that of the disciplinary panel save that references to the bringing and questioning of witnesses is omitted.

14. There is also a disciplinary guide, a lengthy document which has been "compiled to answer some of the questions that can arise from the disciplinary process", and is recommended to be read in conjunction with the disciplinary procedure. The Defendant argues that this is not a document apt to have contractual force. It is plainly something of a management handbook designed to answer frequently asked questions. I consider that it does not lend itself to incorporation into a legal contract, but it does give a useful indication of how the Defendant construed its obligations towards its employees in the disciplinary process.

The Claimant's Previous History

15. Mr Dermott was born on 10 July 1949 and had worked in the planning area of local government since 1975. He joined the Defendant in June 1988 and at the relevant time held the post of Committee Manager, a senior position within the planning structure. His job was to collate and present to a committee of councillors new planning applications. He had an unblemished disciplinary record and was very well thought of, particularly by the councillors with whom he was in this regular form of contact. It was, I am sure, an exacting job.

16. He was and is plainly a hard working man and something of a perfectionist by his own account, perhaps as Prof Fahy (an expert witness) said having difficulty in seeing the wood for the trees. But he was and is an intelligent, diligent and articulate man and was dealing with a heavy workload. That was made more difficult for him by a physical re-organisation of his work place in late 2003 as a result of which he no longer had his own office but worked in a large open plan area with 20 or so other people.

17. So far as his health was concerned, prior to the index events he had a number of medical problems which need not be detailed in this judgment as none of them are relevant to the issues I have to decide. He had had to have surgery on occasions but in general he had an unexceptional history for an active middle aged man.

18. As to psychological problems, his GP recorded him as reporting stress at work in March 1999, and in December 2000 a low mood caused by his wife's diagnosis of breast cancer, the tragic death of his son's girlfriend and stress at work. He was referred to counselling.

19. In November 2001 he had been referred to a neurologist who considered he was depressed and prescribed anti-depressant medication to which he was reported as responding well, and by the following June the GP considered he was no longer depressed.

20. By February 2003 the GP described him as suffering from "endogenous depression, recurrent plus anxiety…works + + +, exhausted, temporary staff, at end of strength, day to day, not actually depressed" and prescribed the anti-depressant Seroxat. He has remained on that medication ever since, with an apparent (and unexplained) gap between October 2003 and June 2004, and the dose was increased in 2008. It is possible that the gap is due to lack of full records.

21. Despite his psychiatric history he lost no time from work for psychiatric/ psychological reasons. It is also the case that the Defendants were never informed and had no reason to know about the psychiatric problems he had suffered prior to the index events. The forensic experts agree that in psychiatric terms he was "vulnerable to the development of further depression if subjected to stress". I will have to return to the psychiatric evidence in more detail later.

22. The Defendant provided an occupational health service which was on the usual confidential basis. Mr Dermott had been to that service in 2002 because he was concerned about the situation in the planning department and the fact that he had been asked to take on his new role as Committee Manager. There was a considerable log

jam of work and he was reluctant to do it. The advice he received was not to take it and that he would regret it if he did. There is no suggestion that the Defendants were notified in any way of his misgivings about his work. There was also a facility provided by the Defendant under which all employees could refer themselves to a commercial health service provider Lancaster Life Assist where they and their families were entitled to a certain level of free and confidential therapy.

The Grievance

23. Harpal Mann had joined the Defendant as an Administrative Support Officer in 2003. She and Mr Dermott never got on. He considered her lazy and insubordinate towards him as well as very noisy, a characteristic exacerbated when the open plan layout was introduced. Other witnesses confirmed that she was indeed a noisy person.

24. On 1 September 2004 she invoked the grievance procedure which formed part of the Defendant's contracts of employment. Her stated grievance was that she had been subjected to "constant harassment intimidation and other types of abuse by Mr Richard Dermott" over the last eleven months and she was asking that this should stop and the person responsible be asked to account for his actions. She later provided a supporting statement dated 22 October. The complaints were that he invaded her personal space, that he always looked at her body constantly staring at her and undressing her with his eyes; he was staring at her trying to single her out and wind her up; that he humiliated or embarrassed her verbally; that on one occasion he touched her bottom and on another he knocked her over without apology. His conduct reduced her to tears every day. He had subjected her to verbal abuse on one occasion calling her a "fat cow".

25. On 25 November Mr Dermott was asked to attend a meeting with his union representative at which he was told that "an allegation" had been made against him. He was given no details but was sent home on five days special leave and told not to contact anyone. In his witness statement he described his reaction to this as "flabbergasted" and he said he was "devastated" in his account to the psychiatrists. He remained in suspense through the following day 26 November, and said that this caused him "great distress".

26. On Saturday 27th Mr Ransford Stewart the interim Chief Planning Officer came to his house and handed him a letter which included the following passage:-

> "The purpose of the meeting [on 25 November] was to inform you that I had received information that indicated that on various occasions since July 2003 you have subjected a female work colleague (Harpal Mann) to serious harassment, intimidation and physical contact of an intimate nature.
>
> If substantiated I consider these allegations to be potential gross misconduct. Tony Lear therefore agreed for you to take five working days special leave until 3 December 2004. You should note that this is not disciplinary action nor does it imply guilt on your part. During this time Bill Munro…has been requested to undertake an initial investigation into these allegations"

He was told that as part of those investigations he would be asked to provide a written statement. The initial investigation should be completed by 3 December and in the meantime he must not attend his place of work. Mr Dermott said that he was relieved when he read that letter because he knew he could expose it as obvious nonsense. This relief did not, I find, last long. He consulted his old friend, and now his Leading Counsel, Mr John Hendy QC who took a more cynical view of the way employers dealt with spurious disciplinary allegations, with the result that Mr Dermott instructed solicitors. At all events he agreed in cross examination that Ms Mann's allegations were very serious, if true, and merited investigation.

27. There is no allegation that the Defendant had acted in breach of duty in acting on the grievance procedure in this way. It is suggested in the claimant's evidence that it in some way appeared to him that he had been found guilty before he could even enter his defence, but a moment's consideration of Mr Stewart's letter would have made it clear that was not the position. However I am satisfied that the mere fact of the grievance must have caused very considerable stress to Mr Dermott, added to which he was already developing a sense of his being a victim of perceived injustice.

The Procedure – Stage One

28. The purpose of this stage is to act as an initial fact finding exercise, intended to be completed rapidly, within five days. Bill Munro who was put in charge of this whole investigation impressed me as a mature and conscientious man who took his duties seriously. He introduced his role to Mr Dermott in a letter of 1 December 2004, recited the allegation in its then general form and said that if those allegations were proved a finding of potential gross misconduct could be made against him.

29. He offered him the option of attending a meeting on 8 December 2004 and formally extended the five day period to 10 December. He said he would then be submitting his findings to Ransford Stewart who would decide whether or not to instigate the formal disciplinary process. He acknowledged that Mr Dermott may be undergoing a stressful time and referred to the confidential staff support scheme, referred to above, details of which he gave.

30. A minute of the meeting was taken which is not verbatim but an aide memoire and ran to some eight pages. Mr Dermott is critical of the minute, but it is certainly fuller than the note taken by his union representative Mr Ken McDonald. Mr Dermott had evidently prepared a witness statement in advance of this meeting and at stages read from it.

31. In essence he gave a full account of his response. He was critical of Ms Mann's behaviour and performance as an employee. He denied any physical contact with her. He admitted that he had made a remark to the effect that she was a "useless fat thing" which he later regretted. As to working relations generally in the office he said they were good saying that he bought gifts for those with whom he was most in contact.

32. Lerleen Thomas, the HR representative working with Mr Munro, asked whether there was any flirtation in the office. Mr Dermott said there was light hearted banter between men and women in an office situation about things people were wearing, which he accepted could have sexual overtones, with references to underwear such as thongs visible above trousers. He accepted that he did stare at Miss Mann on some

occasions when her behaviour annoyed him "to indicate my disapproval". At the end of the hearing he was again offered counselling services and commented that he had been on medication for about two years, an anti-depressant; the relevance of this remark appears to have been to show that it had helped him to be more "light-hearted", rather than that to give a warning that he was psychologically vulnerable. He asked Mr Munro to speak to three other named witnesses who might give a more balanced picture.

33. The fact that this meeting ranged over wider issues, some of which were introduced by Mr Dermott himself, I do not find at all surprising and certainly not a breach of any duty owed. The nature of the original allegation was such that it was not improper or inappropriate to consider in general terms the relationships that Mr Dermott enjoyed towards his female colleagues in this open work area; indeed he himself was anxious that Mr Munro should do so since he considered it portrayed him in a favourable and innocent light.

34. The upshot of this stage was that Mr Ransford Stewart wrote on 13 December stating that he had considered the matter and was instigating a disciplinary investigation, appointing Mr Munro as the Investigating Officer who would be arranging an interview. He envisaged that this stage two investigation would normally be completed within 10-15 days. The allegation was still just the original allegation made by Ms Mann. The letter confirmed that he was suspended on full pay and should not visit his place of work. Again he offered the confidential staff support scheme and said that when he received the report he would then decide whether the matter should proceed to a disciplinary hearing.

Procedure – Stage Two

35. On 22 December solicitors acting for Mr Dermott came on the scene and expressed concern that the substance of the allegations made was "inadequate" saying that he was entitled to know and understand the complaint being raised against him. They said he wished to be informed who the investigating officer was proposing to interview and that he might wish to put forward names of other individuals he would wish to be interviewed both as to the facts and as regards character evidence. It will be remembered that he had already provided three such names to Mr Munro. There was no formal response to this letter until 5 January when Mr Dermott was invited to attend a meeting on 14 January and was told that the 15 day period was extended to end on that date. Mr Munro also included two sets of minutes of the meeting of 8 December.

36. On 11 January another letter from Mr Munro said that a further allegation had come to light which he needed to discuss with him namely that

> "You have used inappropriate behaviour dealing with other female members of staff, especially in a work situation where other people might find such behaviour offensive (more specific allegations in relation to this may arise and may be investigated during the 10-15 days formally (sic) process; in this event you will be advised accordingly)"

37. There were therefore now two allegations in play for discussion on 14 January.

38. Mr Dermott describes himself as having been "absolutely devastated" by this development and said he had no idea what these new allegations could be. I find that difficult to accept. The discussion on 8 December had already widened out beyond his treatment of Ms Mann into his relations generally with female members of staff. I am supported in this approach by the EAT's decision in Silman v ICTS UK [2006] WL 690636, where it was held at Para 22 that even at a disciplinary stage evidence will emerge which identifies potentially disciplinary conduct which though closely related to the original conduct is a variation of it. At the investigative stage that must *a fortiori* be the case. But it is true that the new allegation was expressed in the widest and most general of terms and he needed to know details of who was saying these things against him.

39. The January 14 meeting never took place. The next four or five weeks were taken up with correspondence between the Defendant and Mr Dermott or his union representative, who were re-iterating that he was not prepared to provide a meaningful defence or attend further interview without, as he put it in his evidence, "precise clarification" of the new allegation.

40. On 31 January for the first time Mr Dermott made strong complaints about the manner of his questioning at the 8 December interview and also submitted a heavily amended version of the minute. The defence suggest, with justification as it seems to me, that these amendments can only be described as insignificant and not in any meaningful way altering the sense of the original draft. He had also discovered that two of "his" witnesses had been distressed by the tenor of Ms Thomas' questioning.

41. On the same day Mr Munro endeavoured to give particulars in the form of 6 bullet points identifying what he called some of the main issues in the second allegation giving rise to concern about Mr Dermott's conduct towards female members of staff. He had by this time, we now know, obtained statements from 16 members of staff between 10th and 13th January and would have had those before him. The letter does not identify who said what but purports to quote sections from some of these witnesses grouped under particular headings of misconduct. Mr Dermott complains accurately that there are no names dates or specifics offered. I do not believe that at this stage of the procedure that was yet appropriate. I remind myself that this stage is still an essentially inquisitorial process designed to establish the relevant facts in order to make a decision as to whether matters should progress further. It is at the later stage of the disciplinary hearing itself that the procedure at clause 6.6 required there to be a "written statement of the alleged conduct" and the "basis for the allegations". That is what one would expect at the more adversarial stage of the process.

42. On 4 February Mr Ken McDonald the union representative, who had no training in this area of union representation and was a Health and Safety specialist, made his own detailed criticism of the minutes of 8 December over five closely typed pages. Some of these were explored with him in cross examination. It was very difficult to see where any omission or distortion of any significance had occurred and Mr Warnock for the Defendant suggested that one example said to be an important change was "footling and nit picking". It was hard to disagree with that.

43. The adjourned meeting eventually took place on 24 February 2005 at which Mr Dermott was represented by Kathy McDonald (no relation to Mr Ken McDonald), a more qualified union representative. Mr Dermott states that it was clear from that meeting that there had been no "complaint" by any other member of staff and that the second set of allegations were based on comments he had himself made in the first interview describing his relationship with other staff.

44. At all events the decision was taken to refer the matter to a disciplinary panel. This decision was contained in Mr Munro's Investigation Report signed on 30 March. That set out in exact detail the meetings he had had and the witnesses he had interviewed. It then summarised the interviews, witness by witness, including the evidence of Mr Dermott attaching his witness statement as an appendix to the report. He then summarised his own findings as to the evidence. His recommendation at the end of the 18 page report was that both allegations should proceed to a hearing. Prior to the disciplinary process starting Mr Dermott was supplied with the Investigation Report and all the witness statements, in question and answer form, which underlay it.

45. Up to this point it is important to note that there is no pleaded allegation of breach of duty by the Defendant. The events I have just summarised, as Mr Hendy accepts, were covered by the evidence only as being necessary background material without which the allegations which follow could not have been understood. But for the reasons given above as to the essentially inquisitorial nature of this part of the procedure none of them is capable of forming the basis of the relief sought in this action

Stage Three – The Disciplinary Hearing

46. There were in fact three hearings before a disciplinary panel, on 6 May, 29 June and 15 August. The chair of the panel throughout was Andy Parsons a senior manager in the planning and development department. The two other members of the panel on the first occasion did not re-appear thereafter. The second panel had as its wingers Ms Kashmir Takhar and Ms Louisa Ofori, and the third panel had Ms Takhar and Mrs Marion Afoakwa.

47. Kathy McDonald represented Mr Dermott on 6 May and opened proceedings by making a submission that all the written statements had been corrupted by the participation of Ms Thomas at the investigative stage. She gave examples of what she meant. She was asking for the matter to be adjourned and for all witnesses to be re-interviewed. The upshot, after some discussion, was that the panel did decide to remove Ms Thomas from the investigating process, and that four witnesses be re-interviewed, namely Sally Fox, Harpal Mann, Teresa Hopkins and Zoë Macintyre. Also some "leading questions" were to be redacted from other statements. On that footing the hearing adjourned without embarking on any consideration of the merits of the allegations. There is nothing in the record of this hearing to suggest that it was being suggested that Mr Dermott required further clarification of the allegations he faced.

48. Mr Parsons' evidence was that he accepted that Ms Thomas had asked some leading or inappropriate questions and the panel felt a concern that therefore some witness statements might not tell the full story. In the interests of fairness it was therefore felt

the panel ought to be changed and the witnesses who had possibly been affected by the manner of interviewing should be re-interviewed. This was evidence of his fair minded approach to the process. Many chairmen, I consider, might have declined to go along with such a request.

49. Mr Parsons thought it appropriate that he remain as chair of the panel, but thought the other members should be changed lest it be later said they had been "tainted" by their reading of the earlier versions of the evidence. I do not find there was any debate about this, any more than there was any objection to it thereafter. It was a sensible and fair approach, especially as the first panel had not considered the substance of the case in any way.

50. The second hearing took place on 29 June. Mr Munro submitted an amended investigation report to reflect the decision of 6 May. Four witnesses were called Harpal Mann, Claragh McSweeny, Lyn Moriarty and Sheila Moore. Lyn Moriarty was a witness that Mr Dermott was keen to put before the panel. By 4:20pm the panel had run out of time and it was agreed the meeting should be adjourned to a future date as Ms McDonald wanted to question Ms Bradbury in front of the panel.

51. On 15 August 2005 the third hearing took place. This time Mr Dermott was represented by Anna Jackson an assistant branch secretary of Unison. Mr Dermott read a pre-prepared statement of his evidence which runs to over ten pages in the note, and Jenny Bradbury gave evidence as did Steve Swain and Sangeeta Jerath. Mr Dermott was asked questions by the panel and made a summing up statement as did Mr Munro and Anna Jackson.

52. The criticisms of the disciplinary proceedings themselves are set out at paragraphs 12(a)-(p) of the particulars of claim. I must look at each allegation separately.

<u>Lack of particularity: (a) – (b).</u>

53. It is said that the first allegation was not properly particularised in that it should have set out separately each of the distinct allegations being made by Ms Mann as referred to in her statement. Also it suffered from a lack of clarity as to whether the allegation of staring/glaring was that it was done to express disapproval as distinct from sexual purposes. Therefore there was scope for misunderstanding and confusion.

54. As to the second allegation it is alleged that there was no "complaint" from any person or individual which led to this being added to the case against Mr Dermott, and the framing of the charge was very wide and vague making it impossible for him to know what it was that was being alleged against him. Mr Munro's letter of 31 January did not deal with the question of gifts to colleagues at all or overly close relationships though it was to play a part in the proceedings before the disciplinary panel.

55. The Defendant's case before the disciplinary panel rested on the lengthy investigation report itself and the witness statements that underlay it. All this had been given to Mr Dermott. The report summarised all the underlying witness evidence and then at paragraphs 15-18 Mr Munro put forward his view of the case on the first allegation. In this he appeared to emphasise the matters which Mr Dermott himself had confessed and avoided, as lawyers would put it, namely staring to express disapproval (as well

as intrusions into personal space) and the "fat cow/thing" remark. When cross examined before me Mr Dermott accepted in terms that he was aware of what was being alleged against him on the first count.

56. As to the second count again Mr Munro summarised the case as he saw it in paragraphs 22 to 28, and when cross examined Mr Dermott agreed that he was aware of the flavour of the allegations. That was summarised by Mr Munro as a case which emerged from the evidence of a number of witnesses but was not subscribed to by all of them. A number had mentioned Mr Dermott's comments on dress or suggestive or smutty remarks or innuendo, though others had not overheard such comments. Others said they felt uncomfortable about his invasions of their personal space and some that they never did. A number had referred to his flirtatious behaviour though others took this as more of a joke. Some mentioned comments about references to underwear. Mr Dermott at the investigation stage had admitted to regular banter with female colleagues including such matters. At the investigation stage he had admitted to commenting about two women about the colour of their thongs. Several male witnesses had said they felt his behaviour to female staff was over friendly or too familiar and one found his practice of buying gifts for some of his team discomforting.

57. When Mr Dermott came to give his own evidence on 15 August, which he did at length, he addressed all these issues without any appearance of misunderstanding the case against him. It was clear from what he said that he knew that the staring/glaring allegation in respect of Ms Mann which he had to meet was one of an inappropriate expression of disapproval rather than of sexual interest. He defended his close relationships/familiarity with certain team members, including the giving of gifts, which he alleged should be viewed as "good working practice".

58. In my judgment given the nature of this whole procedure and the fact that it is laid down for a domestic lay tribunal and not a court of law there is no force in the allegation of defective particularity, certainly by the time the matter came before the disciplinary panel.

Defects in the Investigation: (c)-(g)

59. These are raised as instances of a defective disciplinary process although they relate to events which had occurred prior to the start of that process and which are not separately pleaded as breaches as I have already pointed out. In any event as to (c) to the extent there had been any unbalanced questioning of a leading kind at this stage that was fairly dealt with in my judgment in the first disciplinary hearing. Otherwise the tenor of the evidence is that Mr Munro conducted his investigation properly and fairly. Despite her shock at the attitude of Ms Thomas Teresa Hopkins had no criticism to make of Mr Munro whom she described as professional in his approach. Mr Dermott himself made no complaint at the time about his initial interview, though when he did complain about it, it was because the questioning had "gone off track" into allegation two. As I have already said the investigative process was crucially different from the disciplinary process, by definition, and it is plain that any reasoned complaints that were made against it were taken account of by the disciplinary panel with the results I have set out above.

Withholding of Statements: (h)

60. Two statements were objected to as being inaccurate and incomplete at the hearing on 29 June and it is said that the revised statements and the minutes of that hearing were not available to the panel which resumed the hearing of the disciplinary process on 15 August, one of whose members was new to the case. It is right to argue as Mr Dermott does that no letter has been disclosed among the many thousands of pages of documents in this case enclosing them either to him or to the panel members, and Mr Parsons was not able to say the date on which they were provided, but I am satisfied that they were provided in advance of the third hearing. Mr Parsons said that the minutes themselves were generated by an outside contractor and were generally available within one to two days of a given hearing. Having seen Mrs Afoakwa who was an experienced and I thought very professional HR representative, I cannot see that she would have been prepared to join this panel without seeing exactly what had happened at the previous hearing.

Changes in Composition of the Disciplinary Panel: (i)

61. The claimant's pleaded case is that is was implicit in the disciplinary procedure that the members of the panel would remain the same throughout and hear all the evidence and submissions made.

62. As for the change between the first and second panels that was in my judgment entirely appropriate and fair and the reason for it was explained in advance by Mr Parsons in his letter of 18 June. No objection was taken to the course he proposed.

63. The change between the second and third panels was caused by the fact that Ms Ofori who was pregnant was required to go on maternity leave. The objection is that her replacement had not heard or seen the four witnesses who gave evidence on the previous occasion and that in particular had she seen Ms Mann she would have seen a particularly unimpressive witness. This is in a sense a fair point, but whether it undermines the fairness of the procedure depends on the effect that that omission is likely to have had. The eventual finding on allegation one in its essential parts was limited to the matters which Mr Dermott himself accepted had happened in her case and not on the allegations that she alone made.

64. The rules are silent as to changes in the personnel forming the panel. Plainly there must be occasions when a panel has to change where that can be done within the overall obligation to act fairly. The procedure did require that an HR representative serve on the panel – see rule 6.3 - which Ms Ofori had been and her replacement was. Due notice was given in his letter of 14 July by Mr Parsons that Ms Ofori could not sit on any date after 25 July and no objection was taken at the time to the change. The only alternative to changing would have been to restart the whole process in front of a fresh panel. Given the length of time this matter had already taken it cannot in my view sensibly be argued that that would.

Inadmissible Evidence: (j)-(o)

65. The only rule which touches on this point is 6.10 which I have already set out but repeat here:-

> "The panel must allow the opportunity for both sides to put their case fully and must make sure that both sides have a fair hearing. Each side must be allowed an opportunity to bring witnesses and to put questions to witnesses bought by the other side. In general the panel shall conduct the hearing in such a manner as it considers appropriate to the circumstances".

Of the 22 witnesses interviewed by Mr Munro 8 (including the Claimant) eventually gave evidence in an oral form and statements of the others were before the panel. On 29 April 2005 Mr Munro wrote to Mr Dermott with a copy to his representative giving notice of the four witnesses he for his part intended calling. In a second letter of the same date to the union representative he said

> "I would advise you that it is the intention to use evidence contained within the investigation report at the hearing and that this has already been disclosed to you in my letter dated 5 April 2005".

66. There is no provision, either in the disciplinary procedure or the guide, to suggest that all evidence must be given orally and that no consideration can be given to written statements of evidence. Obviously there will be cases where it is not possible to meet the requirement to try an allegation fairly without calling witnesses. Instances would be where a discrete incident of misconduct such as an assault or theft is alleged and there are hard-edged questions of fact to be resolved. In this case witnesses were talking about their general impression of behaviour and practice over a period of time in an employment context and of their and others' reaction to it. That is a very different type of question. I am quite satisfied that if the Claimant had made reasonable requests for other witnesses to be called his wishes would have been accommodated or considered.

67. That the Claimant understood that this was the practice is shown by the fact that both he himself and his representative drew out points from the body of the written witness evidence which they considered suited the defence case. Ms Jackson represented him at the third hearing, and I am satisfied on balance of probabilities, either herself carried out an analysis of the witness evidence on what could be called a head count basis (see the undated document at bundle O.34) or was party to its preparation. This identified the number of witnesses who supported or did not support a particular allegation and was used in submissions made to the panel. The Defendant himself introduced the evidence of his wife which was not mere character evidence but dealt with issues of fact concerning his practices where the giving of gifts was concerned.

68. There was no express agreement to these statements being called and they were certainly not "agreed evidence" as I find nor did the panel treat them as such, despite elements of confusion in the evidence of Mr Parsons, who like many intelligent laymen was not easily able to grasp the difference between a written statement being "agreed as evidence" and "agreed evidence" in the way a lawyer will. But I accept that the practice followed was the normal practice of the Defendants and was fair.

Refusal to Adjourn: (p)

69. By the time of the third hearing Ms Kathy McDonald had gone off sick, on long term ill health as it transpired. On 18 July Mr Ken McDonald left a message with Mr Parsons seeking an adjournment of the adjourned hearing then due on 20 July. On 19 July the Claimant told Mr Parsons' personal assistant that he was willing to go ahead even if he could not get Kathy. He explained this in evidence, saying that he was expecting the union to come up with a senior representative to take her place. In the event he was represented by Ms Jackson a full time assistant branch secretary of Unison. She was not as she put it a well established representative at this time and said that she had done "not a lot" of such hearings. At all events the hearing fixed for 20 July was indeed adjourned to 15 August.

70. I am satisfied that Ms Jackson was allocated to the case not at the last minute but on 29 July and therefore in good time to familiarise herself with it. I am satisfied that she met and discussed the case with Mr Dermott on two occasions and as I have said as part of her preparation either saw or produced the analysis document to which I have referred.

71. On 15 August her first step was to apply for an adjournment but her difficulty was that it was not known by what date Ms McDonald would be fit to resume her role. The panel had a discretion to exercise and exercised it in favour of going ahead. It is not possible in my judgment to say that they were not entitled to take that course. In the event Ms Jackson played an active role together with the Claimant at the hearing. The application to adjourn was itself made in firm and appropriate terms. She made a coherent and effective summary of the defence case. She led three witnesses through their evidence in chief including Jenny Bradbury whose evidence went over some four pages of transcript. She read the statement of Mrs Dermott and made a short but powerful closing submission.

72. I am satisfied that the presentation of Mr Dermott's case to the disciplinary panel was not prejudiced by her presence as his representative that day.

The Decision of the Panel: 16 (a) – (r)

73. At the outset I have to remind myself that it is not for me to say whether I agree with the decision of the panel or whether their decision is one which I would have made had it been my task to do so. Mr Hendy accepts that it is for him to show that the decision was irrational or perverse on the basis of the evidence that was before the panel. Nor is it the case that a panel of this type is required to produce the kind of line by line reasoning, addressing every single issue in express terms, which might be held appropriate in a decision made by a court. The Defendant criticises the approach of the claimant in this area of the case as being over legalistic and I have with regret to say that I agree. In the area of statutory unfair dismissal it is well established that the role of the appellate court is to ask whether the decision fell outside the boundaries of reasonable responses – see Foley v Post Office [2000] 1 ICR 1283 – a decision of the Court of Appeal. The same rule applies to this class of case.

74. The decision on the first allegation was in these terms -

> "The panel found that as an experienced senior member of staff your actions in making a muttered comment about Ms Mann to her hearing and by glaring at her on various occasions, both of which you have admitted doing, were inappropriate and intimidating. The panel could not find evidence to substantiate Ms Mann's claim of physical contact of an intimate nature, but on the balance of probability believes that the allegation of serious harassment against Ms Mann is substantiated".

75. As to the second allegation the reasoning read -

> "The panel found that a majority of witnesses interviewed, male and female, made reference to behaviour which the panel deems inappropriate, even if some witnesses in their statements did not testify to finding your behaviour inappropriate or offensive. Secondly the panel was of the view that your close relationship with some of the support staff and your selecting staff to give personal presents to was not good working practice, but favouritism potentially divisive to the team and against the council's equal opportunities policy. The panel's view therefore is that this allegation is substantiated".

76. So far as allegation one is concerned the reasoning could not have been clearer. The two allegations of physical contact were found not proved, as Mr Munro had in effect invited the panel to find, while leaving the decision to them, as was the allegation that the staring to which she took exception was sexually motivated. The fact that the word 'inappropriate', for example, was not found in the original allegation or that Ms Mann had not said that she was intimidated by disciplinary staring but rather intimidated by sexual staring is nothing to the point in my judgment. Nor is it right that 'harassment' was defined in the guide in such a way as to restrict it to sexual harassment. I believe that is, with respect, a complete misreading by Mr Hendy of the relevant provision. As to whether these two matters taken together could amount to serious misconduct it is right that they are not either of them set out in explicit terms in that part of the disciplinary procedure which attempts to give examples of misconduct and serious misconduct. But it was for the panel to decide what it felt about the seriousness of the behaviour it found proved and it was not dependant on there being evidence of seriousness inappropriateness or any other of these matters. The way the panel members put it in their evidence was in these terms.

77. Mr Parsons said this -

> "…in any event staring/glaring by a manager is wholly inappropriate in respect of minor behavioural issues involving a more junior member of staff. …it is also important to note that Ms Mann confirmed that she found the staring/glaring intimidatory".

And as to the muttered remark he said -

> "No manager should express themselves in that way against a junior colleague…we did not consider that Mr Dermott's

> staring at Ms Mann constituted sexual harassment. However we did consider that his staring was inappropriate and intimidating".

His two colleagues agreed with the approach he took on the first allegation. Mrs Afoakwa the HR representative said -

> "Our guide to disciplinary proceedings cannot cover each and every potential act that may or may not constitute intimidation or harassment. However we were quite certain that the glaring and muttering that we found proved was intimidating and constituted serious harassment of a more junior employee".

78. As to the second charge complaint is made that the "behaviour which the panel deems inappropriate" is not spelt out and identified. I am in no doubt that by this stage of the proceedings all parties knew what was being found. As Mrs Afoakwa put it -

> "There was plenty of evidence within the statements that Mr Dermott had made highly inappropriate comments about the underwear worn by female colleagues and indeed Mr Dermott agreed that he had done so. Furthermore some of the comments made by Mr Dermott to and about other female colleagues went well beyond acceptable banter".

Miss Takhar said -

> "I do not consider that it is acceptable for a manager to make comments about the underwear of female employees or to invade their personal space. I am also firmly of the view that giving presents to some employees but not others is a divisive practice by any manager and can easily been seen as favouritism".

Mr Parsons said -

> "Mr Dermott may have perceived his comments to be harmless and indeed a number of witnesses said that they considered Mr Dermott was harmless, in so far as his intent was concerned when making such comments. However a significant number of witnesses did not consider his comments to be harmless and they expressed concern".

He also thought there was clearly a risk that present buying would be seen to be divisive and likely to imply favouritism.

79. In my judgment the criticisms of the wording of the finding are indeed over legalistic. At its highest Mr Parsons showed uncertainty at times in his evidence about that part of the decision relating to the second allegation beginning with the word "secondly". He said that it was part of the "inappropriate behaviour" as they perceived it, but it was also spelt out to make it clear that this was an area which needed to be addressed, as it was supposed that after this decision Mr Dermott would be returning to the work

place. He accepted it "may have been better expressed" but it was an example of inappropriate behaviour, because he (Mr Dermott) did not see it as such we needed to spell it out. In re-examination he re-iterated that the inappropriate behaviour in the second allegation was all the information in the investigation report principally about leaning over female staff members, talking about dress, the use of inappropriate language and innuendo and familiarity with certain members of staff.

80. My conclusion is that there is no breach of duty established either in relation to the disciplinary process, the decision reached or the articulation of that decision.

The Appeal Process: paragraph 27 (a) – (d)

81. On 19 July 2005 the claimant submitted a medical certificate to the effect that he was unfit for work for three months due to "stress symptoms". On 26 September he submitted written grounds of appeal against the disciplinary panel decision.

82. He was invited to meet with the Defendants' Occupational Health Service about his fitness to return to work, and on 26 October Dr Chait, an Occupational Health Physician, stated that he was not fit to attend a return to work interview or any hearing; this was based on the opinion of Dr Watts a private Psychiatrist whom the Claimant had been attending. On 16 December 2005 Mr Dermott wrote to the Defendant saying he would say when he was well enough to return to work and proceed with the appeal.

83. Through much of 2006 matters came to a halt due to an attempt to settle issues between the parties about the terms on which Mr Dermott might leave the service of the Defendant by way of mediation at ACAS. That broke down in October when the claimant's solicitors produced a substantial schedule of damages based on a claim for personal injuries and the appeal was fixed for 13 March.

84. One point taken is that the Defendant should have allowed him to be represented at that appeal by his friend and current leading counsel Mr Hendy. It is accepted that there is no right in the procedure to legal representation but it is suggested there was a discretion which should have been exercised in favour of the application. Between 29 November 2005 and 27 April 2007 there was protracted correspondence on this issue. On at least six occasions the Defendants said in clear terms that they would not allow legal representation. Mr Dermott maintains through the entire period of the appeal process he was unable to obtain any form of union representation, which I find surprising though it is right to say that none of the union witnesses were questioned about it. On the date fixed for the appeal the Claimant did not attend but it was accepted that he had not received notice of the adjournment of the appeal date which his then solicitors should have sent him.

85. The first hearing took place on 30 April and I find it was in the words of Mr Tenconi, clerk to the appeal, chaotic. One major problem was whether certain councillors could give oral character evidence in support of the appeal. Three in particular were keen to do so. Cllr Dharmarajah was one, and he had been told that he could not do so and appears to have accepted that advice. There were also Cllrs Ashton and Cowan who were important figures in the council. All were members of the ruling Conservative group. Cllr Ashton was married to the deputy leader, portfolio holder for the planning department and a Justice of the Peace. Cllr Cowan was a former

Mayor of Harrow. A considerable debate raged as to whether they could give character evidence at all and if so on what terms. There is no doubt that Cllr Ashton had initially been told by the Director of Legal Services that there was no reason why she could not.

86. However on 26 April Mr Tenconi on instructions from above wrote to her saying that her evidence would be admitted in writing but that she would be "not expected to attend". When she read this she said she felt very strongly about the matter, and was extremely annoyed and unhappy. Cllr Champagnie was designated chair of the appeal panel. She herself was a strong character and had stood for Mayor of London. Cllr Ashton challenged the email from Mr Tenconi and said she was intending to appear at the hearing and she duly did, together with Cllr Cowan and for good measure Mr Hendy armed with 3 lever arch files of material to support the appeal.

87. All three of the Councillors were "strong willed individuals" said Gill Coule (formerly Travers) a solicitor then working in the department. Linda Cohen another solicitor had provided a written legal opinion to the effect that it was unconstitutional and improper for Councillors to involve themselves at all in giving evidence in such circumstances. Mr Hendy says that was plainly wrong. I am not able to agree; it seems to me to have been at the very least an arguable and reasoned position for her to have taken.

88. At all events the hearing started in closed session with the panel and Mr Tenconi and eventually Miss Cohen, and there was about a two hour discussion most of which seems to have been about the question of the councillors giving evidence. Ms Champagnie expressed her concern about the behaviour of Mrs Ashton. It was eventually resolved that a compromise be struck between the officials' view and the councillors' wishes, namely that they could attend and give evidence, but only by way of reading out pre-submitted written witness statements. A shorter discussion took place which resolved again not to allow a right of audience to Mr Hendy and to require him to leave the premises (which he duly did).

89. The parties then entered at about eleven o'clock. Mr Dermott had produced the 3 files named A, B and C and the representative of the council, now Mrs Cureton-Williams, expressed concern about what she thought was a "new appeal". She unsuccessfully asked the panel to strike it out which was refused but she was given further time to respond to it and the matter was adjourned. The panel also announced its decision about the giving of character evidence.

90. When this meeting came to an end I am satisfied there was a major argument between Councillors Ashton and Champagnie - a "blazing row" as Cllr Cowan (now deceased) described it to Mr Dermott later. I reject Cllr Ashton's evidence about this episode. I am satisfied that she was indeed incensed and saw no reason why her wings should have been clipped in this way. The only significance of this major row was that it was an unseemly event, as Mrs Coule described it, and potentially constituted a political embarrassment to the majority group on the council with two of its senior members openly and loudly arguing with each other in a public place.

91. The significance for this action is that the result of these events was that a decision was, I find, taken at the highest level of the Council to remove Cllr Champagnie from the appeal panel, as seems likely because she had lost control of the appeal process.

She was approached by the council leader and asked to stand down which she declined to do unless the other two members did the same. They agreed to do so. Therefore the need arose for a new panel of three.

92. There is no doubt in my mind that steps were taken to conceal all this from Mr Dermott. When Mr Tenconi, himself not fully in the loop, subsequently went about the business of fixing a new date, acting on the instructions of those higher up he gave the clear impression that the same panel would hear the appeal. This persisted until his letter of 26 July in which he apologised for the delay in replying to earlier correspondence which he said had been "due to difficulties with finding a suitable date for your hearing".

93. The letter then continued

> "In light of the problems of finding dates for the hearing with the existing panel membership, and due to the amount of time which has elapsed since your last hearing, your appeal will now be heard by a new panel of members".

He then proposed a new date of 15 August.

94. This letter was palpably untrue as Mrs Coule says (she no longer is employed by the Defendant). Her recollection of the position was that the whole episode constituted an embarrassment for the ruling party and that it was not advisable or necessary to wash this dirty linen in public. She also thought that the junior staff were to be kept in the dark. She sought to justify this by saying that those who took this decision wished to avoid any possible allegations of bias against Cllr Champagnie following her dramatic disagreement with her council colleague.

95. Mr Dermott was not taken in. He demanded disclosure under the Freedom of Information Act of all documents relating to the change of the panel which in due course revealed the true position.

96. Mr Hendy categorises all this as "secret manipulation" of the panel which in a sense it is. But I am satisfied that it was not in an attempt to harm or prejudice the Claimants case. It was indeed to avoid political embarrassment and not to install another panel more amenable to officials advice as to the inadmissibility of councillors' evidence. But the matter has to be viewed objectively, as the cases earlier cited state, and motive is not important.

97. This was in my view a sufficiently serious breach of the duty to act fairly under the terms of the disciplinary procedure to constitute a breach of the implied contractual term of good faith. It was a lie told to Mr Dermott on an issue where he was entitled to be told the truth, and that was so even though he had no "right" to dictate or even have a say in the membership of the panel concerned.

98. From the 19 September 2005 he had a certificate declaring him unfit for work for 3 months due to "stress symptoms" and by the end of October 2005 the Defendant's OH physician, who had seen the views of Dr Watt, and therefore knew he was consulting a psychiatrist, said he was unfit to be interviewed or play any part in the appeal

process. I consider the Hatton threshold test is passed by this time. This breach of duty is therefore proved, subject to the issue to which I now turn.

Causation

99. There seem to me to be four phases over which the developments of Mr Dermott's psychiatric symptoms need to be considered. The first is from the beginning of the grievance procedure on 25 November 2004 until the decision to mount a disciplinary investigation on 13 December 2004. The second runs to 5 April 2005 when the disciplinary investigation proper took place leading to a decision to institute disciplinary proceedings. The third runs until the end of those proceedings on 19 August 2005 and the fourth covers the appeal procedure ending on 19 November 2007.

100. Over the first of these periods the claimant's own description of his response to being told of the grievance and his being sent home was that he was "flabbergasted" and from that time was in what he called a state of high anxiety and stress. He was unable to sleep for more than a couple of hours and was addicted to cigarettes and caffeine. The letter of 27 November caused him immense distress but the relief he felt at the obvious nonsense of the allegation was dispelled by the more cynical view expressed by Mr Hendy. By 8 December he had convinced himself Mr Munro had made up his mind against him. He went to his GP on 18 January saying he was "stressed and distressed" and sleeping poorly, and he told the occupational health representative that he had feelings of panic and anxiety if he even so much as saw an email emanating from the defendant.

101. In the second period he described himself as "absolutely devastated" by Mr Munro's letter of 11 January and after the letter of 31 January he was completely taken aback and wanted the nightmare to end. He said the events of January and February made his health deteriorate further to the extent that he had suicidal thoughts. He had six counselling sessions which he told Prof Fahy he found helpful and he was slightly better in March to May.

102. As to the third period Prof Fahy and Dr Prothero agree there was deterioration in Mr Dermott's symptoms after the finding of the tribunal on 19 August which was the high point of his symptoms. Prof Fahy thought that from late 2005 the symptoms had receded to the mild end of the clinical spectrum where they lay, he thought, on the borderline of clinical significance.

103. The respective psychiatric experts reached agreement that the claimant was vulnerable to the development of further depression if subjected to stress, by virtue of his previous depressive illnesses. They differed as to the description of his illness in 2005. Dr Prothero called it a depressive episode and Prof Fahy an adjustment disorder with anxiety and depression. But both agreed that his mood had varied and his symptoms were at their worst in 2005 and that by 2009 he was suffering mild symptoms on the borderline of clinical significance. The primary cause of his illness was his "suspension and the disciplinary processes".

104. The doctors were asked what would have happened had the original complaint taken place and been handled with the correct procedures being followed. Dr Prothero thought that Mr Dermott would not have fallen ill as he would have "perceived the

process as being fair". In view of his stated reaction to the grievance I find it very unlikely that Mr Dermott would ever have felt that. Prof Fahy considered that his prior vulnerability was such that, combined with the serious and humiliating nature of the allegations and the inevitable stresses of the process that followed, he would have developed depressive symptoms in any case.

105. I prefer the view of Professor Fahy who struck me as the more impressive witness. He explained the rationale of his opinion in this important area of disagreement in what seemed to me a coherent and convincing way. He based it on two strands of evidence namely the chronology of symptoms given by the claimant over the relevant period combined with his previous reaction to life events, and his lengthy history of stress related symptoms leading to his agreed 70% probability of suffering further psychiatric illnesses at some stage in his life in any event. Dr Prothero's approach seemed to me looser and more impressionistic. I was not impressed with his stance that the initial allegations were not that serious to the claimant, since they plainly were. Shown the occupational health note of 2 February 2005, about Mr Dermott's reaction to emails from the defendant, after a long pause he said he did not think that changed his answer. As to their differences over diagnosis at various times at one stage Dr Prothero was saying that on the two occasions that he examined him in 2006 he was "seriously ill" although his actual diagnosis was mild to moderate depression. As to whether Mr Dermott was displaying an increasing lack of resilience over his recent psychiatric history he would not accept that from about 2000 he was demonstrating this, as the records to my mind seem clearly to show, and I thought he was not convincing in his answer.

106. The position therefore seems to me to be that if there was a proven breach of duty in the summer of 2007 relating to the change of the panel member for the appeal, and I have found there was, it is not possible to identify any material or non-negligible impact or effect upon the claimant's then condition. All the evidence is that he was either stable from 2006 to the present time with as Prof Fahy put it "occasional blips" or as Dr Prothero put it fairly stable from 2006 and there was no deterioration between 2007-2009.

107. As for the remainder of the appeal procedure, I am sure Mr Dermott had lost interest in it as the answer to his problems. New solicitors sent a detailed pre- action letter of claim on 8 November 2007 and confirmed that he was no longer participating in the appeal. It went ahead and succeeded to the extent that the sanction was reduced from a final to a first warning, but the matter was by then moot. I do not consider the criticisms of the panel's finding well made, but will not in the circumstances add to the length of this judgment by saying more than that.

108. In this class of claim the burden lies on a Claimant to prove as a matter of probability that the breach of duty proved has made a material contribution to the continuation or worsening of his then current psychiatric symptoms, however they fall to be categorised, which were themselves due to matters unrelated to any breach. That seems to me to be the effect of Smith LJ's judgment in Dickens v. O2 PLC [2009] IRLR 58 at Para's 40 – 41, relying on the Court of Appeal's decision in Bailey v Ministry of Defence [2009] 1 WLR 1052 at 46. I cannot be satisfied that the legitimate criticisms of the Defendant's conduct in relation to the appeal process probably caused or made a material contribution to any discrete or discernible deterioration in the claimant's psychiatric condition or health.

109. For the reasons I have set out above the claim for damages and a declaration must be dismissed.

110. It will be apparent that I have not dealt separately with the general allegation that the long delays in this affair are the result of breaches of duty by the Defendant. It follows from my findings on the evidence that I do not consider they were. In general the Defendant was doing what it could to progress the matter, though some delay in the mid-summer of 2007 was probably caused by the breach I have found. It was not causative of any damage, for the reasons I have given.

Judgment ends.

Postscript

Other issues in the case do not fall for decision in the light of the above. Should this judgment be reversed in a higher court that tribunal will be better fitted than I to decide the arguments on the suitability or otherwise of the claim for declaratory relief, and the defence of limitation. Mr Dermott's own evidence on his perception of the reason for a declaration will be apparent from any transcript and can be considered, with the other arguments. Contributory negligence was never in my view a realistic plea, and no time was devoted to it by Mr Warnock.

I have however been asked by Counsel to give certain rulings on the issue of Quantum, should that ever become a relevant issue, and there is a good reason for me to offer my views on those, having had the benefit of seeing the evidence at first hand, particularly Mr Dermott himself and the expert psychiatric witnesses.

As will be apparent from the body of the judgment where the doctors disagreed I preferred Prof Fahy's views. These were that the Claimant had suffered a recurrence of psychiatric symptoms, starting as sub-clinical anxiety/distress at the beginning of 2005 and reaching a peak in August or September of that year, when his mood symptoms could have attracted the diagnosis of a major depressive disorder, but more likely an Adjustment Disorder with Anxiety and Depression (DSM - IV 309.28). From late 2005 they declined in severity and from 2006 to date lie at the border between a mild Adjustment Disorder and no clinically recognisable psychiatric injury.

As for the future he should be treated as being likely to make a full recovery. Had there been no problems between him and the Defendants it was 70% likely that he would in any event have suffered a similar episode of psychiatric disorder at some stage. I would have reflected this factor by treating him for the purposes of the award for general damage for pain and suffering as effectively recovered within say 6 months of the end of this litigation.

The JSB 10th edition bracket most appropriate for his injuries is A (c) moderate injury, and within that bracket I would have assessed the general damages for pain and suffering at £6,500.

Two other issues were raised. There was little or no examination of these issues at the hearing, and what follows is largely speculative and of little value, but as both sides ask me to address it I do so as best I can.

(1) Would he have left the Defendants' employ in any event and if so when? Mr Dermott's evidence was that he wanted to return to work with his head held high and I am sure he sincerely believes that. I doubt if he would, unless offered a new post (see below) Even if the Mann allegation had been investigated exactly as he wanted, without leaving him with any feeling of unjust persecution, and he had been exonerated on all allegations, I cannot accept that to have continued to work in his old post would have been at all attractive to him. Unless he felt he had a strong chance of promotion I believe he would have sought to negotiate early retirement on the best terms available and moved to Oxfordshire at about the time he did.

(2) Would he have applied for promotion within the reorganisation which was in the offing at the time? In 2002 he expressed reservations to Occupational Health about his decision to accept new responsibilities in that reorganisation, which he came to regret, but he did cope with the work which was as I have found arduous and was viewed as a success as Committee Manager. I believe he would have tried for his line manager's job, which is said to have been a possible target, but I cannot say on what little I know about the competition for it that he would probably have succeeded. He must have had an outside chance, but to quantify it further would be a speculative exercise.