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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **01/02/2016**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM AN INDUSTRIAL TRIBUNAL

CAROLINE CONNOLLY

Appellant;

-and-

WESTERN HEALTH AND SOCIAL CARE TRUST

Respondent.

Before Gillen LJ, Weatherup LJ and Weir LJ

WEIR LJ (delivering the judgment of the court)

The Nature of the Appeal

[1] This is an appeal from the decision of the Industrial Tribunal ("the Tribunal") to dismiss the appellant's claim for unfair dismissal. The Tribunal found that despite deficiencies in the conduct of the disciplinary investigation and disciplinary hearing rendering them unfair, the appeal process restored fairness to the disciplinary process as a whole. The appellant appeals on the grounds, inter alia, that the Tribunal erred in not finding the appeal process itself was unfair and that the Tribunal erred in finding that dismissal was a reasonable sanction for appellant's misconduct.

Background

[2] The appellant qualified as a nurse in 2009 at the age of 27 years. She entered employment with the respondent Health Trust ("the Trust") in January 2011 and from 7 February 2011 served as a Staff Nurse, Band 5, in the Acute Medical Unit of the Altnagelvin Hospital. The appellant's terms and conditions of employment, which she had signed when commencing her employment, required the appellant to, inter alia, adhere to and maintain

regulations regarding controlled drugs and the custody and proper administration of medicines.

[3] A report from the appellant's GP, Dr McSorley, dated 26 September 2013, states that the appellant suffered from "suspected asthma" diagnosed in 2007.

[4] It is the appellant's assertion that when she was at work on 4 October 2012 she had cause to use her Ventolin inhaler and this was witnessed by Sister Palmer, the Ward Sister on duty that day. On 7 October 2012 the appellant was again at work. The Ward Sister that day was Sister McGarrigle. The appellant felt the onset of an asthmatic attack but did not have her inhaler with her because she had left it in her car parked near to or within the hospital premises. Sister McGarrigle was not on the ward at the time. The appellant went to the medicine room in the ward, took a Ventolin inhaler which was the property of the respondent Trust, took approximately five puffs from it and then left the inhaler sitting on the desk in the medicine room. The appellant then continued with her duties for the remainder of the shift; she did not on that day inform the Ward Sister nor any other person that she had used the inhaler. Two days later, on 9 October 2012, during a conversation with Sister Palmer about her health and suffering from a cold, the appellant informed Sister Palmer of what had occurred two days previously and that she had used the inhaler from the medicine room. Sister Palmer reported the matter to Raymond Jackson who was the respondent's 'Unscheduled Care Co-ordinator, Emergency Care and Medicine".

[5] Mr Jackson, after an initial meeting with the appellant, formally wrote to her on 10 October 2012 confirming that she was suspended from work with immediate effect pending further investigation of a number of concerns, namely, "conduct, attitude and behaviour at work which could impact on your practice"; "removal of an inhaler from the Ward for your own personal use"; and "argument with a colleague on the Ward on [29 and 30 September 2012]".

[6] The appellant raised a number of health issues and there was a concern that she might not be fit to attend an investigatory hearing. She was referred to the occupational health service by a referral also dated 10 October 2012. Following examination by the occupational health doctor, the appellant was cleared as being fit to work and to attend disciplinary meetings.

[7] An investigatory meeting with Mr Jackson took place on 1 February 2013. The appellant was represented at the meeting by Kevin Bell, a representative from the Royal College of Nursing ("RCN").

[8] Mr Jackson conducted an investigatory meeting with Sister Palmer on 8 March 2013 less than half the notes taken at which related to the inhaler

incident with the majority relating to the other alleged workplace conflicts concerning the appellant. During this meeting Mr Jackson did not endeavour to determine, as far as Sister Palmer's account was concerned, the date or dates upon which Sister Palmer might have observed the appellant using the inhaler (or an inhaler) and the date or dates upon which Sister Palmer understood the Trust's Ventolin inhaler to have been appropriated and used by the appellant. A further investigatory meeting was then held by Mr Jackson on the same date with Sister McGarrigle. Again, the notes of this meeting make little reference to the inhaler incident apart from a very brief mention where Sister McGarrigle advised that if a member of staff had an asthma attack a doctor would normally be there to assess them and, further, that Sister McGarrigle clarified that it was "not normal practice", as she put it, for staff to take an inhaler off the ward. Specifically, Sister McGarrigle was not questioned about any observation or interaction with the appellant which might connect to the appellant's suggestion that she had used the Trust's Ventolin inhaler on 7 October. Reference is made in the notes to the topic of the appellant's health. Sister McGarrigle is recorded as confirming that she did not notice the appellant having an asthma attack over that weekend.

[9] By letter dated 23 May 2013 the appellant was advised by Mr Jackson that a formal disciplinary hearing would take place. The letter stated:

> "The charge the panel will consider are (sic): You removed a Ventolin inhaler from the acute medical unit for your own use."

It will be noted from this that the hearing was not to deal with the other allegations for which the appellant had been suspended.

The letter added:

> "A copy of the disciplinary procedure is attached and I would refer you to Section 6.5 of the procedure, which relates to the range of possible disciplinary actions. This describes the potential sanctions, which a disciplinary panel may consider appropriate depending on the nature of the misdemeanour and ranges from a formal warning to dismissal from your employment."

[10] The disciplinary hearing took place on 12 June 2013 before a panel consisting of Mrs Donna Keenan, General Service Manager for Cardiology and Respiratory, and Ms Marina McShane, Human Resources Manager. The presenting officer was Mr Jackson and the appellant was again represented by Kevin Bell from RCN.

[11] By letter dated 21 June 2013 Mrs Keenan advised the appellant of the outcome of the disciplinary hearing. The panel had determined that the appellant had removed a Ventolin inhaler from the drugs cupboard for her own use which she had admitted to doing and that she had informed Sister Palmer two days later that she had done so because she had felt an asthma attack coming on. The letter continued, "From your response to my questions at the hearing about the symptoms of the attack it was clear that you were not suffering from a full blown acute asthma attack". The letter further made comment that it was unclear whether the applicant had used the inhaler from the medicine cupboard on more than one occasion. The panel viewed the appellant's actions as totally inappropriate and noted that the appellant's refusal to accept same raised concerns about the likelihood of similar behaviour in the future. The panel considered that the unauthorised use or removal of Trust property constituted gross misconduct under the disciplinary procedures; that, given the appellant's lack of insight as to the seriousness of her actions and the possibility of future incidents, a final warning was not appropriate and, due to the irreparable damage caused to the trust and confidence placed in the appellant, the appellant was summarily dismissed with effect from 21 June 2013.

[12] On 26 June the appellant lodged an appeal against the disciplinary panel's determination. This appeal took the form of a re-hearing on 2 December 2013 before Fiona Beattie (Assistant Director of Diagnostics and Clinical Support) and Shirley Young (Assistant Director of Human Resources). The presenting officer was again Raymond Jackson; and this time the appellant was represented by Kathryn Gault of the RCN.

[13] By letter dated 13 December 2013 the appeal panel gave its determination. It confirmed that the undisputed facts established that the appellant had removed the Ventolin inhaler from ward stock for her own use; that she had informed Sister Palmer of this and her intention to replace the inhaler with one of her own and that her actions were wrong. In the appeal panel's view this conduct constituted gross misconduct. Despite her representative's attempts at the appeal hearing to convey the appellant's remorse and full understanding of how the incident impacted on the trust placed on her, the appeal panel concluded that this had not been substantiated. When the appellant had been questioned in person by the panel it had been left with the belief that, because she had continued to attempt to justify why she had removed and used the inhaler, she continued to hold the view that her actions were justifiable in certain conditions. The panel took the view that the removal of medicines was never justifiable, that the replacement of medicines was dangerous and that the appellant's future judgment in such matters was called into question. Furthermore, there was no medical evidence of the appellant having suffered an acute asthma attack and no explanation as to why she had failed to report her medical situation or use of the medicine as a matter of priority; in the appeal panel's opinion the

appellant's explanation was not plausible. In those circumstances the panel upheld the sanction of the disciplinary panel that the appellant be summarily dismissed with effect from 21 June 2013.

The Proceedings before the Industrial Tribunal

[14] Following receipt of the decision of the disciplinary panel the appellant had lodged a claim of unfair dismissal to the Tribunal on 1 July 2013 so that, following the decision of the appeal panel to confirm the decision to dismiss her, that claim proceeded to hearing before the Tribunal on 18 and 19 June 2014. On 10 October 2014 the Tribunal issued its decision dismissing her claim. The Tribunal's decision consisted of 24 pages, much of which were concerned with trying, not entirely successfully, to disentangle what exactly had been the nature and extent of the evidence laid against the appellant in relation to her self-confessed use of the Ventolin inhaler and examining to what extent extraneous material irrelevant to the subject of the hearing but prejudicial to the appellant had been introduced both before the disciplinary panel and the appeal panel. What the Tribunal describes as its "findings of facts" extend over some 14 pages but it is plain that its task was not made easy by the way in which the respondent had conducted its investigation and the two Trust hearings that followed. The following are some examples taken from that section of the decision of the difficulties with which the Tribunal was presented:

> (1) The investigation conducted by Mr Jackson was not specifically directed to the construction of a clear and precise timeline of any material events, circumstances and facts in connection with the allegations which were levelled against the appellant concerning the Ventolin inhaler. Indeed, of the 9 ½ typed pages of notes of the meeting, only 1 ½ pages were devoted to the investigation of the inhaler incident; the remainder related to the other issues of 'workplace conflict'.
>
> (2) At the commencement of the disciplinary hearing on 12 June 2013 Mr Jackson stated to the panel that as part of the investigation his team had met with four witnesses but that as a result of the investigation he had decided that part of the original concerns should be dealt with informally. Statements and notes of meetings with the two witnesses, Sister Palmer and Sister McGarrigle, were with the papers presented to the disciplinary panel. No endeavour had been made to remove or redact any part of the content from the papers which did not relate to the Ventolin inhaler matter. Significantly, the Tribunal observed:
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> > "That other part of the content contained material which was potentially significantly and materially

> prejudicial to the claimant and which dealt with significant issues of workplace conflict. No explanation was afforded to the tribunal as to why this material was nonetheless placed before the disciplinary panel when it had apparently no direct bearing whatsoever upon the disciplinary charges (sic) which the panel was charged with addressing."

(3) The disciplinary panel's note of the proceedings makes various, and sometimes conflicting, references to "an" inhaler and "the" inhaler indicating that there may have been confusion as to whether the appellant had retained the inhaler from the medicine room and was subsequently using it as her own or whether she had left it down in the room after using it on the one occasion. Also, during the course of the hearing, one of the panel members made the observation, much to the objection of the appellant's representative, that the appellant's actions would be considered as theft.

(4) The claimant had informed Sister Palmer that she had taken an inhaler from the ward as she felt that she had an asthma attack coming on. However in her letter of 21 June 2013 conveying the decision of the disciplinary panel, by stating "from your response to my questions at the hearing about the symptoms of the attack it was clear that you were not suffering from a full blown acute asthma attack" Mrs Keenan appears to have been conducting some manner of a clinical assessment as to whether or not the claimant had been having an asthma attack at the material time and attempted to assess the severity or otherwise of any such attack".

(5) When it came to the hearing before the appeal panel there was a rehearing of the matter. Notes were taken of the hearing but not a verbatim record. The Tribunal recorded:

> "There was placed before the appeal panel essentially the same documentation as had been seen by the disciplinary panel save that some documents were subject, in part, to redactions of portions of the text. The redacted portions of the documents consisted of that part of the notes of the disciplinary investigation where such notes referred to the other issues of workplace conflict (as mentioned above) which were matters stated to have been dealt with informally. The tribunal, however, noted that the statements and notes of meetings of Sister Palmer and Sister McGarrigle, were detailed in Section 4 of the report placed before the appeal panel. As far as the tribunal

> understands things (for there was nothing to the contrary adduced in evidence) it appears that unredacted versions of these documents were accordingly made available to the appeal panel. These unredacted documents refer specifically to the other matters of workplace conflict. These are matters which contain material which was potentially significantly adverse to the claimant. No explanation was afforded to the tribunal as to why there was partial redaction only and why some seemingly prejudicial material was permitted to be viewed by the appeal panel members, which latter material had no direct bearing upon the subject matter upon which the disciplinary appeal panel was required to focus".

The Industrial Tribunal's Decision

[15] At the conclusion of setting out applicable principles of law at some length the Tribunal reminded itself of the following matters before proceeding to its application of the law to the facts: that it must not commit the "substitution error" namely, substitute its own determination on the evidence in substitution for that of a panel. (Rogan v SEH&SCT [2009] NICA 47). The potential effect upon the employee is also a relevant circumstance thus, where the employee's reputation or ability to work in their chosen field of employment is in issue, it is all the more important that there shall be a fair investigation into allegations of misconduct. An employer was not expected to conduct a quasi-judicial investigation into allegations of misconduct. Nonetheless any investigation of the material facts must be carefully-conducted and must be conscientious in character. (Ulsterbus v Henderson [1989] IRLR 251).

[16] The Tribunal found that it had grave concerns regarding the investigation conducted by Raymond Jackson. His focus appeared to have been substantially distracted away from the principal issue of the inhaler incident by the detail of the other workplace conflicts; this meant he failed to conduct a thorough and detailed investigation into the Ventolin inhaler matter causing there to be an absence of critical evidence and clarity regarding issues such as the timeline of events and whether the appellant and witnesses were actually talking about the same or different inhalers and what days they were describing. The Tribunal concluded that Mr Jackson had seemingly failed to further the investigation in a full and proper manner. It put the matter thus:

> ".. notably absent is the construction, perhaps, of a clear and precise timeline of all material events and facts concerning the specific allegations against the

> claimant and the clarifying of essential matters with relevant witnesses in regard to such a timeline or sequence of events."

[17] The Tribunal found that this confusion or doubt about "some quite central matters subsisted and indeed went so far as to be incorporated in the outcome letter from Mrs Keenan. Such was the confusion and uncertainty that the exact circumstances of the misconduct were not defined by the disciplinary panel. "Accordingly the inadequacy of investigation appears to have engendered significant residual doubt concerning what is quite a significant issue in the matter". The Tribunal rightly pointed out that it is important that an investigation be proper and thorough "because in many cases there is a fine and quite difficult distinction to be drawn between cases where a dismissal (and very probably the ending of a professional career) ought fairly and properly to be the outcome to matters of admitted gross misconduct and those where a lesser sanction than dismissal is a proper, proportionate and fair outcome, enabling the professional career to continue…".

[18] The Tribunal concluded that, at the stage of the disciplinary hearing, it "harbours considerable doubts about whether the investigation conducted by Mr Jackson fell within the band of reasonable responses of a reasonable employer…His investigation permitted confusion and doubt as to the proper facts, in proper context, to enter into the arena ; this is reflected both in the presentation of the case and also feeds into the way in which matters are expressed in the dismissal letter."

[19] The Tribunal also voiced concerns as to other aspects of the procedural fairness of the proceedings before the disciplinary panel. Firstly, it appears the members of the panel had also on the same day dealt with a formal grievance lodged by the appellant in connection with the workplace conflicts. It felt that there should have been a separation of functions especially in such a large organisation as the respondent. Secondly, the papers placed before the disciplinary panel contained the full investigation of the workplace conflicts; such information, which did not directly concern the specific disciplinary charge levelled against the claimant, might have influenced the panel, consciously or sub-consciously, especially when it came to finely-balanced determination of whether dismissal or a lesser form of sanction was appropriate. Thirdly, the charge indicated to the appellant that she was to face before the disciplinary panel was the 'removal' of the inhaler; but the Tribunal found it to be clear that the disciplinary panel had before the end of its hearing formed a concluded view that the action of the claimant constituted "theft" notwithstanding the claimant's case being that she had briefly appropriated the Ventolin inhaler and used it. Failing to advise the appellant in advance of the hearing that she was to face the graver allegation of 'theft' was procedurally unfair particularly because, as the panel noted, the

respondent's disciplinary procedure has a category of "misuse of Trust property" into which the admitted action of the claimant in using the inhaler might be seen as permitted to fall. It concluded at para 22 that:

> *"Taking account of all the foregoing issues of concern, in what was such a serious and significant process, where a professional career was at stake, these issues bring the matter outside the range of what is fair and what is reasonable. On account of this, the tribunal's conclusion is that the decision to dismiss the claimant was procedurally unfair in the circumstances."* (emphasis supplied)

[20] Having thus found that the disciplinary panel's determination to dismiss was unfair, the Tribunal then considered whether such unfairness in the disciplinary process was subsequently capable of being corrected at the appeal stage of the process. It noted that there is authority for the proposition that a fair and proper appeal may serve to correct procedural deficiencies present in the first part of an employer's disciplinary process. (Taylor v OCS Group Ltd [2006] IRLR 613 EAT). The Tribunal recognised that while other statements that had been before the disciplinary panel had been redacted by the time of the appeal panel hearing it concluded from the documentary evidence that those of Sister Palmer and Sister McGarrigle had not been and were provided to the appeal panel in "full and unredacted form". On this state of affairs the Tribunal said at para 24 of its decision:

> "…. If the tribunal is correct that these two statements were presented in **u**nredacted form, the appeal panel would have seen material which referred to workplace conflict issues between the claimant and another person in both of these statements. Indeed these issues formed by far the majority of the statement of Sister McGarrigle. If this is correct, the appeal panel was accordingly given access to material which appears to be materially prejudicial to the view that might be taken of the claimant. The potential for conscious, or perhaps more importantly, unconscious, influence upon the view that the appeal panel might have taken of the claimant significantly concerns the tribunal. It is difficult for the tribunal to gauge the degree or extent of such potential influence, if there was indeed any, without engaging in a substantial degree of speculation. Accordingly, this emerges as a rather difficult matter and was one which troubled the tribunal in endeavouring to assess whether the appeal was procedurally fair and if the appeal served to

> correct any procedural unfairness engendered in the earlier stage of the process."

[21] The Tribunal dealt with this "difficult" and "troubling" issue in the following way:

> "The tribunal is unable and unwilling to "second guess", as it has been put, the appeal panel members who were present ….in the absence of clear evidence of bias or malice existing, or some other inappropriate attitude or approach being taken or adopted by the appeal panel members. To imply or to import a finding that there was such an adverse approach, in the absence of anything else of substance emerging from the evidence, the tribunal would need to conclude that the inclusion of the material present in the witness statements of Sisters Palmer and McGarrigle was sufficiently prejudicial so as to adversely influence the panel members to such a degree and to such an extent that they moved from a position of possibly imposing a lesser sanction to one where they concluded that dismissal was the only appropriate sanction. The tribunal is unable to conclude that that is the case. Accordingly, the tribunal's decision is that the appeal hearing served to restore fairness to the matter."

[22] The Tribunal therefore concluded that taking everything fully into account the respondent, upon the conclusion of the appeal process, "fairly sanctioned the dismissal of the claimant, taking account of all the circumstances of the matter" and dismissed the appellant's claim.

Review of the Tribunal's Decision

[23] On 20 October 2014 the appellant lodged an application for a review of the Tribunal's decision. The Tribunal held a review, however in a decision dated 23 December 2014, rejected all the grounds for review advanced.

The Appellant's Arguments on Appeal

[24] As a preliminary point, the appellant seeks an extension of time within which to lodge the appeal under Order 3 Rule 5 of the Rules of the Court of Judicature 1980("the Rules"); the time limit being 6 weeks from the date of the Tribunal's decision under Order 59 Rule 4(1)(c). The Tribunal handed down its decision on 10 October 2014 but rather than then lodge an appeal the appellant instead applied to the Tribunal for a review of its decision. The

review decision was as we have said issued by the Tribunal on 23 December 2014 and the appellant lodged her appeal on 3 February 2015.

[25] As regards the substantive appeal, the appellant argues that the Tribunal having found that the respondent's investigation into the incident was flawed and unfair, it was impossible for the appeal hearing, which was based on the same flawed investigation, to correct the failures in that investigation. Being a cornerstone of both hearings the unfair investigation not only rendered the disciplinary hearing unfair, but for the same reason, must have also rendered the appeal hearing unfair, given that Raymond Jackson presented the same flawed investigation to both panels. The result was that neither the disciplinary panel nor the appeal panel had before it the relevant, fair and necessary information to come to a proper conclusion and, therefore, both their decisions to dismiss fell outwith the range of reasonableness.

[26] The appellant also submits that both the disciplinary panel and the appeal panel failed to establish a number of relevant facts about the inhaler incident in particular and, more generally, about whether there was a culture within the hospital of using Trust medicines for personal use (as claimed by the appellant). The Tribunal expressly said that the failure to establish some of these facts by the disciplinary panel caused it concern in relation to the fairness of the proceedings yet the appeal panel equally failed to establish the same facts.

[27] Furthermore, 'misuse of Trust property', the charge levelled against the appellant, falls to be considered under both 'Misconduct' and 'Gross misconduct' within the Trust's disciplinary policy. The differentiation between these categorisations was not considered by the investigation, the disciplinary panel or the appeal panel. Without a proper analysis by the investigation or the panels as to why the inhaler incident fell to be gross misconduct rather than merely misconduct, especially in light of the appellant's assertion that other staff members used Trust medicines for personal use, it is not possible to determine whether summary dismissal fell within the range of reasonable responses.

[28] The appellant further argues that Article 6 ECHR is engaged in the present case due to the repercussions on the appellant's future career (although the appellant does not give any details as to how it is contended this should have additionally or differently impacted on the Tribunal's consideration of the fairness of the procedure).

[29] The appellant submits that the Tribunal erred in finding that it could not "second guess" the influence the prejudicial material in the witness statements may have had on the appeal panel, especially in circumstances where the Tribunal had already found that the material (together with the

unredacted investigation papers) had had a capacity to influence the disciplinary panel's decision. The Tribunal's assertion that it was for the appellant to prove the adverse effect it had on the appeal panel rendered the appeal process unfair.

The Respondent's Arguments on Appeal

[30] In relation to the appellant's application for an extension of time, the respondent highlights that the 6 week time limit is imposed by Order 60B Rule 2(1) of the Rules and that the explanatory notes which accompany the Tribunal's decision specifically advise that the time limits for appeals are not extended because an application has been made to the Tribunal seeking a review of its decision. The respondent also emphasises that the appellant did not act promptly in the present case; she did not seek legal advice after receiving the Tribunal's substantive decision; despite the review decision being issued on 23 December 2014 the appellant did not seek legal advice until 13 January 2015; and then, even at that, she did not lodge a Notice of Appeal until 12 March 2015. This was a total of 17 weeks from the substantive decision. Moreover, in all the circumstances, the Trust is likely to be prejudiced given, inter alia, it is now 3 years since the inhaler incident occurred thereby reducing the cogency of witness evidence and also the appellant's post has long since been filled by another nurse.

[31] In relation to the substantive issues, the respondent submits that there is no question of law stated in the Notice of Appeal; at most, the grounds of appeal could be considered as amounting to an allegation that the Tribunal decision was legally perverse. Whilst perversity can amount to a question of law, in such circumstances the appeal should only succeed where there is an overwhelming case that no reasonable Tribunal could have come to the decision which the Tribunal did, see Spence v Department of Agriculture [2011] NICA 27.

[32] The respondent further submits that the Tribunal was never asked to adjudicate on whether the conduct complained of was capable of amounting to gross misconduct, nor does it appear in the Notice of Appeal.

[33] In relation to the investigation, the respondent argues that the requirements on an employer are less onerous where the employee admits to the misconduct alleged, see Harvey on Employment Law, Division D1, paras 1461-1462. In the present case the appellant fully accepted from the outset that she had used the Ventolin inhaler thereby rendering it unusable by patients. In any event, the appeal hearing restored any unfairness at the earlier stages of the disciplinary process. In this respect the Tribunal considered the law appropriately and arrived at the conclusion that the appeal process had restored fairness; a conclusion which was reasonable in the circumstances.

[34] As regards the Article 6 ECHR point, the respondent contends that this adds nothing to the detailed employment law rights which the appellant had and that it is difficult to discern the import of the appellant's argument on the matter.

Consideration

[35] We will firstly examine the merits of the case and turn thereafter to the application for extension of time for bringing this appeal. We have at the outset reminded ourselves, as we also did recently in Stadnick-Borowiec v Southern Health and Social Care Trust and another [2016] NICA 1 at para [50], that on an appeal from a Tribunal this court does not conduct a rehearing and, unless the factual findings made by the Tribunal are plainly wrong or could not have been reached by any reasonable Tribunal, they must be accepted by this court. Provided there was some foundation and fact for any inference drawn by a Tribunal the appellate court should not interfere even though it might have preferred a different inference.

[36] Bearing those principles in mind, this court has carefully examined the approach taken by the Tribunal to both the proceedings before the disciplinary panel whose decision to dismiss the appellant it found to be "procedurally unfair" and the subsequent appeal process in which it found that "the appeal hearing served to restore fairness to the matter". We are unable to discern the factual basis for the latter conclusion. We have set out at para [14] some of the examples of failings identified by the Tribunal. Firstly, the inadequate and unsatisfactory manner in which the Trust's investigator had carried out his investigation, had prepared the evidence for the disciplinary panel and had provided to it material potentially significantly prejudicial to the appellant. Secondly, the unresolved confusion as to what exactly the appellant was alleged to have done with the Ventolin inhaler – had she used it and then left it down in the medical room or was she accused of taking it away? Theft was hinted at by a panel member but not established. This latter question was crucial to the issue as to whether her conduct amounted to misconduct such as to justify her dismissal. Thirdly, documents placed before the disciplinary panel contained prejudicial references to other disciplinary matters concerning the appellant which were live at or about the same time as the Ventolin matter but which it had been decided should be dealt with informally and which had no relevance to the Ventolin matter and should not have been mentioned in connection with it.

[37] The Tribunal's decision does not explain, except in one small respect, how these crucial matters had been addressed so as to enable it to conclude that "the appeal hearing served to restore fairness to the matter". The inadequate investigation remained as inadequate as ever, the uncertainty surrounding the precise allegation made against the appellant and therefore the applicable range of appropriate sanctions had not been clarified and,

whilst some prejudicial material that had been before the disciplinary panel had been redacted by the time of the appeal hearing, the statements of Sisters McGarrigle and Palmer had not been. We have set out the Tribunal's discussion of this issue at length at paragraph [20] and in particular its conclusion that:

> "This emerges as a rather difficult matter and was one which troubled the Tribunal in endeavouring to assess that the appeal was procedurally fair and if the appeal served to correct any procedural unfairness engendered in the earlier stage of the process."

[38] This court is not satisfied that the Tribunal, having identified the problems, addressed them adequately or at all. We have set out at paragraph [21] the Tribunal's process of reasoning leading to its conclusion that fairness had been restored by the appeal hearing. That process ignored the worrying defects and uncertainties that the Tribunal had itself plainly identified and made no finding that any of them had been remedied or adequately remedied. Rather it decided that in the absence of clear evidence of bias or malice or some other inappropriate attitude or approach being taken or adopted by the appeal panel members the Tribunal would need to conclude that the material wrongly placed before the Tribunal in the statements by the sisters was sufficiently prejudicial as to adversely influence the panel members to impose the more serious sanction of dismissal rather than a lesser one.

[39] This court considers that the Tribunal's reasoning and its resultant conclusion cannot be supported. It had previously acknowledged that the degree of extent of such potential influence was impossible to gauge yet its conclusion was that, absent proved bias, malice or other inappropriate approach by the panel members, it should be assumed that the influence was not such as to lead to inappropriate dismissal. This is a most surprising conclusion given the approach that the Tribunal had earlier taken to the fairness of the disciplinary hearing. Moreover, the Tribunal in reaching its conclusion entirely failed to consider the other problems of the unsatisfactory investigation and the persisting lack of clarity as to what exactly was alleged against the appellant as it had also itself earlier identified and of which it had been highly critical. We accordingly conclude that the Tribunal's decision that "the appeal hearing served to restore fairness to the matter" is unsupported by the material that was available to it which rather pointed in the opposite direction and the decision was in that sense perverse.

[40] We now turn to the application for an extension of time to bring this appeal. Under Order 59 Rule 4(1)(c) it ought to have been served within 6 weeks of the decision but was not in fact served for some 14½ weeks. It is

submitted on behalf of the appellant that this occurred because, after the Tribunal's decision issued on 10 October 2014, the applicant exercised her right to request the Tribunal to review its decision which it agreed to do and issued a decision on 23 December 2014 declining to alter its decision. Thereupon the appellant, who had been represented and assisted up to that point by lay persons, promptly took legal advice and issued the Notice of Appeal on 3 February 2015 without waiting for the outcome of her legal aid application. The respondent pointed out that the appeal notice was served out of time and declined to consent to an application for extension of time. Such application was made on 12 March 2015.

[41] The position is that the time for appealing runs from the date of the Tribunal's decision and is not postponed or extended by any review that the Tribunal may undertake of its decision. This fact appears in the several pages of explanatory notes that issue with the decision of an industrial tribunal but, while particular attention is drawn at the outset of those notes to the time limits for appeal in paragraph 6, 10, 11 and 14 of the notes, attention is unfortunately not so drawn to the important matters at paragraph 15 on the next following page which include the following:

> "The time limits for appeals … are **not** extended because an application has also been made to the industrial tribunal to review its decision."

[42] The principles governing an application for extension of time to appeal to this court were reviewed and re-stated by Girvan LJ in Magill v Ulster Independent Clinic [2010] NICA 33. The court has power under Order 3 Rule 5(1) and (2) to extend time after the expiry of the relevant time limit as is the present case. At para [12] he set out the principles identified by Lowry LCJ in Davis v Northern Ireland Carriers [1979] NI 19 and at para [13] Lord Lowry's comments on the relevance of examining the strength of an appellant's case when deciding whether to grant an application to extend time:

> "[12] In Davis v Northern Ireland Carriers [1979] NI 19 Lowry LCJ reviewed the authorities and enunciated the relevant applicable principles in relation to an application to extend time for an appeal. At 20A-D he stated:
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> > "Where a time limit is imposed by statute it cannot be extended unless that or another statute contains a dispensing power. Where the time is imposed by Rules of Court which embody a dispensing power such as

> that found in Order 64 Rule 7 the court must exercise its discretion in each case and for that purpose the relevant principles are –
>
> (1) whether the time is sped; a court will, where the reason is a good one, look more favourably on an application made before the time is up;
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> (2) when the time limit has expired, the extent to which the party applying is in default;
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> (3) the effect on the opposite party of granting the application and, in particular, whether he can be compensated by costs;
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> (4) whether a hearing of the merits has taken place or would be denied by refusing an extension;
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> (5) whether there is a point of substance (which in effect means a legal point of substance when dealing with cases stated) which could not otherwise be put forward; and
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> (6) whether the point is of general and not merely particular, significance.
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> To these I add the important principle;
>
> (7) that the rules of court are there to be observed."

[13] In that case Lowry LCJ concluded his judgment in the following terms which have a clear resonance in the present case:

> "If we had left the case here my view would undoubtedly have been that the delay had not been satisfactorily explained and, that all the more so because there had been a hearing on the merits (which must, judged by the very exhaustive and obviously careful written decision, have both been full and painstaking), the application should be refused.
>
> We decided, however, that in order to do justice it would be better to find out the strength of the appellant's case, so far as it was founded on points of law and therefore remained capable of being pursued by way of case stated. We therefore discussed the legal merits of the case in some detail … It is not, however, necessary to expatiate on this branch of the case, if only because it may come before this court in another guise. I am content to say that nothing emerged to make me feel that justice demanded an extension of time in face of the principles to which I have already adverted."

[43] In this case, having examined the merits, we have concluded above that the Tribunal's decision that the appellant's dismissal was not unfair is not well-founded. As a result, if time for this appeal were not extended the appellant would be deprived of the potential to retain her employment and not improbably, given the finding of gross misconduct warranting dismissal, the ability to practise her profession in future. She and her legal advisors proceeded with dispatch once they came to appreciate that, rather counter-intuitively, time for appeal continued to run while the review application and its determination were in train. That this misunderstanding was shared by the appellant's solicitor appears from an e-mail sent by her to the respondent's solicitors on 17 February 2015. While unquestionably the rules of court (and other procedural requirements) are there to be observed as much by litigants in person as those who are legally advised, we consider that the delay in this case was not excessive, is understandable if not justifiable, did not prejudice the respondent and that, if time were not extended, the appellant would suffer permanent injustice arising from the Tribunal's

decision as it presently stands. Accordingly, in all the particular circumstances of this case we have decided that the balance of justice lies firmly in favour of extending the time for the bringing of this appeal to the date of actual service notwithstanding that the application for extension was not made until after the expiration of the 6 week period for serving notice of appeal.

[44] Accordingly we extend time and order that the decision of the Tribunal be set aside and that the matter be remitted to a differently constituted Tribunal for rehearing.