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# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs A Oluwaseye  
**Respondent:** Barts Health NHS Trust  
**Heard at:** East London Hearing Centre  
**On:** 1 – 3 February 2017  
**Before:** Employment Judge Goodrich

## Representation

**Claimant:** Mr Maurice Rifat (Counsel)  
**Respondent:** Mr R Moretto (Counsel)

# ORDER AND JUDGMENT

The judgment of the Tribunal is that:-

1. The name of the Respondent is amended from “Newham University Hospital (Bart Trust)” to “Barts Health NHS Trust”.
2. The Claimant was not unfairly dismissed.

# REASONS

## *The Claim and the Issues*

1 The background to this hearing is as follows.

2 The Claimant undertook ACAS early conciliation between 24 May 2016 and 6 July 2016. She presented her Employment Tribunal claim form on 6 July 2016. She gave her dates of employment as being 1 October 2010 to 1 March 2016.

3 The Claimant ticked in box 8.1 that she was bringing an unfair dismissal claim.

4 By letter dated 7 July 2016 the Claimant solicitors applied to bring an additional claim of race discrimination. By letter dated 28 October 2016, however, the solicitors notified the Tribunal and the Respondent's solicitors that she would no longer be pursuing her discrimination claim and would be proceeding with her unfair dismissal claim only.

5 A Preliminary Hearing took place before Employment Judge Prichard. Initially the case had been listed for one day only. He listed the case for a three day hearing, made Case Management Orders; and confirmed that the race discrimination claim was no longer being pursued.

6 At the outset of the hearing I discussed with the parties' representatives what the issues for me to decide were. They are agreed as being as follows.

*Unfair dismissal complaint*

7 The Respondent accepts that the Claimant is entitled to bring an unfair dismissal claim and no jurisdictional issues arise.

8 It is agreed that the Claimant was dismissed by the Respondent. The Respondent contends that the reason or principal reason for the Claimant's dismissal was on grounds of conduct, namely the viewing of a video at work of child rape and the making of inappropriate comments in respect of the video and the failure to report the incident.

9 The Claimant accepts that conduct was the reason or principal reason for the Claimant's dismissal.

10 The Claimant contends and the Respondent disputes that the dismissal was both procedurally and substantively unfair. The Claimant's case is that the Respondent did not have reasonable grounds for their belief that the Claimant had committed gross misconduct; and did not conduct as much investigation as was reasonable. Additionally, the Claimant contends and the Respondent disputes that even if the Respondent did have such reasonable beliefs and conducted as much investigation as was reasonable, the sanction of dismissal lay outside the band of reasonable responses a reasonable employer might have adopted.

11 If successful in her unfair dismissal claim the Claimant seeks reinstatement or re-engagement with the Respondent; and, failing that, compensation.

12 The Respondent would resist such an order and will contend that it would not be practicable to make such an order because trust and confidence on the employer's part has broken down and the Claimant has contributed to her dismissal to an extent where it would not be just to order reinstatement or re-engagement.

13 If the Claimant's dismissal is held to be unfair the Respondent would contend that the Claimant would, or might, have been dismissed if fair procedures had been followed; and would contend that the Claimant caused or contributed to her dismissal. The Claimant would resist any such submissions.

*Other matters*

14 I discussed with the parties whether the hearing would be to consider liability only or, if appropriate, also remedy. After hearing their representations (both being agreed that the hearing should not include considering evidence on remedy) I notified the parties that this hearing would be to consider liability only, together with evidence and submissions on “*Polkey*” issues and contributory fault.

15 Other matters of note which occurred during the course of the hearing were as follows.

16 Mr Rifat informed me that he had only received the witness statements this morning (the first morning of the hearing). The Respondent was late in complying with Judge Prichard’s order for exchange of witness statements to be on Friday 13 January 2017. I understand that they were provided to the Claimant’s solicitors one week before the start of this hearing, although I understand they were not passed on by them to Mr Rifat.

17 Additionally Mr Rifat did not have some of the documents that had been added to the original trial bundle. I was informed that these were additions to the bundle that had been supplied to the Claimant’s solicitors but that they had not been provided by the Claimant solicitors to Mr Rifat. After hearing representations from the representatives I adjourned the first day’s hearing at 3.40pm in order to allow Mr Rifat an opportunity to consider the documents, take instructions if needed and prepare any necessary questions arising from the documents he had not seen until that point.

18 Mr Rifat was not seeking an adjournment of the case.

19 At the beginning of the second day I asked Mr Rifat for clarification as to whether part of the case of the Claimant was that even if I were to decide that the Respondent did have reasonable grounds for believing their reasons for dismissal and had conducted as much investigation as was reasonable into these matters the Claimant would contend that the dismissal lay outside the band of reasonable responses in the sense of being too harsh. He confirmed that he did and I added a sentence to the list of issues accordingly.

***The Relevant Law***

20 Section 98(4) Employment Rights Act 1996 provides:

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

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

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

the case.”

21 In the well-known (to employment lawyers) case of *British Home Stores Ltd v Burchell* [1978] IRLR 379 EAT, guidance was given that in misconduct cases, when determining whether the dismissal is unfair, an employment tribunal has to decide whether the employer who dismissed the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First, there must be established by the employer the fact of that belief; that the employer did believe it. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. Third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

22 In considering the fairness or unfairness of the dismissal a Tribunal will usually consider both the fairness of the procedures adopted by the employer; and the fairness or unfairness of the sanction, or penalty, of dismissal. In respect both of the procedures adopted and the sanction of dismissal the function of the Employment Tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

23 In the case of *Newbound v Thames Water Utilities Ltd* [2015] IRLR 734 CA guidance was given, however, that the band of reasonable responses is not intended to be a matter of procedural tick boxing; and that an Employment Tribunal is entitled to find the dismissal to be outside the band of reasonable responses without being accused of placing itself in the position of the employer.

24 In the case of *Salford Royal NHS Foundation Trust v Roldan* (2010) IRLR 721 CA, referring to the case of a A v B, it was held that it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where the employees reputation or ability to work in his/her chosen field of employment is potentially apposite.

25 In the case of *Santamera v Express Cargo Forwarding* [2003] IRLR 273 it was held that there is no rule of law which renders it incumbent on an employer, when dismissing an employee for misconduct, to arrange a hearing which gives the employee who is liable to be dismissed the opportunity to cross-examine the person making the complaint. Cross-examination of complainants by the employee whose conduct is in question is very much the exception in workplace investigations of misconduct. There may be cases, however, in which it will be impossible for an employer to act fairly and reasonably unless cross-examination of a particular witness is permitted. The issue under section 98(4) is always reasonableness and fairness.

26 An Employment Tribunal will take into account, where it considers it relevant, the ACAS Code of Practice on disciplinary and grievance procedures.

***The Evidence***

27 On behalf of the Respondent I heard evidence from the following witnesses:

27.1 Ms Clare Hughes, lead named nurse for safeguarding children for the Respondent.

27.2 Ms Felitta Burney-Nicol, Associate Director of Midwifery/Head of Midwifery for the Respondent.

27.3 Mr Chris Pocklington, Managing Director for Newham University Hospital (which forms part of the Respondent's group of hospitals).

28 On behalf of the Claimant I heard evidence from the Claimant herself, Mrs Abidemi ("Abi") Oluwaseye.

29 In addition I considered the documents to which I was referred in the bundle of documents provided to me.

***Findings of Fact***

30 I set out below the findings of fact I consider relevant and necessary to decide the issues I am required to decide. I do not seek to set out each detail provided to me. Nor do I seek to resolve every dispute of fact between the parties. I have, however, considered all the evidence provided to me and I have borne it all in mind.

31 The Claimant, Mrs Abi Oluwaseye, was employed by the Respondent from 8 November 2010 until she was summarily dismissed by the Respondent at the conclusion of a disciplinary hearing on 1 March 2016.

32 The Claimant worked as a nurse in maternity wards of the Respondent.

33 Up to the date of the events on 8 April 2015 that gave rise to the Claimant's dismissal she had an unblemished disciplinary record.

34 The Respondent, Barts Health NHS Trust, is a large employer – I do not know exactly how large as their representatives failed to fill in boxes 2.6 – 2.9 of the ET3 response form.

35 On 8 April 2015 events took place that were to give rise to the dismissal of the Claimant and Ms Amudat Popoola; and disciplinary warnings to Ms Grace Asare and Ms Bernice Mowatt.

36 Exactly what took place is disputed by the parties. What is agreed, however, is the following.

37 The Claimant was working on a late shift and was in the staff break room having a break.

38 Also present with the Claimant in her break room were two midwives; Ms Grace Asare and Ms Bernice Mowatt.

39 Ms Mowatt was the most senior of those individuals present and was in charge of the maternity unit on that shift.

40 Whilst present in the staff room Ms Popoola told those present that she wanted to show them a video. The video was viewed to a greater or less extent by Ms Asare, Ms Mowatt and the Claimant.

41 The video on Ms Popoola mobile telephone showed a young child (thought to be under 5 years old) being raped by an adult male.

42 A student nurse, Ms Southern, entered the room and also saw the video, or a part of it.

43 None of Ms Asare, Ms Mowatt, the Claimant or Ms Popoola reported the incident to their superiors, nor any external organisation such as the police.

44 Ms Southern raised concerns with her university supervisor the following day. Those concerns were escalated to the Respondent and brought to the attention of Ms Cathy Falvey-Browne, Consultant Midwife/Supervisor of Midwives for the Respondent.

45 Ms Southern gave a statement to the Respondent on 10 April 2015. The main points made in her statement were the following:

- 45.1 When she went into the staff room midwives Mowatt, Asare and Popoola and RN Abi (the Claimant) were having a discussion about something.
- 45.2 She asked them what they were talking about and Abi said something along the lines of "there is a video of a child having sex with a man" and briefly showed her the phone.
- 45.3 This showed a man having penetrative anal sex with a small female child who looked about 4 or 5.
- 45.4 She (Ms Southern) said that she should not have it as it is illegal and (the Claimant) explained that it was Amudat's (Popoola) phone.
- 45.5 Nurses Mowatt and Asare were looking away and looking distressed.
- 45.6 Abi continued to watch the video and said things like "why is the child letting the man do that?" and other comments. RN Abi continued to watch the video and said "she looks like she is enjoying it" or words to that effect.
- 45.7 RN Abi flashed the screen to her again and I (Ms Southern) said it was disgusting; and RN Abi was also saying it was wrong and "Lord have mercy" or words to that effect. RN Abi continued to watch the film and

turned the sound on briefly and RN Mowatt asked her to turn it off.

- 45.8 RN Abi commented that the man had ejaculated onto the child and was rubbing it on her.
- 45.9 There was a conversation about abuse during which RN Abi said “I would never let my child do that, I won’t let her go to the park after school. I tell her if she has sex before marriage she will go to hell”.
- 45.10 RN Asare asked “how would know she was having sex?” and RN Abi said “I check her bottom to see if it has got any bigger”.
- 45.11 I (Ms Southern) asked how old the child was and she said 14.
- 45.12 Grace (Asare) then said “you can’t do that its child abuse” or words to that effect.
- 45.13 The incident lasted approximately five – six minutes, possibly longer.

46 On 12 April 2015 Ms Asare gave a statement. Her statement was much briefer than that of Ms Southern. The main contents included:

- 46.1 Whilst she and others were on break in the break room Amudat Popoola told them that she had something to show them on her mobile phone.
- 46.2 On realising the contents of the video, after a few seconds she found that it was so horrifying and disgusting that she gave it back to the owner; and that Bernice Mowatt who had also seen it just before her was also horrified with it.
- 46.3 The phone was taken by Abi Oluwaseye who watched the whole video even though she was asked to turn it off.
- 46.4 She asked Amudat Popoola how she obtained the video on her phone and she said a friend had sent it to her. They discussed it and said that it was something that needed to be reported to the police.
- 46.5 On asking her about getting it off her phone Amudat Popoola said that she needed to let people see and be very cautious and careful who they leave their children with whether family or friends.
- 46.6 On 14 April 2015 Ms Cathy Falvey-Browne, Consultant Midwife, wrote the Claimant a letter to notify her that she was suspended. She informed the Claimant that the allegation against her. The allegation against her was that, in possession of a mobile phone on 8 April 2015, whilst on duty in the delivery suite, she shared with other members of staff a video containing images of child sexual abuse.

47 Ms Popoola was also suspended from duty.

48 The Claimant's suspension was a lengthy one. This was as the Respondent referred the incident to the police and the Respondent postponed the disciplinary investigation pending the police investigation. These investigations ultimately led to Ms Popoola being convicted of a criminal offence and given a suspended prison sentence. The police decided not to instigate proceedings against the Claimant.

49 Additionally, the Respondent referred Ms Popoola and the Claimant to the Nursing and Midwifery Council (the "NMC") and the Local Authority Designated Officer ("LADO").

50 The Local Authority undertook investigations on the Claimant, including interviewing her daughter. They decided that it was not necessary to take any further action against her (the Claimant).

51 The NMC investigation was not concluded until after the Claimant's dismissal and I deal with this later.

52 On 17 April 2015 Ms Mowatt provided a statement. Amongst the contents of his statement were:

- 52.1 Amudat Popoola ("AP") passed her phone and said words to the effect of "look at it".
- 52.2 On seeing some images, after a few seconds and realising the contents of the video she passed the phone back and told her it was awful and disturbing.
- 52.3 Grace Asare ("GA") held the phone and on seeing the content had the same reaction as her.
- 52.4 AO (the Claimant) then took the phone and watched the video.
- 52.5 AS (Abbie Southern) asked what the video was about and on being shown by AO and seeing the images was also upset.

53 On 30 May 2015 the Claimant provided what she described as an incident report. Amongst the contents of her report were the following:

- 53.1 Amudat (Popoola) brought out her mobile phone and said she had a video she wanted everyone to watch.
- 53.2 Sister Bernice (Mowatt) gave her the phone to watch but she needed assistance to operate the phone as she did not know how to operate it.
- 53.3 When the video started playing she saw the disgusting images and asked if they was a dummy or dwarf, to which Sister Bernice replied "can't you hear them talk" and stated that "the man was asking the girl if she was



enjoying it” to which she (the Claimant) said “enjoying what?”

- 53.4 She (the Claimant) said this video should be deleted it was an abuse and the mother should not be watching this sort of video.
- 53.5 During the conversation on the video issue a number of student midwives came in and must have overheard some of the conversation.
- 53.6 She was an innocent person and the victim of being shown and targeted by Amudat.
- 53.7 To be shown the video did not and should not constitute possession or sharing of it and “it was all lies, a cover up and totally deny neither be in possession nor shared it with anyone”.

54 During the delay in the disciplinary investigation the Claimant contacted Ms Burney-Nicol, Associate Director of Midwifery/Head of Midwifery for permission to be allowed to continue external agency work whilst suspended and was given permission. She undertook some agency work during that time.

55 Ms Hughes, lead named nurse for safeguarding children, had been asked in April to conduct a disciplinary investigation and then told to delay the management investigation until the police investigation had finished. Ms Hughes was asked to arrange the internal investigation; and was provided with the statements of Ms Southern, Ms Asare, Ms Mowatt and the Claimant (to which I have referred above).

56 On 20 November 2015 Ms Hughes held meetings with the Claimant, Ms Southern and Ms Asare. The Claimant was the first of these three individuals that she interviewed. Amongst the contents of that interview were the following:

- 56.1 The Claimant gave a similar account of the events of 8 April, although in more detail.
- 56.2 Ms Hughes expressed concern that the Claimant had not reported the incident to anyone; to which the Claimant responded that she had not received safeguarding training.
- 56.3 Ms Hughes challenged her, saying that she knew the video was sexual abuse, to which the Claimant responded that she did not know and had not received the safeguarding.

57 Ms Hughes felt that the Claimant was difficult to interview and reluctant to answer questions put to her; and felt that the Claimant wanted to tell her what she wanted and not what she needed to know.

58 Ms Hughes took a statement from Ms Southern. Ms Southern’s statement was in similar terms to the statement she had previously provided. Mr Rifat, in the course of cross-examining Ms Hughes referred to a statement from Ms Southern in which she

referred to the Claimant and her sitting down and continuing to watch the video and that Ms Southern had the phone at that point. This was relied on as (Mr Rifat contended on behalf of the Claimant) that Ms Southern was much more involved in the matter than she had stated.

59 I do not accept that this was the case. It was not something that was suggested by the Claimant or on her behalf during the disciplinary process against the Claimant, although the Claimant had representation from a paid employee of the nurses union at her disciplinary hearing. Additionally, Ms Southern experienced difficulties as a result of her whistleblowing, as many whistleblowers do. She told Ms Hughes that there had been gossip about the incident; that people had heard the wrong story; that people had confronted her about it; and that the incident had caused her a lot of trouble. The ill feeling expressed towards her over the incident caused her to change her original intention of continuing to work at the hospital after finishing her training.

60 In the course of Ms Hughes's interview with Ms Asare, Ms Asare confirmed that the Claimant had watched the video for longer than the others. Ms Hughes asked her if she had heard anyone in the room say about the child that she looked like she was enjoying it; to which Ms Asare stated that she did not hear anyone say it. Ms Hughes asked whether she had heard Abi (the Claimant) say that she checks her children to see; to which Ms Asare said that she had told her that this could be deemed as abuse as the girl is 13 and how could she do this. Ms Asare said that the Claimant had said that she looked to see if she was intact, although she did not give a description on how she checked.

61 On 25 November 2015 Ms Hughes interviewed Ms Mowatt. In the course of the interview Ms Mowatt was asked how long the Claimant had watched the video for; and confirmed that she watched for longer than the others. She was asked by Ms Hughes whether the Claimant had made any comments; and Ms Mowatt replied that she was saying things but that she could not tell what she was saying. Ms Mowatt explained that she was more talking to Amudat (Popoola) and was not taking notice of what the Claimant was saying. Ms Mowatt also stated that the Claimant had said something like that she inspected her daughter, although she could not remember her actual words. She and Grace (Asare) asked what she meant by this and that Abi (the Claimant) just said "I inspect her". Ms Mowatt said that so far as she could remember she did not hear anybody saying "the little girl looks like she is enjoying herself".

62 On 27 November 2015 Ms Hughes interviewed Ms Popoola. In the course of the interview Ms Popoola confirmed that she had brought the video in on her telephone. She said that Grace (Asare) on watching the video said "oh no this is disgusting". Abi (the Claimant) took the phone from them, watched it and said "this girl is enjoying it".

63 Ms Popoola went on to say that the Claimant had said that when her daughter came back from school she checked her parts. Ms Popoola had replied to the Claimant that this was child abuse. Ms Popoola said that the student midwife had told Abi (the Claimant) to stop watching the video and that Grace (Asare) also had said that she had heard Abi made a comment that the child looked like she was enjoying it.

64 Ms Hughes produced a disciplinary investigation report, dated 11 January 2016, covering both Ms Popoola and the Claimant. She gave a summary of the interviews she

had conducted and recommended that disciplinary action be taken against both individuals. Attached to her report were the documents she had obtained in her investigation such as the statements she had obtained during the investigation she had carried out.

65 Ms Burney-Nicol wrote to the Claimant to require her to attend a disciplinary meeting on 17 February 2016 and to notify her that she would be chair of the disciplinary panel. She was notified that a potential outcome would be dismissal. The allegations for consideration were described as “the suspension following possession of a mobile phone on 8 April 2015 while on duty in the Delivery Suite at Newham General Hospital in which you shared with other members of staff a video containing images of child sexual abuse”.

66 The Claimant was notified that if she wished to call witnesses she should give her the details of their names and the evidence they intended to contribute. She was notified of her right to be represented by a trade union representative or accompanied by a work colleague.

67 The Claimant asked for the disciplinary meeting to be postponed so that her RCN representative could have time to prepare.

68 The Respondent agreed to the request to postpone and re-arranged the meeting for 23 February 2016.

69 The meeting was re-arranged again, at the Claimant’s request, because her union representative was unavailable. It was rearranged to take place on 1 March 2016.

70 Ms Southern, Ms Asare and Ms Mowatt were asked by Ms Burney-Nicol to attend the disciplinary hearing as witnesses. So far as I am aware they would have been able to attend the first two dates at which the disciplinary hearing was set- they did attend the disciplinary hearing of Ms Popoola. They were, however, unable to attend the disciplinary hearing on 1 March 2016.

71 The disciplinary panel consisted of Ms Burney-Nicol (chair of the panel), with two panel members, one of whom was from the Respondent’s Human Resources department.

72 Ms Hughes was present to present the management case.

73 The Claimant attended the disciplinary hearing accompanied by her trade union representative, an employee of the Royal College of Nursing.

74 At the start of the disciplinary hearing Ms Burney-Nicol asked the Claimant whether she intended to call any witnesses.

75 Ms Hughes notified the panel that the witnesses she intended to call were unable to attend.

76 Neither the Claimant nor her union representative queried the absence of the Respondent’s witnesses. They did not request an adjournment to allow the witnesses to

attend.

77 Ms Burney-Nicol was cross-examined at this hearing on why she did not insist that the witnesses be present. She explained that the meeting had been changed from 17 February to 23 February to 1 March for the Claimant's trade union to attend; that the policy of the Respondent was to re-arrange once and within five days; and that they could have asked for an adjournment themselves.

78 Ms Hughes presented her disciplinary investigation report.

79 The Claimant presented her case.

80 The Claimant was challenged by the panel about her non-reporting of the incident. The Claimant's response was that she had had the Level 2 safeguarding training but not Level 3 (the Respondent's training records show that the Claimant had attended Level 3 safeguarding in 2012) and was due to attend again in 2015. The issue of whether the Claimant had in fact attended the Level 3 training was not relied on by the Respondent as part of the grounds of dismissal so, the Claimant having denied that she attended such training, it is unnecessary for me to record whether or not she did attend. The Claimant accepted that she had attended Level 2 but that she had not attended the Level 3 training.

81 Ms Hughes challenged the Claimant, explaining that as part of her safeguarding children training they went through all four categories of abuse and sexual abuse was one of them; and that watching pornographic images and children being involved in the pornographic videos and people watching them was a form of child abuse. The Claimant insisted that she was not taught about videos.

82 The Claimant was then challenged by the panel about what action she thought she should have taken as a professional nurse; to which the Claimant responded that she did not know; to which the panel member asked her whether she would have done nothing and let the matter lie.

83 The Claimant was then challenged as to why, even if she had not got the training, as an ordinary member of the public why she would ignore such an issue. The Claimant responded that she only realised recently that she should report it.

84 The Claimant was then challenged on the conflict between the witnesses' evidence that she had watched the video for longer than the others and her denial of it. Ms Burney-Nicol asked her why everyone else in the room said something different to her about this and asked what she wanted to tell the panel about her relationship with the staff in the room and how that would affect what they would say about her. The Claimant's response was that "the reason why they might imply, they are all midwives". Ms Burney-Nicol continued to challenge the Claimant's account on this point, referring to Ms Southern's statement and Ms Southern not being a midwife but a student; to which the Claimant responded that she (Ms Southern) was a student midwife.

85 Ms Burney-Nicol challenged the Claimant about the allegation that she had made a comment that it looked like the child was enjoying it. The Claimant continued to deny this comment.

86 Ms Burney-Nicol then asked the Claimant about the comment in Ms Southern's statement that the Claimant had commented that the man had ejaculated into the child and rubbed it in. The Claimant denied this comment.

87 Ms Burney-Nicol then asked the Claimant about the comments that Ms Southern had talked about the Claimant saying that she checked her daughter; GA (Asare) asked how you check your daughter; AO (the Claimant) said she checks her bottom regularly and GA said you cannot do that. She was asked if she recalled having that conversation and responded that she did not. Another panel member challenged the Claimant's explanation that her reference to checking her children meant her phones or laptops and asked how the word bottom could be mistaken for phone or laptop. The Claimant denied making such a remark. The allegation that the Claimant had said that the girl was enjoying it was also explored by Ms Burney-Nicol. She stated that there were three witnesses that had stated it and challenged her as to how they could have got it wrong. The Claimant's response was that may be she was not among them.

88 The Claimant was asked in summary by Ms Burney-Nicol whether she had watched the video from start to finish; whether she had commented about the child enjoying what was going on; whether she felt that what they were watching was unprofessional to watch on work premises and illegal; and that if it ever happened again how she would deal with it. The Claimant confirmed her denial of the remark she was alleged to make; and stated that she did not know it was illegal. Her initial response to being asked how she would deal with the incident if it happened again was that she would not report it within the Trust and would call the police immediately. On being challenged she did then state she would report it to the Trust and the police and that she had not had training on watching such a video.

89 The meeting was adjourned for the Claimant and her union representative to make final statements. The Claimant's union representative expressed an apology for not reporting the video; and asked the Trust to consider all options and training. The Claimant also made an apology.

90 The outcome of the disciplinary hearing was that the Claimant was summarily dismissed. She was told of this at the conclusion of the disciplinary hearing.

91 By a letter dated 2 March 2016 Ms Burney-Nicol confirmed the dismissal and the reasons for it.

92 Ms Burney-Nicol summarised the key points from the witness statements as being:

- 92.1 She had watched the video that contained images of child sexual abuse.
- 92.2 All three witnesses had the same recollection of the event that she had watched the video till the end.
- 92.3 All three witnesses had the same recollection that she also commented and made inappropriate comments such as 'the child looks like she was enjoying it'.

92.4 All three witnesses said she had commented that she checked her daughter's bottom when she came from the park.

92.5 The Trust had a record of her attending Level 3 safeguarding training in December 2012 with next update due in November 2015.

93 Ms Burney-Nicol went on to state that the panel agreed that these actions amounted to a serious breach of the professional code of practice under the NMC Code of Practice, particularly prioritising people and acting in their best interests at all times; preserving safety and acting without delay if they believed there was a risk to patient safety or public protection; and raising concerns immediately if they believed the person was vulnerable or at risk and needing extra support and protection; and promoting professionalism and trust.

94 Ms Burney-Nicol continued, stating that the panel agreed that the Claimant had deliberately accessed internet sites containing pornographic, offensive or obscene material which was not relevant to work activity whilst in the workplace, using the Trust network. She explained that the panel agreed that her action was likely to bring the Trust into disrepute.

95 Ms Burney-Nicol went on to state that the panel had agreed that the Claimant actions amounted to serious breaches of trust and confidence. She explained that the panel did not have evidence of remorse from her about the breach of the public safety; she had failed to give the panel any evidence that she had done any self development or reflection since the incident, which demonstrated a lack of insight into the seriousness of her professional responsibility in safeguarding.

96 The Claimant appealed against her dismissal. She had five grounds of appeal. These were that the panel failed to consider her statement and solely considered that of their chosen witnesses; failed or refused to consider the report of the Newham Local Authority Designated Officer ("LADO"); the witnesses evidence was full of contradictions; and the safeguarding training she had attended did not include watching this kind of video, so she did not know what to do immediately.

97 Ms Burney-Nicol prepared a response to the Claimant's grounds of appeal. She disputed that the panel had failed to consider her statement; and stated that the panel had considered the LADO report. She referred to an extract of the LADO report which stated that when someone was thought to have placed or accessed child abuse images on the internet the police must be informed. She gave an explanation of why the panel had preferred the evidence given in the statements of the witnesses to that of the Claimant and what the panel had considered the Claimant had said and done. She explained that the panel had felt that she had shown no insight into her actions; had condoned the inappropriate viewing of child sexual abuse by watching the full video and making inappropriate comments on it; and had failed to escalate and disregarded her responsibility as a registered practitioner in safeguarding children.

98 The Claimant also prepared a further witness statement in support of her appeal, denying the disciplinary allegations against her. One of her criticisms was that the witnesses had not been present at the hearing. She did not, however, make any request that they attend the appeal hearing.

99 In the intervening period between the disciplinary hearing and the appeal the Claimant paid to attend a Level 3 safeguarding course herself.

100 The Claimant's appeal took place on 1 July 2016, with a panel chaired by Mr Pocklington, Managing Director for Newham University Hospital.

101 Ms Burney-Nicol presented the panel's case for their decision; and the Claimant was accompanied by a work colleague.

102 The Respondent's procedures provide for the appeal to be by way of review of the disciplinary hearing, rather than a re-hearing of evidence.

103 Ms Burney-Nicol presented the management case for their decision. The Claimant asked her questions about it both sides presented their cases and questions were asked by the panel.

104 The outcome of the appeal was to uphold the decision to dismiss the Claimant. Their decision was notified to the Claimant in a letter dated 6 July 2016.

105 The reasons given for upholding the decision to dismiss the Claimant included the following, namely that the Claimant had watched the video that contained images of child sex abuse for an excessive period of time; she had assisted in encouraging other midwives to watch the footage; there was consistent witness evidence that she made inappropriate comments (specifying what they were); there was consistent witness evidence that she had said that she checked her daughter to see if she had engaged in sexual activity, carrying out a physical inspection; and had failed to take appropriate actions to terminate the viewing of the video, protect colleagues from watching it and escalate this to senior managers as per the Trust's safeguarding policy.

106 The appeal panel disagreed with the disciplinary panel's finding that the Claimant had deliberately accessed internet sites containing pornographic, offensive or obscene material; but agreed that her actions amounted to a serious breach of the NMC code; had failed to prioritise people and safety by acting without delay if she believed there was a risk to patient safety or public protection, or to raise concerns immediately if she believed a person was vulnerable or at risk and needs extra support; was action calculated or likely to bring the Trust into disrepute; and amounted to serious breaches of trust and confidence.

107 Mr Pocklington also explained in his witness evidence that he had asked the Claimant about whether she was suggesting there was a conspiracy and if so why other staff would conspire against her; but that she was unable to explain and that there was no evidence to suggest that the staff had conspired against her as she suggested or that they had anything to gain. He also referred to the inconsistencies within the accounts of the staff being powerful, particularly that of Ms Southern; and that she had no vested interest in making false allegations.

108 Mr Pocklington also explained that they could not find whether or not Mrs Oluwaseye had attended the Level 3 safeguarding training but that the panel did not consider that it was necessary to have Level 3 safeguarding training to know that a video

containing child pornography was not appropriate in the workplace and should be escalated immediately. Nor, they found, did absence of training explain or mitigate the comments she was found to have made.

109 On 15 September 2016 a letter was written to the Claimant notifying her of the decision of the NMC that the case examiners had decided that there was no case to answer. They considered that failing to report a safeguarding incident was regarded very seriously and could be said to fall far below the standards expected of a nurse or midwife and amounted to serious misconduct; but that this appeared to be an isolated event which was unwise but did not amount to a serious departure from expected standards and was not capable of amounting to misconduct; and that if a similar situation arose she seemed able to demonstrate how she would deal with it differently. They also concluded that the risk of repetition was very low and that the reputation of the profession would not be damaged by her alleged failings.

110 In listening to the Claimant's evidence when she was cross-examined, I had concerns about it. I take into account that she was almost certainly nervous when giving her evidence; and was less articulate than the Respondent's witnesses. Nonetheless she did consistently fail to answer the questions asked of her; and was determined, instead, to give the account of events she wanted to give, with little or no regard to what she was actually being asked. The impression given to me was that her evidence was evasive at times and she was highly defensive. Additionally, I agree with the comments of Ms Burney-Nicol that the Claimant appeared to lack insight into the seriousness of her professional responsibility in safeguarding the public and not to show remorse about what had occurred. In giving her evidence when cross-examined she continued to blame the lack of Level 3 safeguarding training on her failure to report the incident and did not give me the impression that she had learned lessons from it.

111 Ms Popoola's disciplinary hearing took place on 13 April 2016. The outcome was that she was summary dismissed.

112 In October 2016 Ms Asare and Ms Mowatt had disciplinary hearings conducted by Ms Burney-Nicol. They were given first written warnings for failing to report the incident. The passage of so many months after the disciplinary hearings for the Claimant and Ms Popoola's suggest to me that these disciplinary hearings were an afterthought; prompted either by the Claimant issuing Employment Tribunal proceedings or the NMC's findings about the Claimant's (and probably Ms Popoola's, although I did not see the NMC report on her) comments that it was a serious issue for the incident not to have been reported.

### ***Closing Submissions***

113 On behalf of the Claimant Mr Rifat gave typed skeleton arguments at the outset of the hearing; and oral closing submissions at its conclusion. Amongst the points made by him were the following:

- 113.1 The Claimant was not given the opportunity to cross-examine the witnesses. This was one of the exceptional cases in which they should have been called, having in mind the gravity of the allegations against her.



- 113.2 Referring to the *Salford* case to which I had referred the parties' representatives, submitting that the Claimant's livelihood was still at stake.
- 113.3 The panel knew of the conflict of evidence and it was for them to bring it up although there was a mutual responsibility. Although the Claimant had an RCN union representative the representative was not a lawyer.
- 113.4 The conflicts of evidence should have been put under forensic scrutiny. Ms Southern was more involved than she said, as shown by her reference on page 219 to having watched the video on the telephone.
- 113.5 The initial witness statements of Ms Asare and Ms Mowatt reported no words from the Claimant and were in contrast to the initial statement of Ms Southern. Ms Hughes did not investigate why there was such a difference.
- 113.6 Dismissal was in any event not a reasonable response. There was no accusation of improper motives as to the Claimant looking at the video; she had an unblemished record; there were unusual circumstances; there was no public involved; and she should have been given the benefit of the doubt.
- 113.7 The Claimant on 7 June did take the Level 3 safeguarding and the panel's outcome that the Claimant had shown no remorse, did not sit with the NMC's findings on that point.
- 113.8 Mr Pocklington's approach was limited to assessing whether or not there was collusion and he had prejudged the matter.
- 113.9 Whether or not there was contributory fault depended on my findings. If I found that the Claimant did make the remarks concerned and did show no remorse these would be factors so as to cause a reduction in award. But the absence of inappropriate motive pointed strongly in the Claimant's favour.

114 On behalf of the Respondent Mr Moretto gave typed closing submissions, supplemented by oral submissions. Amongst the points made by him were the following:

- 114.1 The Claimant's case was put firmly on the basis that she should have been able to cross-examine witnesses at the disciplinary hearing. The law was clear on this (see *Santamera v Express Cargo Forwarding*) that this was very much the exception in workplace investigation of misconduct. Nor does the ACAS guidance advise employers that employee should be entitled to cross-examine witnesses. Doing so would be liable to increase workplace conflict.
- 114.2 The *Roldan* line of authority was not apposite, as the Claimant was able to continue with her livelihood both before and after the NMC decision not to take the case forward.

- 114.3 There were ample grounds showing that the Respondent had reasonable grounds for their belief following a reasonable investigation, the Claimant having accepted that the Respondent did genuinely believe that the Claimant had committed the misconduct alleged against her.
- 114.4 Overall the four different sources painted a clear and consistent picture of the misconduct that was inconsistent with the Claimant's account; referring to all the statements concerned. Four people's accounts of events are bound to contain inconsistencies. The Claimant was suggesting that there were colluding but could only give the reason, when asked, that they were midwives and she is a nurse. There were no previous relationship issues for why they would do that. It would defy logic that Abi Southern would make up the detailed account she had at page 124 and back it up by subsequent interviews.
- 114.5 In contrast the Claimant's account was supported by no one. Her account lacked credibility. It was quite plain that the Respondent had a reasonable belief as to the Claimant's misconduct as the evidence was stacked up against her.
- 114.6 There was plainly a reasonable investigation with all the witnesses being questioned in lengthy interviews. In so far as she argued that she should have been entitled to cross-examine witnesses which she had not done to date, neither nor her union representative asked to adjourn the meeting when informed that the witnesses were not attending; there were asked whether they wished to carry on and said that they did.
- 114.7 Dismissal was a reasonable response.
- 114.8 The NMC's outcome was different and the Tribunal must not make findings as to the reasonableness of the Respondent's decision to dismiss on the basis of that – see *Bryant v Sage Care Home [2012] UKEAT/0453/11/LA*. The NMC has a very different function to that of the employer. If their findings were considered to be relevant to the fairness of the employer's decision to dismiss, an employer would have to wait until the outcome of NMC proceedings to make their decision.
- 114.9 The Employment Tribunal heard evidence of the Claimant at this hearing and it lacked credibility. She was entirely evasive, evading most questions asked for her and the Respondent's evidence was to be preferred.

## **Conclusions**

115 It was accepted by Mr Rifat on the Claimant's behalf that the reason or principal reason for the Claimant's dismissal was on grounds of conduct; and that the first part of the guidance given in the *Burchell* case (whether the employer did believe that the Claimant had committed misconduct alleged) was the case here.

116 Did the Respondent have reasonable grounds for its beliefs; and did the Respondent conduct as much investigation as was reasonable?

117 The Claimant's case on these issues is that these two aspects of the guidance in the *Burchell* case were not fulfilled because this was the type of exceptional case where the Respondent was required to ensure that their witnesses did attend the disciplinary hearing and be cross-examined.

118 In the particular circumstances of this case I have concluded that this was not such an exceptional case.

119 The context of the disciplinary hearing was that the Claimant had been provided prior to the disciplinary hearing with Ms Hughes's report which contained all the statements that had been provided by all the witnesses.

120 The witnesses had been asked to attend the disciplinary hearing, but the hearing had been postponed twice at the Claimant's request in order to accommodate the availability of her trade union representative. If she had not postponed the hearing on those two occasions there is no reason to doubt that they would have attended, as they attended the disciplinary hearing of Ms Popoola. By the time of the third occasion the disciplinary hearing had been set, the witnesses were not available. In the context of the Claimant being represented by a paid trade union representative I consider that it was something the union representative could have requested if thought necessary at the disciplinary hearing; or have asked for their presence at the appeal hearing.

121 From reading the notes of the disciplinary hearing, summarised by me above, I am satisfied that the disciplinary hearing was thorough. The Claimant was given an opportunity to question Ms Hughes's presentation of the management case. The Claimant was asked extensive questions by the panel on the areas in dispute. They had valid grounds for coming to their view that they preferred the witnesses evidence to that of the Claimant.

122 Ms Southern's witness evidence was particularly compelling. She gave the account two days after the incident when it was fresh on her mind. She had no vested interest in doing so, such as a previous animosity against the Claimant. Indeed, it appears that she encountered some degree of reprisals for her whistleblowing. It was a courageous act on her part and highlighted the failure of the much more experienced Claimant, who was a nurse of many years standing; and also a failure on the part of the midwives who had been present.

123 So far as the procedures are concerned, therefore, I am satisfied that the Respondent had reasonable grounds for their beliefs in the Claimant's misconduct; and did conduct as much investigation as was reasonable.

124 So far as the band of reasonable responses are concerned I consider that I need to take into account a nurse facing dismissal for gross misconduct is facing allegations that are likely to have very serious consequences for her career if upheld. My analysis of the band of reasonable responses guidance takes that into account.

125 I have, next, considered whether the decision to dismiss the Claimant lay within the band of reasonable responses a reasonable employer might have adopted. I consider that it is such a case, including for the following reasons.

126 On one view, the Claimant (and the others present) was taken by surprise by a work colleague doing something completely unexpected, namely the showing of an exceptionally serious criminal offence of a young child being raped. The Claimant was then alleged to have made seriously inappropriately remarks. None of those that watched it other than Ms Southern reported it. She was foolish but no more than that.

127 There are difficulties, however, with this analysis. The Claimant never stated during the disciplinary process that she was acting irrationally and foolishly. Instead, she denied the allegations of inappropriate comments; and excused her failure to report the incident by stating that she had not had an adequate safeguarding training. The panel found that the weight of evidence, particularly that of Ms Southern and her not having a vested interest in the matter, was more credible. The panel having done so they were likely to lose trust in the Claimant.

128 The analysis of the NMC to the allegations suggests to me that one reasonable employer might have decided to give the Claimant a final warning, whilst another reasonable employer might have decided to dismiss.

129 I have concluded, however, that this is a case that lies within the band of reasonable responses a reasonable employer might have adopted. The Claimant did show a lack of insight and remorse at the disciplinary hearing and appeal; and indeed during this Employment Tribunal hearing. Whilst one reasonable employer might have given the Claimant another chance coupled with further training, another would decide that the combination of the seriousness of what had taken place, the nature of the Claimant's job and her lack of insight or remorse as to what had taken place meant that dismissal was a reasonable response.

130 The Claimant's dismissal was not, therefore unfair. I make two concluding comments. I did feel some concern at a comment by Ms Burney-Nicol that once the panel had decided that the Claimant had committed gross misconduct they had no alternative to dismiss the Claimant. This caused me concern; although I appreciate that she is not a lawyer. It appeared to me that what she was intending to convey was that the Claimant's actions were so serious that despite her previous good record the panel considered dismissal to be the appropriate option.

131 I also considered that it would have been better if in the letter requiring the Claimant to attend a disciplinary hearing they had made specific references to the allegations of the comments made by her. Nonetheless, the Claimant was questioned closely about these at the disciplinary meeting.

132 Neither of these last points formed part of the Claimant's case, either in the skeleton arguments, cross-examination or closing submissions. I put them as general observations on the case.

Employment Judge Goodrich

9 March 2017